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THE
NEW YORK SUPPLEMENT

WITH KEY-NUMBER ANNOTATIONS

VOLUME 178

PERMANENT EDITION

(NEW YORK STATE REPORTER, VOL. 212)

CONTAINING

THE DECISIONS OF THE SUPREME AND
LOWER COURTS OF RECORD OF
NEW YORK STATE

OCTOBER 27, 1919—JANUARY 12, 1920

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THE NEW YORK SUPPLEMENT VOLUME 178

(189 App. Div. 82)

PEOPLE v. CONNELLY.

(Supreme Court, Appellate Division, Second Department. October 3, 1919.)

1. LARCENY $\S$ 55—EVIDENCE INSUFFICIENT TO SUSTAIN CONVICTION.

Evidence held insufficient to sustain conviction of larceny of a pig of tin.

2. CRIMINAL LAW $\S$ 741(1)—REASONABLE DOUBT A QUESTION OF LAW.

Whether the evidence as matter of law is sufficient to exclude reasonable doubt of defendant's guilt is a matter for the court to decide.

Appeal from Rockland County Court.

Michael Connelly was convicted of grand larceny in the second degree, and he appeals. Reversed, and defendant discharged.

Argued before JENKS, P. J., and MILLS, RICH, PUTNAM, and BLACKMAR, JJ.

Frank Comesky, of Nyack, for appellant.

Morton Lexow, Dist. Atty., of Suffern, for the People.

BLACKMAR, J. We regard the evidence as insufficient to sustain the verdict. The indictment was for stealing one pig of tin, of the value of \$72.32 on the 4th day of July, 1917, at the village of Suffern, Rockland county. It was claimed that the crime consisted in aiding and abetting the theft of the tin by Edward Veech, and the conviction rested on circumstantial evidence. The jury seemed loath to render the verdict, and asked if they could not find the defendant guilty of a lesser degree of the crime than that charged in the indictment. The court instructed them to the contrary, and in response to their request as to the punishment, whether fine or imprisonment, they were told by the court that they were not concerned with the punishment, but that, if they recommended mercy, he should consider it. The jury thereupon found the defendant guilty as charged and recommended mercy. The defendant was sentenced to state prison on an indeterminate sentence, with a minimum of 1 year and 8 months and a maximum of 3 years and 4 months. The court on the same day certified that there was reasonable doubt whether the evidence as a whole proved the defendant guilty.

On the 3d of July, 1917, 41 pigs of tin were stolen from a freight car on the Erie Railroad at Sloatsburg, N. Y. Roscoe C. Taylor, a

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detective in the employ of the railroad company, on investigation, discovered some of the tin hidden in the woods near the railroad track. That night he watched the tin. About 10 or 11 o'clock an automobile came from the east with the lights dimmed, and after turning stopped near where the tin was concealed. Three men got out of it and began to load some objects into the car, which they took from beneath a culvert. Taylor drew his revolver, came upon the men, and commanded them to throw up their hands. The three men scattered and ran away. He stopped the driver, Edward Veech, and together they recovered 12 bars, loaded them into the car, drove to a garage in Suffern, and there left the car with the tin; Taylor giving instructions that it should not be moved without orders from him. Veech, having satisfied him that he was the owner of the car, was permitted to return to his home in Passaic, N. J. Taylor retained the car, which was a Paige touring car, as security for Veech's return.

On the following day Veech, who was a hackman living and doing business in Passaic, went to Benjamin F. Turner, the captain of the detective forces at Passaic, and asked Turner to help him secure possession of his car. Turner directed John J. Howard, a police detective, to go with Veech, identify him to Taylor, secure the car, and do what he could to aid in detecting the thieves. Veech and Howard secured a Ford car from Earl, the owner, who sent a young man, James Wentick, with them as a driver. They picked up Farrell, a member of the police force, and the defendant, and the four went together in the car to Suffern. Veech was to have driven the defendant and his family to the Delaware Water Gap on the Fourth, and, having notified the defendant that he could not go, took the defendant with him to give bail, if necessary. The party stopped at the Ferncroft Inn, and took with them some articles belonging to Farrell, which he had left there.

On arriving at Suffern they found that Taylor was not there. After dining, they located him at Sloatsburg, and Wentick, Farrell, Howard, defendant, and a man named Dean went to Sloatsburg, arriving about 4 o'clock, and found Taylor. Howard told Taylor that the load of tin was too heavy for the Paige car, and asked if he might remove it. Taylor told him he could do so, and that he had better take it to the Erie station. Taylor was asked to accompany them back, but declined, saying that he would go by train and reach there about 5 o'clock. The parties returned, went to the garage, and by Howard's direction took five bars of the tin from the Paige car and placed them in the Ford car, and both cars went to the station. The Paige car was unloaded, and defendant and Dean together unloaded the Ford car. The defendant then told Wentick, who was in a hurry to return on account of an arranged Fourth of July excursion, that he might as well go back. Wentick cranked his car and started, asking Veech if he wanted the stuff in it, and Veech said, "No." It appears that there was a bar of tin left in the Ford car, and Wentick, alone in the car, took it back to Passaic with him.

When Taylor appeared on the scene at Suffern he counted the bars of tin and found two missing. One was found by Farrell under the

seat of the Paige car. At that time the Ford car had left, and it was suggested that the missing bar might have gone back to Passaic in it, and Howard said that, if it had, he would get it. The parties then went before a justice of the peace, where a charge was for the first time made against Veech. Bail was fixed at \$100, and defendant furnished cash bail. The nature of the charge is not disclosed by the evidence.

When Wentick, driving the Ford car, reached Passaic, he went to the barn where the car was kept, took out the bar of tin, and the articles put in the car at the Ferncroft Inn, and placed them in a closet. He then went on a call, telling the owner, Earl, that there was some stuff brought back in the car, which he had left in the barn, and started with his cousin on the projected Fourth of July excursion.

The Paige car, with Veech, Howard, Farrell, and defendant, left Suffern after bail had been given for Veech, and, being delayed by engine trouble on the road, reached Passaic late at night. Howard and Farrell were dropped. Veech went to see Earl, and asked him if Wentick had brought anything home in his car. Earl informed him that Wentick had left some stuff in the barn, and, accompanied by defendant, Veech went to Wentick's barn, where Veech took the bar of tin and placed it in his car. On the way home his engine stopped, and defendant left him with his car on the street. He sent to the railroad station for assistance, and several hackmen came out to help him. He showed them the bar of tin, and told them he was in trouble over it. They failed in remedying the engine trouble in the car, and pushed it along until they came in front of Veech's house, where two of the men took the bar of tin and threw it over the fence into Veech's yard. The next day Turner, Howard, and Nolan, a detective from the Erie Railroad, came to defendant's place and asked him if he knew where the slab of tin was. He said that he did not. Being pressed, he told them to go and see Veech, who was working on his car on the opposite side of the street. They went to Veech, who at first said he did not know where the tin was, and together they went to his premises, where Veech pointed it out near the fence on a pile of rubbish. Whether or not it was concealed is in dispute between two of the people's witnesses. Veech and the defendant were then placed under arrest. The defendant is 29 years of age, engaged in a regular business at Passaic, and living there with his family in good repute.

[1] A careful analysis of these facts discloses defendant's connection with the alleged theft on three points only. He, with a man named Dean, not called because he was in military service, unloaded the Ford car at Suffern, and he told Wentick that he could go back to Passaic. He was with Veech, when Veech took the bar of tin from Wentick's barn, and on the next day he told the police officials that he did not know where the tin was, but to go to see Veech. As two persons were concerned in unloading the Ford car at Suffern, it is as reasonable to infer that the bar was left by mistake, each thinking that the other had completed the unloading, as it is to infer a theft of a bar of tin 18½ inches long, 6 wide, and 5½ high, weighing over 100 pounds, in the presence of a number of spectators, including two police

officers, and certainly known to at least Wentick. As those concerned at Suffern, when the tin was missed, expressed the opinion that it went back to Passaic in the Ford car, it was natural for Veech to try to locate it and secure it, and defendant's presence under such circumstances does not permit an inference of guilty knowledge. He had nothing to do with the disposition of the tin after that; and, when he told the police officials the next day that he did not know where it was, he spoke the truth, and performed his whole duty in referring them to Veech, in whose possession he had last seen it.

The district attorney's theory seems to be that defendant went with Veech to Suffern for the purpose of aiding him in stealing the tin. This is a remarkable theory. The tin had already been stolen, reclaimed, and was in the custody of a detective of the Erie road. Each block was a bulky and heavy object. Veech was then under suspicion, and, to reduce the matter to an absurdity, they took with them two police officials, against whose character nothing can be said on this record, either to watch them steal the tin, or, as hinted by the district attorney, to aid them in doing it.

[2] We think the conviction a miscarriage of justice. It rests on "suspicion light as air." The evidence was as matter of law insufficient to exclude reasonable doubt, and as this is a matter for the court to decide (*People v. Ledwon*, 153 N. Y. 10, 46 N. E. 1046; *People v. Gluck*, 188 N. Y. 167, 80 N. E. 1022), the judgment of conviction should be reversed and the defendant discharged. All concur.

MILLER et al. v. WINDHOLTZ et al.

(Supreme Court, Appellate Term, First Department. July 25, 1919.)

1. DAMAGES §123—MEASURE OF DAMAGES ON BREACH OF WARRANTY.

In an action for breach of warranty in failing to dye skins in accordance with contract, plaintiffs, having elected to sue on the contract, not in disaffirmance, must credit defendants with the contract price of the work, and cannot recover undiminished the difference between the market value of the skins as delivered to defendants and their market value had they been dyed in accordance with the contract.

2. TRIAL §26—ON NEW THEORY OF DAMAGES AND AMENDMENT, DEFENDANT ENTITLED TO ADJOURNMENT.

In action for breach of warranty in failing to dye skins in accordance with contract, where plaintiffs abandoned an incorrect measure of damages, and undertook to prove the difference in the respective market values of the skins as they were and as they should have been, though the allowance of plaintiffs' amendment to conform with the proofs may have been proper, defendants should have been granted an adjournment to get an expert witness to meet the new theory of damages.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Jacob Miller and another against Harry Windholtz and another. From a judgment for plaintiffs, defendants appeal. Re-

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versed, and new trial granted, unless defendants stipulate to allow judgment to go against them.

Argued June term, 1919, before GUY, BIJUR, and MULLAN, JJ.

Samuel H. Hofstader, of New York City (Gerald B. Rosenheim, of New York City, of counsel), for appellants.

Koppelman & Weinberg, of New York City (Abraham P. Wilkes, of New York City, of counsel), for respondents.

BIJUR, J. Plaintiffs sued for what in the complaint is denominated defendants' breach of warranty in failing to dye certain skins belonging to plaintiffs in accordance with the requirement of the contract between them. The skins were to be dyed to colors known respectively as "Kolinsky" and "Sealine." It is conceded that defendants would have been entitled under the terms of the contract to some \$323.50, if the work had been properly done, and for this amount the defendants interposed a counterclaim.

[1] The learned judge below gave plaintiffs judgment for the full damages claimed, namely, the difference between the market value of the skins as they were delivered by defendants and their market value, had they been dyed in accordance with the contract. This was error. It matters not what name plaintiffs placed upon their cause of action, namely, whether they claimed that it was founded upon breach of contract or negligence in performing the contract or breach of warranty. See *Mack v. Snell*, 140 N. Y. 193, 199, 35 N. E. 493, 37 Am. St. Rep. 534. Plaintiffs have elected to sue upon the contract, and not in disaffirmance thereof (*May v. Georger*, 21 Misc. Rep. 622, 623, 47 N. Y. Supp. 1057), and the defendants became entitled on that theory to be credited with the compensation fixed in the contract (*Mack v. Snell*, supra, 140 N. Y. at page 198, 35 N. E. 493, 37 Am. St. Rep. 534). That such allowance should be made is taken for granted in all similar cases. *Walter v. Hangen*, 71 App. Div. 40, 41, 75 N. Y. Supp. 683; *Olsen v. Henderson*, 113 App. Div. 676, 99 N. Y. Supp. 917; *Kidd v. McCormick*, 83 N. Y. 391. The statement in all these cases of the true measure of damages as the difference in the respective market prices is not intended to be exclusive, but is made merely in contradiction to a claim of a different measure.

Indeed, in *Mack v. Snell*, the complaining party was awarded the difference between "the price agreed to be paid * * * for the shears, and their market value if made according to the contract," the proof being that the completed shears were worthless. The court said, at page 198 of 140 N. Y., at page 494 of 35 N. E. (37 Am. St. Rep. 534), that the award should "represent the value of the contract" to the injured party. In other words, as pointed out in *Kidd v. McCormick*, supra, at page 397, the plaintiffs are entitled only to compensatory damages, and not to a profit by reason of defendants' failure to perform their contract.

[2] We might merely modify the judgment, by making the appropriate deduction, were it not for another error which requires a new trial. In the complaint, in alleging their first cause of action relating to the "Kolinsky" skins, plaintiffs allege that they were "compelled

to sell said skins at a much lesser value and were thereby damaged" in a specified sum per skin. On the trial plaintiffs abandoned this incorrect measure of damage, and undertook to prove the difference in the respective market values. Defendants objected to this proof, but not on the ground that it constituted a variance from the pleadings. Nevertheless, at the close of the plaintiffs' case when plaintiffs asked to amend to conform to the proofs, defendants objected on the specific ground that it was not in accordance with the allegations of the complaint, and asked for at least an adjournment "in order to get somebody here as an expert to prove the difference in the market values." The amendment was allowed without adjournment, and defendants excepted.

While the allowance of the amendment may, under the circumstances, have been technically proper, defendants were entitled to meet the new theory of damages which the amendment set up, and for that purpose should have been granted an adjournment as asked.

Judgment reversed, and new trial granted, with \$30 costs to appellants to abide the event, unless defendants stipulate within 10 days to allow judgment to go against them for the amount found below less \$323.50 together with appropriate costs, in which event the judgment, as so modified will be affirmed, with \$25 costs of this appeal to appellants.

GUY, J., concurs.

MULLAN, J., concurs in separate opinion.

MULLAN, J. (concurring). I agree that the deduction should be made, but I think it cannot be made too clear that the sum of the deduction represents not anything that defendants did, but only what they would have been entitled to had they performed. The deduction does not give any credit or allowance to defendants, who manifestly are entitled to none. It does nothing more than accurately measure the damage plaintiffs actually suffered. The deduction is not under the counterclaim. No counterclaim should have been interposed. The defendants could not sue, therefore they could not counterclaim. Our decision merely lays down what seems to be the clearly just rule that bailors in plaintiffs' situation, who sue in affirmance of the bailment contract, may not treat the contract as alive for that purpose, ask for the difference between the market value of the bailed article as redelivered and as it should have been redelivered, and procure in addition the actually unsuffered damage represented, by what would have been the cost of doing the work properly had the bailees performed.

LEVINE v. ISLER et al.

(Supreme Court, Appellate Term, First Department. July 17, 1919.)

1. SALES ~~§~~272—IMPLIED WARRANTY THAT STRAW HAT BODIES WERE MERCHANTABLE.

Straw hat bodies, purchased by hat manufacturer from dealers in straw goods, were impliedly warranted to be merchantable, under Personal Property Law, § 96.

2. SALES ~~§~~285(2)—NOTICE TO SELLER OF BREACH OF WARRANTY.

Where it was customary in the millinery trade for manufacturers to buy merchandise from six months to a year ahead for the summer trade, and meanwhile store it, hat manufacturer, who, having bought straw hat bodies in November, notified seller of breach of warranty upon discovery of breach during following April by dyers, to whose warehouse sellers had sent goods, gave notice within a reasonable time after he knew or ought to have known thereof, within Personal Property Law, § 130.

Mullan, J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Nat Levine against Paul A. Isler and another. Judgment dismissing complaint, and plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued June term, 1919, before GUY, BIJUR, and MULLAN, JJ.

Kleiner & Kleiner, of New York City (Lewis Nadel and Joseph Kleiner, both of New York City, of counsel), for appellant.

Samuel Sturtz, of New York City, for respondents.

GUY, J. In this action for damages for breach of warranty, the trial judge dismissed the complaint upon the merits. The material facts are uncontradicted. In or about November, 1916, the plaintiff, a manufacturer of ladies' hats, purchased from defendants, importers of and dealers in straw goods, 1,000 dozen of "Wenchow bodies," which are described as coarse straw hats in the raw product converted into a conelike form. Defendants' salesman solicited an order from plaintiff in the prior September, and as a result the plaintiff about the beginning of October visited defendants' store and examined 4 sacks or bales there, part of a consignment of 20 sacks, each containing 50 dozen Wenchow bodies. Plaintiff was satisfied with his examination of the 4 bales, and, on being informed by defendants' authorized representative "that the rest of the bodies run the same," he purchased the 20 sacks; the 4 sacks examined being sent to plaintiff's place of business and the remaining 16 sacks, which were at the public stores or bonded warehouse, being thereafter delivered by the defendants at the warehouse of the dyers in Brooklyn, and all of the bodies were paid for at the agreed price. The uncontradicted evidence shows that the straws purchased were for midsummer hats, and that it is customary in the millinery trade for manufacturers to buy merchandise from 6 months to a year ahead for the summer trade and meanwhile store it.

On or about April 5, 1917, the plaintiff was notified by the dyers

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that they discovered upon opening a sack in one of the bales to prepare the same for dyeing, that the bodies were so brittle they would break in the hand and could not be used, which report was verified by plaintiff upon a subsequent examination of the contents of that particular bale; the explanation given being that some preservative had been used to the detriment of the material. Plaintiff thereupon reported the matter to defendants, and demanded another bale, or that defendants return the money paid for the goods, which request was refused. Plaintiff's evidence further tended to show that no injury or damage occurred to the straw while in the custody of the dyers at their warehouse.

[1] A cause of action was clearly established by plaintiff, which was not negated by any evidence given by defendants. There was not only an implied warranty that the goods were merchantable (Personal Property Law [Consol. Laws, c. 41] § 96), but an express warranty that the quality corresponded with the bodies contained in the 4 sacks examined by plaintiff; and as under section 130 of the statute acceptance of the goods did not discharge the seller from liability in damages, or other legal remedy of the plaintiff for the breach, the only question for determination was whether the plaintiff, within a reasonable time after he knew or ought to have known of the breach, gave notice thereof to defendants.

[2] Upon the facts proven it is clear that the examination was made within reasonable time. As the contents of the sacks contained in the bale in question were worthless, plaintiff was entitled to recover as his damages the amount he paid for that bale, which was \$237.50.

It follows that the judgment appealed from must be reversed, with \$30 costs, and judgment directed for plaintiff for the sum of \$237.50, with appropriate costs in the court below.

BIJUR, J., concurs.

MULLAN, J., dissents.

(108 Misc. Rep. 20)

LUKACH v. BLAIR et al.

(Supreme Court, Special Term, New York County. July, 1919.)

1. CORPORATIONS § 820(1)—STOCKHOLDER'S ACTION AGAINST DIRECTORS FOR MALFEASANCE DERIVATIVE AND NOT INDIVIDUAL ACTION.

Where the alleged wrongful acts of defendant directors, so far as they injure the corporation, are such as would give it a cause of action, a stockholder seeking to enforce its right of action must rely on a derivative, as distinguished from an individual and direct, action, and that wrongs are alleged to have been the result of a conspiracy, does not change their essential character or the character of the action.

2. CORPORATIONS § 310(1)—DIRECTORS NOT PARTIES TO ITS CONTRACT NOT LIABLE TO STOCKHOLDERS FOR ITS BREACH.

Directors of corporation, not parties to the contract, are not liable to a stockholder for having caused the corporation to breach its contract with another corporation, as such an extension of the doctrine of inter-

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fering with a contract right would tend to leave directors open to tort claims whenever the corporation had failed to perform its contracts.

3. CORPORATIONS §=306—DIRECTORS NOT PERSONALLY LIABLE FOR ITS BREACH OF CONTRACT.

Where the promisee in a corporation's contract can enforce full satisfaction of a judgment obtained in an action against the corporation for the breach of the contract, the directors, if liable at all for causing breach of contract, would not be personally liable.

4. CORPORATIONS §=310(1)—WHERE TWO CORPORATIONS NOT GUILTY OF TORT IN BREACH OF CONTRACT, DIRECTORS NOT LIABLE AS JOINT TORT-FEASORS.

Where a stockholder alleged no cause of action in tort against either of two corporations, the directors thereof could not be held liable on the theory that they were joint tort-feasors with either of their corporation principals in a breach by one corporation of its contract with the other.

5. CORPORATIONS §=189(11), 580—COMPLAINT OF STOCKHOLDER AGAINST TWO CORPORATIONS FOR BREACH OF CONTRACT INSUFFICIENT TO SHOW BREACH.

Complaint in stockholder's action against two corporations, alleging that plaintiff and another were to be appointed sole representatives of the new or succeeding corporation, without directly alleging that it had adopted contract of the old corporation, and alleging old corporation's delivery of stock in new corporation to plaintiff, as required by agreement, stated no cause of action against either corporation.

6. PLEADING §=8(1), 11—COMPLAINT MUST ALLEGE ULTIMATE FACTS.

A complaint should be made up of allegations of ultimate facts, omitting conclusions of law and mere evidentiary facts.

7. PLEADING §=810—INSTRUMENTS ARE NOT PART OF COMPLAINT WHEN NOT ATTACHED TO IT.

Written instruments referred to in the complaint are not made part of it by the statement that they are incorporated in it, when in fact no copy thereof is attached.

Action by Joseph Harry Lukach against Thomas S. Blair, Jr., and others. On motion by all defendants except Mundy for judgment on the pleadings, consisting of complaint and answer thereto by all the defendants except Mundy. Motion granted in favor of each moving party, with leave to plaintiff to plead over.

Thomas S. Ormiston, of New York City, for plaintiff.

Gardenhire & Schlesinger, of New York City (S. M. Gardenhire and Louis B. Davidson, both of New York City, of counsel), for defendants Blair, Reigart, Beach, Blair Engineering Co., and Blair Furnace Co.

GAVEGAN, J. [1] 1. It is evident from the complaint that the pleader desired to state a direct, individual cause of action in favor of the plaintiff; but it is also evident that, in so far as plaintiff sues as a stockholder, the acts complained of would give rise to a derivative action. The alleged wrongful acts of the individual defendants, so far as they injured the furnace company, were such as would give the furnace company a cause of action. In seeking to enforce that right of action, plaintiff must rely on a derivative as distinguished from an individual or direct right of action. That the wrongs are alleged to have been the result of a conspiracy does not change their essential character or the character of the action which the law af-

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fords as a remedy. Such allegations could be inserted in nearly every complaint against directors, based on corporate acts, which acts in the usual course are planned and agreed upon between the directors. By adopting the expedient of alleging that the corporate acts performed by the directors were performed pursuant to a conspiracy, plaintiff cannot overturn the established principles of law relating to derivative actions. *Brock v. Poor*, 216 N. Y. 387, 111 N. E. 229.

2. The complaint is insufficient to state such an action as a creditor may maintain under sections 90 and 91 of the General Corporation Law, being *Consol. Law, c. 23* (*Steele v. Isman*, 164 App. Div. 146, 149 N. Y. Supp. 488), or an action like *Shalek v. Jetter Brewing Co.*, 155 N. Y. Supp. 972; for it fails to show either that plaintiff is a judgment creditor or that it would be impracticable to obtain a judgment against the furnace company or against the engineering company.

[2, 3] 3. Plaintiff's brief indicates that he seeks to recover the damages resulting from a breach of contract.

(a) No action on contract can be maintained against the defendant directors who were not parties to the contract.

(b) It seems plaintiff, vaguely and indefinitely, relies on an alleged tort akin to the tort of interfering with a contract right. The limits within which that doctrine will be confined have not been worked out. See 18 Harv. Law Rev. 423; *Elliott, Cont. c. 56*. The briefs do not refer to any case in which an attempt was made to hold the members of a directorate liable on that theory for having caused their corporation to breach its contract. Such an extension of the doctrine would tend to leave the directors open to tort claims whenever the corporation had failed to perform a contract. In the exercise of their discretion, and in acting on their judgment for the benefit of their corporation, the directors should be free from possible liability of that kind. Moreover, it would not seem feasible to draw a line between directors' acts which are dictated by no other motive than the performance of their duties as directors and their acts which, though they may be performed in transacting the business of the corporation, are actuated by ulterior motives—such as the motive to bring about a breach of a corporate contract.

But even were directors to be held liable for so conducting their corporation as to cause it to fail to perform its contract, it is probable that they would not be held personally liable where the promisee could enforce full satisfaction of a judgment obtained in an action against the corporation for breach of contract. In that situation there would be no occasion for introducing a new form of remedy. Accordingly, if the principle applied in *Lumley v. Gye*, 2 El. & Bl. 216, and in *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30, should be extended to hold directors for bringing about the nonperformance of corporate contracts, it is likely to be limited to cases where a judgment against the corporation would be worthless. In this case there are no allegations tending to show that the engineering company is not responsible. As to the furnace company, the com-

plaint alleges it has not received the assets which should have been turned over to it, and that its cash assets were converted. It cannot be said, however, that the complaint alleges the furnace company to be without assets, or even insolvent. Indeed, it is indicated that it received some assets.

[4] (c) No cause of action in tort against either corporation is alleged, so that the directors cannot be held on the theory that they are liable as joint tort-feasors with either of their corporation principals. Plaintiff contends he has alleged that the furnace company caused the engineering company to breach the contract made with Grenfell and plaintiff, that thus he has set forth the commission by the furnace company of a tort, and that therefore the defendant directors are liable as joint tort-feasors. But the complaint, so far as it attempts to set forth acts of a tortious character, relates to the acts of the individual defendants. The complaint does not indicate that the pleader intended to set forth facts showing that the furnace company was guilty of the tort of interfering with the contract obligations which it is claimed the engineering company owed to plaintiff.

(d) There is nothing in this complaint to show that the corporate form was used as a mere cloak; for plaintiff relies on alleged abuse of corporate action.

[5] 4. No violation of plaintiff's rights is set forth, unless it be a violation of his rights as a stockholder or his rights as a creditor, or of his rights based, directly or indirectly, on the contract referred to in the complaint. It is apparent that no cause of action against the defendant directors has been stated. Does the complaint state a cause of action against either of the corporate defendants? It has been shown above that no cause of action in tort against either corporation has been set forth. The failure of the plaintiff to make the contract of June, 1912, a part of the complaint and his failure to clearly differentiate between the undertakings which were to be performed by the engineering company and those which were to be performed by the new company, the furnace company, gives rise to difficulty in considering whether a cause of action for breach of contract against either corporation has been stated. Evidently, it was the pleader's idea to set forth that the parties to the contract contemplated that it would be adopted by the furnace company, and that the furnace company would undertake to carry out some of the provisions affecting plaintiff and Grenfell. That is made very clear from subdivisions 4 and 5 of paragraph II of the complaint. Subdivision 4 provides that plaintiff and Grenfell were to be appointed the sole representatives of the new company in Europe. They could be so appointed only by the new company. Subdivision 5 provides that they were to receive as commissions a percentage of the first \$200,000 received by the new company on account of the sale of preferred stock or the sale of foreign patents. The fair inference from the complaint is that the undertakings in said subdivision 5 were to be undertakings of the new company, as distinguished from undertakings of the engineering company.

In so far as plaintiff seeks to declare for the failure of the new

company to perform its alleged obligations, the complaint fails to state a cause of action, because it fails to state by direct allegation that the new company adopted the contract. It is possible to infer from other allegations in the complaint that the new company did adopt the contract, but such inference is by no means compelled by those other allegations. Had plaintiff intended to set forth a cause of action for a breach of contract against the new company, he would not have left to such uncertain inference a vital and necessary part of his cause of action. In considering the complaint to see whether it states a cause of action for breach of contract against the engineering company, it is first essential to distinguish between the undertakings of the engineering company to the new company and the undertakings of the engineering company to plaintiff, or to plaintiff and Grenfell. The complaint contains numerous allegations tending to show that the engineering company failed to perform its alleged obligations, growing out of the contract of June, 1912, to the new company; but for the alleged failure of the engineering company to perform its obligations to the new company plaintiff has no direct, individual cause of action.

Judging from the first amended complaint, the obligations which the engineering company is alleged to have undertaken, so far as they relate to plaintiff, have been fully performed. Paragraph XI alleges that the shares of stock in the new company required by the agreement of June, 1912, to be delivered by the engineering company to the plaintiff, on performance by plaintiff and Grenfell, "were duly delivered to this plaintiff." It seems to me that by no fair inference can the complaint be held to allege that the engineering company undertook to render to plaintiff directly the performance of any obligation other than such delivery of stock. It is therefore apparent that no cause of action for breach of contract against the engineering company has been stated.

[6, 7] In deciding this motion on the pleadings, it would be improper for me to consider the proposed second amended complaint. It is not part of the pleadings. Moreover, it would seem that this court should not be called on to further consider the case until plaintiff, deciding on and proceeding on some definite theory, scientifically sets forth the elements of a cause of action. The complaint should be made up of allegations of ultimate facts, conclusions of law and mere evidentiary facts being omitted. It should also be noted that the written instruments referred to in the complaint are not made parts of it by the statement that they are incorporated in it, when in fact no copies thereof are attached.

The motion for judgment on the pleadings is granted in favor of each of the moving defendants. Plaintiff may have leave to plead over on payment of \$10 costs.

Ordered accordingly.

(108 Misc. Rep. 90)

PEOPLE v. LAPHAM et al.

(Supreme Court, Trial Term, Warren County. July, 1919.)

ADVERSE POSSESSION ¶115(1)—**EVIDENCE INSUFFICIENT TO ESTABLISH AS TO ISLAND CLAIMED BY STATE.**

In an action by the people of the state to recover possession of Glen Island, in Lake George, a defense, based on a claim of adverse possession and occupation, *held* not sustained by the evidence, so that judgment would be directed for plaintiff.

Action by the People of the State of New York against Byron Lapham and another to recover possession of Glen Island in Lake George. Judgment for the People.

Merton E. Lewis, Atty. Gen. (Burton H. Loucks, of Albany, of counsel), for the People.

James S. Kiley, of Glens Falls, for defendant.

WHITMYER, J. The action has been brought to recover possession of Glen Island, in Lake George. The defense is based on the claim of adverse possession. Defendant Ferris died before the trial, and the action has proceeded against defendant Lapham. The latter claims under his father, Jerome Lapham, and the former claimed under his father, Orange Ferris. No patent for the island has ever been granted, and it has not been sold on bond or otherwise.

In 1871 a number of men formed a club, and called it the Cold Water Club. It was not incorporated, and was formed for outing purposes. Orange Ferris and Jerome Lapham were members. In 1872 Orange Ferris applied to the commissioners of the land office for a patent of the island to himself and Jerome Lapham, jointly. Thereafter Ferris and Lapham applied for a lease. The club met on Phantom Island, just north of Glen Island, in 1873, and the name was changed to the Glen Club, and a cottage was built in that year. On September 8, 1874, the commissioners of the land office passed a resolution declining to sell or to lease any of the islands of Lake George, and denied the several applications which were pending. In 1875 the commissioners appointed a superintendent to take charge of the islands owned by the state in the lake. That appointment was in effect until 1884. In 1876 the Legislature prohibited the sale of the islands. In 1883 the state engineer and surveyor made a map of the lake, including the islands, for the commissioners of the land office. It was ordered on file. In 1885 the forest commission was created, and jurisdiction over the islands vested in the commission.

On July 1, 1886, William McEchron, a member of the club, appeared before the commission in behalf of the club and asked for permission to the members to remain on the island as occupants. The commission declined. In its reports to the Legislature it asked for power at different times to lease camp sites to occupants who had made improvements on islands occupied by themselves. Such power was given by chapter 707, Laws of 1892, and chapter 332, Laws of

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1893, and numerous leases were thereupon made. A lease of Phantom Island was given to Jerome Lapham. Prior to June 6, 1893, the club applied for a lease of the island in question. The commission granted the request and fixed the rent at the sum of \$150 per year. On August 1, 1893, it was modified, and fixed at the sum of \$75 per year. Three signs, marked "State Land, Glen Island," were erected that year. The leases to Jerome Lapham and to the club were reported to the Legislature in January, 1894. At some time prior to July 29, 1895, the club levied an assessment of \$10 upon each member as his share of the rental. B. F. Lapham and Orange Ferris paid. On that date the plan of leasing the island was given up, and said assessments were refunded.

On July 29, 1895, a minute was entered in the minute book to the effect that it was decided injudicious to further consider the project of an enlargement of the house or of a new one, because the commission did not approve. At that meeting a resolution was passed requiring every member who desired to withdraw from the club to offer his interest to surviving members first. At the annual meeting held April 7, 1899, a resolution was passed regulating the use of the cottage. At the annual meeting held July 3 and 4, 1903, the matter of necessary repairs to dock and cottage was considered and referred to a committee, and at the annual meeting held July 2, 1904, an extra assessment of \$2 was levied to pay the cost of building a new dock. At the annual meeting held July 3, 1905, B. F. Lapham and Mortimer Lapham were appointed to make necessary repairs to the cottage. On July 4, 1906, Mortimer Lapham was authorized to make repairs at the expense of those who were willing to share. On July 8, 1907, Mortimer Lapham wrote to H. W. Fox, state superintendent of the forest commission, asking leave to make some improvements to the cottage, and Mr. Fox answered on the next day declining to give such leave.

These are some of the facts, and clearly show without further details that defendants' claim cannot be sustained, and that plaintiff is entitled to judgment.

Judgment accordingly.

(108 Misc. Rep. 680)

EASTMAN KODAK CO. v. WARREN et al.*

(Supreme Court, Special Term, Monroe County. July 26, 1919.)

(Syllabus by the Court.)

1. INJUNCTION §136(1)—PENDENTE LITE FOR ENTICING SERVANT TO LEAVE FOR HIGHER WAGES DENIED.

An injunction pendente lite will not be granted to restrain the solicitation of the employes of a competitor, where the only inducements were higher wages, better conditions, and increased opportunities of advancement, and the employes were not under a contract for any definite period of employment, and no fraudulent or unlawful means were used for that purpose.

*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Order reversed 189 App. Div. 556, 179 N. Y. Supp. 325.

2. INJUNCTION ¶136(3)—To ENFORCE CONTRACT NOT TO ENTER COMPETITOR'S EMPLOY DENIED.

An injunction pendente lite will not be granted to enforce a negative covenant not to enter the employ of a competitor within the United States, except Alaska, during a period of two years after the employment shall cease, where it is not necessary to the protection of the covenantee, or reasonable and equitable under the facts of the case.

3. INJUNCTION ¶136(3)—PENDENTE LITE TO ENFORCE CONTRACT NOT TO ENTER COMPETITOR'S EMPLOY DENIED WHERE PLAINTIFF HAD MONOPOLY.

An injunction pendente lite will not be granted to enforce such a negative covenant not to enter the employ of a competitor, where the covenantee has a substantial monopoly of the production of motion picture raw film stock, the term of employment has expired, and the occupation of the employé is that of an emulsion coater, of which the covenantee has many others in its employ and can readily secure a substitute.

4. INJUNCTION ¶136(2)—GRANTED PENDENTE LITE AS TO TRADE SECRETS.

An injunction pendente lite will be granted to restrain the disclosure of secrets of manufacture, although the negative covenant of employment in the contract of employment will not be enforced, pending the termination of the action.

*(Additional Syllabus by Editorial Staff.)***5. INJUNCTION ¶171—CONCLUSIONS OF LAW IN COMPLAINT DISREGARDED IN MOTION TO VACATE TEMPORARY INJUNCTION.**

Conclusions of law in complaint will not be considered on motion to vacate temporary injunction granted ex parte.

6. INJUNCTION ¶60—WHEN COVENANT NOT TO WORK FOR COMPETITOR AFTER LEAVING EMPLOY ENFORCEABLE.

Covenant of employé, employed from week to week, not to work for competitor for certain period after leaving employer's service, will be enforced by enjoining employé from working for competitor, where employer cannot secure a substitute and has no adequate remedy; but, where a substitute can be obtained, employer does not need an injunction, since he can secure adequate relief by way of damages.

7. INJUNCTION ¶56—DISCLOSURE OF TRADE SECRETS IN CONFIDENTIAL EMPLOYMENT ENJOINED.

Equity will restrain a party from making disclosures of secrets communicated to him in a confidential employment, whether the secrets be trade secrets, or secrets of title, or any other secrets of the party important to his interest.

Suit for injunction by the Eastman Kodak Company against Harry A. Warren and another. On motion on notice and affidavits to vacate a temporary injunction granted ex parte. Temporary injunction modified.

Ingraham, Sheehan & Moran, of New York City (George L. Ingraham, of New York City, of counsel), for the motion.

Hubbell, Taylor, Goodwin & Moser, of Rochester (W. S. Hubbell, of Rochester, of counsel), opposed.

RODENBECK, J. This action is brought for an injunction restraining the defendant, Powers Film Products, Incorporated, among other things, from soliciting any of the employés of the plaintiff, and particularly from employing the defendant Warren, a former employé of the plaintiff, and restraining the defendant Warren from working for the defendant company, and from disclosing any of plain-

tiff's secrets of manufacture. The controversy relates especially to the manufacture of motion picture film raw stock, used by producers of motion pictures. The plaintiff is engaged in the manufacture of this stock for the trade generally, while the defendant company is manufacturing it for picture producing companies interested in its corporation. The plaintiff is the largest manufacturer of raw film stock in the world, and since 1914 has made practically all of the raw film stock used in this country, and much of that which was used abroad. The defendant company claims in its prospectus that the plaintiff sold approximately 750,000,000 feet of such raw stock a year, and that the greater portion of its annual profits of \$14,500,000 came from this source. So extensive had the plaintiff's business in photographic supplies become that it was declared by the federal courts to be an illegal monopoly under the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. §§ 8820-8823, 8827-8830]). *United States v. Eastman Kodak Co.* (D. C.) 226 Fed. 62; *Id.* (D. C.) 230 Fed. 522.

The defendant company claims that it was organized by persons interested in the picture producing end of the motion picture business, and that its output is all used by companies with which the president of the defendant company is connected; that prior to the European War these corporations imported large quantities of motion picture film raw stock from Europe, paying for this and other raw stock as high as \$75,000 a week; and that after the outbreak of the war the supply from abroad was entirely cut off and that the defendant company was organized to supply the needs of these companies. The defendant company is occupying a plant formerly owned by the Sensitized Products Company, another company which sought to produce raw film stock in the city of Rochester, and the coating machine used by the defendant company is the same one formerly used by the Sensitized Products Company. The defendant company, it is claimed by the plaintiff, among other things, is using illegal methods to secure plaintiff's employes, and has employed the defendant Warren, and that the defendant Warren is in possession of secrets of manufacture which he should be restrained from disclosing.

The defendant company claims the right to obtain its help from any source by any lawful means; that the coating of film is not a secret process, but is well known; that the defendant Warren has none of plaintiff's secrets of trade, has disclosed none, and that the effort of the plaintiff to secure an injunction in this action is directed toward preserving a monopoly, by unlawfully attempting to restrict the employment of its help after the termination of their employment. It attacks as unlawful the provision in defendant Warren's contract with plaintiff, made October 29, 1915, under which he agreed that, for a period of two years after leaving the employ of the plaintiff, he would not engage or be employed, within the United States, except Alaska, in any photographic business, and as tending to create a servitude of employment and perpetuate what the federal courts have condemned.

A temporary injunction was granted ex parte with the issuance of the summons, and this is a motion, upon notice and affidavits, to vacate the same.

[1, 5] The plaintiff has not made out a case for an injunction against the defendant company. The allegations of fact set forth in the complaint, stripping the complaint of its conclusions of law, which are not to be considered on this motion (*De Jong v. Behrman Co.*, 148 App. Div. 37, 131 N. Y. Supp. 1083), do not show that the defendant company, with respect to soliciting employes of plaintiff, did anything that it did not have the legal right to do. There is no legal restraint upon the use of lawful means to secure help from any source. These means consist of offers of higher wages, improved conditions, and better prospects of advancement, and any restraint in this respect would seriously interfere with the rights of employers and employes alike, and seriously affect the development of new enterprises and the growth and well-being of society. It is a matter of common knowledge that these means are used every day, and any restraint by the courts would interfere with the natural law of supply and demand.

The allegations of fact in the affidavits submitted by the plaintiff as to the conduct of the defendant company in relation to soliciting plaintiff's employes describe nothing that is unlawful, and these allegations and those in the complaint are not strengthened by any characterization of them by the plaintiff as unwarranted or unlawful, or as having been committed with any unlawful design or intention. Warren was not under contract for a definite period, being employed from week to week, and had the right to quit whenever he desired to do so. When he left the plaintiff's factory, he was not guilty of any breach of his contract. There is no allegation in the complaint or in the affidavits that the other employes claimed to have been approached were employed for a definite period. The plaintiff seeks to hold these employes to their negative covenants and otherwise, and yet has given them no definite period of employment, except from week to week. The defendant Warren says that he applied to the defendant company for work, and was not solicited. No relief will be granted for alleged enticement of help, where the employe is not under a definite period of employment (*Posner Co. v. Jackson*, 223 N. Y. 325, 331, 119 N. E. 573), and even then it must appear that the means used were fraudulent or otherwise wrongful, amounting to a tort (*De Jong v. Behrman Co.*, *supra*). The right to solicit help of another employer is one of which undoubtedly the plaintiff has availed itself in the past, and, if not fairly and liberally enforced by the courts, would create a servitude of employment that would be intolerable and would soon lead to serious consequences.

The claim to a temporary injunction restraining the defendant company from using any of the trade secrets of plaintiff, or disclosing any communicated to it by defendant Warren, is equally unfounded, as there is no allegation that there has been any such use or disclosure; but, on the contrary, the allegations on the part of the defendants are that they know no such secrets and that none have been disclosed. To entitle plaintiff to such an injunction against the defendant company, it must at least allege, if not show by substantial facts, that secrets of manufacture which have been learned have actually been disclosed. In the original complaint it was not even alleged that the defendant

Warren had learned any of plaintiff's secrets of manufacture, but in the amended complaint this omission is supplied. The defendant company contends that the work in which Warren was engaged, that of coating film, is done by a machine, and is a simple and not a secret process, and this is borne out by the statements of Warren himself. Under the complaint, and the allegations in the affidavits, the plaintiff is not entitled to a temporary injunction restraining the defendant company from soliciting plaintiff's employes as prayed for, or from using or disclosing alleged secrets of manufacture, since it does not appear that any were imparted to it.

[2] The injunction against the defendant Warren's working for the defendant company is not sustained by the proofs submitted, and should be eliminated from the restraining order. The claim of plaintiff is based upon the defendant Warren's contract of employment. The one made December 28, 1911, contained no clause prohibiting his employment after the termination of his contract, but that made October 29, 1915, provides, as stated, that he will not work within the United States, except Alaska, for any manufacturer of photographic supplies within two years after leaving plaintiff's employ, and that he will not reveal any of plaintiff's secrets of manufacture. The two-year limitation was undoubtedly designed to preserve with more certainty plaintiff's secrets of manufacture, but it also serves to debar the defendant Warren from using the skill and experience which he acquired in his employment, and which are not covered by the prohibition against revealing secrets of manufacture. The defendant Warren was employed by the plaintiff for a period of about ten years, and by the clause in the contract referred to he is prohibited for two years from earning a livelihood in his chosen occupation, except in Alaska or abroad. It is no answer to the harshness of this provision to say that he can work at something else. Employes such as he cannot easily shift from one occupation to another, and such a provision operates to keep employes bound hand and foot to their employers, so that they cannot better their occupational circumstances, and is for that reason a serious restraint upon employment. The common law prohibited such contracts, and this rule has been modified only to a limited extent. The modification, however, has not gone to the extent of legalizing all contracts, though mutual in their terms and based upon a consideration, which limit the right of an employe to enter employment in the same line of business to which the contract relates.

"As a general rule, equity will not interfere to restrain by injunction a violation of a restrictive covenant in relation to personal services." *Strobridge Litho. Co. v. Crane*, 12 N. Y. Supp. 898, 899.¹

There are certain exceptions, in which equitable relief by injunction will be granted; but in order to secure that relief it must be plain that the case comes within the exceptions, and does not fall within the general rule which is designed to protect society against the evils of unjust and unreasonable contracts of employment. The law favors

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 58 Hun, 611.

the growth of new and additional enterprises, and is opposed to a monopoly of manufacture, trade, business, or employment. It encourages the fullest and fairest opportunity for business enterprises to develop, and the greatest freedom of action of employ  s in seeking to better their employment, and condemns, both by the general opinion of judges represented by the common law and by public opinion, represented by federal and state statutes, any combination operating to interfere with the free development of these principles.

After the bulk of the cases upon this subject have been examined, the general conclusion is irresistible that a temporary injunction will be granted in this class of cases only where it is necessary, reasonable, and equitable to protect the interest of a covenantee.

"A party is never entitled to an injunction as a matter of right. Whether a court of equity will exercise its power in granting such relief always depends upon the facts peculiar to each case. It will never be granted, unless the court, in the exercise of a sound discretion, concludes that such relief is necessary in order to prevent irreparable injury." *Mahler Co. v. Mahler*, 160 App. Div. 548, 145 N. Y. Supp. 764.

Upon this broad principle all of the cases may be harmonized, although there may appear in isolated cases to be an apparent error of judgment in applying this principle. The principle upon which equitable relief is denied, and the absence of necessity and the lack of reasonableness which forecloses injunctive relief, varies with the facts and circumstances of each case. In some cases the rank of the employ   is emphasized, and in other cases the absence of any other relief or the damage that may be occasioned is the determining factor. "Damage done, rather than rank of employ  ," said Judge Pound in one case, will control the right to injunctive relief in these cases. *Witkop & Holmes Co. v. Great A. & P. Tea Co.*, 69 Misc. Rep. 90, 124 N. Y. Supp. 956. In some cases the contract has been refused enforcement because of its want of reciprocal obligations (*Lawrence v. Dixey*, 119 App. Div. 295, 298, 104 N. Y. Supp. 516; *Dockstader v. Reed*, 121 App. Div. 846, 106 N. Y. Supp. 795; *Star Co. v. Press Pub. Co.*, 162 App. Div. 486, 147 N. Y. Supp. 579), or where the provisions of the contract sought to be enforced were harsh and inequitable (*Gilbert v. Wilmer*, 102 Misc. Rep. 388, 168 N. Y. Supp. 1043; *Witmark & Sons v. Peters*, 164 App. Div. 366, 149 N. Y. Supp. 642; *Tolman v. Mulcahy*, 119 App. Div. 42, 103 N. Y. Supp. 936; *Mahler v. Mahler*, supra). Other cases have refused enforcement of such a covenant, because a substitute could be readily obtained for the delinquent employ  . *W. J. Johnston Co. v. Hunt*, 66 Hun, 504, 21 N. Y. Supp. 314; *Dockstader v. Reed*, supra. In still other cases the denial of the relief was based upon the conclusion that the negative covenant against accepting other employment was void. *Witkop & Holmes Co. v. Boyce*, 61 Misc. Rep. 126, 112 N. Y. Supp. 874; *Gilbert v. Wilmer*, supra; *W. J. Johnston Co. v. Hunt*, supra.

In all of the cases where relief has been granted by injunction under clauses similar to that involved in this case, the court reached the conclusion that the covenantee was entitled to relief because under the facts and circumstances of the case it was necessary, reasonable, and

equitable that the relief should be granted. Thus covenants made, upon selling a business, not to enter into a competing business, have been sustained, as such relief was necessary to preserve in the vendee the fruits of the sale. *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475; *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. St. Rep. 464. Covenants against soliciting special lists of customers of a former employer have been sustained uniformly, as otherwise an employé might seriously impair, if not destroy, the business of his former employer. *Witkop & Holmes Co. v. Great A. & P. Tea Co.*, supra; *Davies v. Racer*, 72 Hun. 43, 25 N. Y. Supp. 293; *Witkop & Holmes Co. v. Boyce*, supra; *Mutual Milk & Cream Co. v. Heldt*, 120 App. Div. 795, 105 N. Y. Supp. 661; *Mutual Milk & Cream Co. v. Prigge*, 112 App. Div. 652, 98 N. Y. Supp. 458; *N. Y. Wet Wash Laundry Co. v. Unger*, 170 App. Div. 761, 156 N. Y. Supp. 598; *People's Coat, Apron & Towel Supply Co. v. Light*, 171 App. Div. 671, 157 N. Y. Supp. 15; *Eastern N. Y. Wet Wash L. Co. v. Abrahams*, 173 App. Div. 788, 160 N. Y. Supp. 69.

Persons performing unique, special, or extraordinary services, such as great actors, artists, and musicians, have been restrained, since their places cannot be filled, and injunctive relief is usually the only substantial relief that can be obtained. *Lumley v. Wagner*, 1 De G., M. & G. 604, and similar cases. Likewise persons who discharge important relations toward a business enterprise, such as managers and experts, will be enjoined, as their places cannot readily be supplied. *McCall Co. v. Wright*, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249; *Magnolia Metal Co. v. Price*, 65 App. Div. 276, 72 N. Y. Supp. 792; *Todd Protectograph Co. v. Hirschberg*, 100 Misc. Rep. 418, 165 N. Y. Supp. 906. In many other cases that do not fall under these well-recognized heads the courts have restrained the employé from disclosing or using trade or confidential information, but have refused to restrain him from entering other employment, although contrary to the terms of his contract. *Witkop & Holmes Co. v. Boyce*, supra; *Gilbert v. Wilmer*, supra; *W. J. Johnston Co. v. Hunt*, supra; *Tolman v. Mulcahy*, supra; *N. Y. Wet Wash Laundry Co. v. Unger*, supra; *Clark Paper & Mfg. Co. v. Stenacker*, 100 Misc. Rep. 173, 165 N. Y. Supp. 367, modified 183 App. Div. 915, 170 N. Y. Supp. 1073. The question in this case, therefore, is, assuming this clause of the contract to be valid, whether or not a temporary injunction is a just and proper exercise of the discretion of the court, and this depends upon whether or not such relief is necessary, reasonable, and equitable under the facts and circumstances of the case.

[3] The facts in this case show that the services rendered by the defendant Warren are not such that they cannot be replaced readily by the plaintiff, and that the enforcement of the restrictive covenant as to employment is unnecessary to protect the plaintiff. It appears that the plaintiff has in its extensive plant 13 assistant coaters, which was the position occupied by the defendant Warren, with head coaters, the number of which is not stated. The defendant company has been producing motion picture film, and of course has emulsion coaters,

just as the plaintiff has these coaters in its plant. There are other film manufacturers, all of whom must employ emulsion coaters, and the same line of work is performed by those who are engaged in the manufacture of photographic paper, in which there is a much greater competition than there is in the manufacture of motion picture film. It is apparent that there must be in this country and in this state a large number of men who are familiar with the work of coating photographic paper and motion picture film, and that this employment is not a unique, special, or extraordinary employment, or even one requiring individual or peculiar qualifications, as those terms are understood in the law of this case. A coater in a photographic establishment does not sustain the relation to that establishment that a great chemist or a great manager or other expert does toward a manufacturing plant. He is, for the purposes of the controversy in this action, so far as the proofs show, and for the purposes of temporary injunctive relief, an ordinary and usual employé. The affidavits show that the process of coating is a comparatively simple one, and that the plaintiff can readily secure all the assistant coaters it needs from its other departments, and that the enforcement of the restrictive covenant is not necessary to its protection in this respect. Nor is it necessary that the plaintiff should have a specific performance of the negative covenant against other employment to protect its secrets of manufacture. The defendant Warren cannot be enjoined from using his skill and experience, and these secrets can be revealed, if there is a disposition to do so, quite as effectually without as with employment on his part.

The enforcement of the restrictive covenant, under the circumstances of this case, considering the interests of the parties and the public, would also be unreasonable. 13 C. J. 473. The law is based upon reason and common sense, and not upon arbitrary rules. In the first place, the defendant company has gone beyond the experimental stage of the manufacture of motion picture film, and is actually producing large quantities of such film. It alleges that it is producing 3,000,000 feet per month, and that it has orders for more than it can fill. It has been operating its plant for some time, has a very large investment in it, and claims to be producing as high a grade of film as the plaintiff. The plaintiff, on the other hand, emphasizes that it occupies 150 acres of land and has 100 or more buildings, with 8,000 or more employes, and yet contends that its business will be affected if an assistant emulsion coater, earning \$26 a week, with some additional allowances, is permitted to work for a competitor. The original complaint states that since 1914 the plaintiff has manufactured practically all of the motion picture film, amounting to millions of feet per month, used in the United States, and a large amount of motion picture film used elsewhere. The amended complaint omits this statement, but it is by reference repeated in one of the affidavits, and this motion is made upon both the original and the amended complaint, and the moving papers on this motion allege that the plaintiff is, and has been declared by the courts to be, a monopoly, and that the contract under review in this case is designed to perpetuate that monopoly.

It is evident that the plaintiff's business will not be seriously affect-

ed by any competition of the defendant company, and that this case does not come in that class of cases where by reason of special circumstances the competition was unfair. The defendant Warren is only an assistant coater, receiving a salary, with some allowances which brings the amount up to \$30 a week, which is not more than an ordinary skilled mechanic obtains in any line of work. It is hardly to be presumed that a man who has been employed in a factory such as the plaintiff's for a period of ten years and receives such compensation is possessed of many of the secrets of manufacture of which the plaintiff claims to be the sole owner. He operated a coating machine at times, and at other times he was a mere assistant. This process of coating consists of placing a sensitized emulsion upon a celluloid base by means of a machine. It is evident that other manufacturers of photographic paper and film must have occasion to use some sort of coating machine and must employ coaters to operate those machines. It appears, therefore, that there are coating machines in general use, so that all that the plaintiff can claim is that there are some special features about its coating machine that are not generally known, and that there is some manipulation or method of coating with its machine that is not known outside of the factory. The defendant company, too, has its coating machine and its coaters, and it is likely that it also has special features for doing this work; but both companies claim to be producing a product which is available for motion pictures, by whatever means the result may be attained. The defendant company may use the defendant Warren in the coating of its film, without the use in the slightest respect of any knowledge that he may have of the special methods of coating in the plaintiff's factory, and he cannot be restrained from using his skill and experience, wherever obtained. *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App. Div. 715, 132 N. Y. Supp. 37; *S. W. Scott & Co. v. Scott*, 186 App. Div. 518, 174 N. Y. Supp. 583.

The enforcement of the restrictive covenant would also be contrary to well-established principles of equity. The relief sought against the defendant Warren, restraining him from entering the employ of a competitor, is in the nature of a specific performance of his contract. The plaintiff in this action asks the court by injunction to compel him to live up to his contract. Where the employé is under contract for a definite term, and quits before the term expires, the nature of the relief sought by specific performance is quite apparent, and to a modified degree the same end is sought where the contract has expired and the covenant applies to a limited period thereafter. The employer cannot compel the employé to continue to work for him, any more than he can be forced to retain his services; but by seeking to restrain him from entering the employment of a possible competitor he is endeavoring to preserve to himself, so far as he can, the terms of his contract. The conscience of the court is not stirred by the appeal of one who has broken the terms of his employment and quit before the end of his contract as in the *Todd & Clark Paper & Manufacturing Company* and other cases, but its sympathies go out to a man who has not brok-

en his contract and is nevertheless barred without sufficient reason from earning a livelihood in his chosen occupation.

[6] Specific performance being the gist of the action, the equitable relief by injunction may be granted, where the employer cannot secure a substitute and has no adequate remedy; but where a substitute can be obtained he does not need the unusual remedy by injunction, but can secure adequate relief by way of damages, if any have been sustained. For this reason the remedy by injunction is usually confined to cases where the service contracted for is unique, special, and extraordinary, or special and individual, which the employer cannot obtain at all, or cannot readily obtain, and is not extended to positions like that of defendant Warren, which can be easily supplied. Restrictive clauses in contracts of employment, such as the one in suit, are not enforced as a matter of course; and when the facts show, as they do in this case, that the covenant is unnecessary, unreasonable, and inequitable, temporary relief by way of enforcement will not be granted, pending a trial, until the facts relating to the nature of the employment and the existence of the alleged secrets of manufacture can be determined.

[4, 7] While the restrictive covenant of employment in such a case as the one at bar will not be enforced, the employé nevertheless will be restrained temporarily from disclosing alleged secrets of manufacture or confidential information until the case can be tried. This course does the employé no harm, and protects the employer in the secrets of his business. The right to this relief does not depend upon the contract, and is wholly independent of its validity. Courts of equity will restrain a party from making disclosures of secrets communicated to him in a confidential employment, and it matters not, in such cases, whether the secrets be trade secrets, or secrets of title, or any other secrets of the party important to his interest. Story, Equity Jur. § 952; High on Injunctions, vol. 1, § 19 (4th Ed.). This doctrine has been applied in numerous cases to secret processes or formulæ of manufacture. *Eastman Kodak Co. v. Reichenbach*, 79 Hun, 183, 29 N. Y. Supp. 1143; *Tode v. Gross*, supra; *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; *National Gum & Mica Co. v. Braendly*, 27 App. Div. 219, 51 N. Y. Supp. 93; *Little v. Gallus*, 39 App. Div. 646, 57 N. Y. Supp. 104; *Eastern Extracting Co. v. Greater N. Y. Extracting Co.*, 126 App. Div. 928, 110 N. Y. Supp. 738. This view was taken by the Appellate Division of the Fourth Department in the case of *Clark Paper & Mfg. Co. v. Stenacker*, supra, where the court held that the defendant should be restrained from soliciting orders for plaintiff's competitor from customers of the plaintiff, and from disclosing the methods or processes of plaintiff's business and the names of its customers, but not from entering the employ of a competitor. *Mahler Co. v. Mahler*, supra.

In *Witkop & Holmes Co. v. Boyce*, supra, affirmed 131 App. Div. 922, 115 N. Y. Supp. 1150, the court granted a temporary injunction restraining the defendant from interfering with plaintiff's business and making use of plaintiff's list of customers, and from soliciting orders from them, and said, with reference to the clause in the contract

prohibiting the defendant from engaging to work for a competitor for a period of two years after the termination of the employment, that "the contract will undoubtedly be refused enforcement in a court of equity." 61 Misc. Rep. 135, 112 N. Y. Supp. 881. In *New York Wet Wash Laundry Co. v. Unger*, supra, where a restrictive covenant prohibited an employé from accepting similar employment in a certain locality for one year, the only relief granted was an injunction restraining him from soliciting or collecting wash from any person who was a customer of the plaintiff while the defendant was in its employ. There are cases in which the restrictive covenant against entering the employ of another was enforced, where the employé violated his contract by leaving before the expiration of his term of employment, which is a strong equitable feature not involved in the present case, where it is sought to enforce such a covenant after the term of employment has legally ceased. There is also a wide distinction between those cases where the employé was an important factor in the business, and his competition threatened the stability of the business, and the present case, where the person sought to be restrained is an ordinary employé in a great corporation.

The temporary injunction herein should be modified and vacated, except to enjoin the defendant Warren from disclosing any of plaintiff's secrets of manufacture relating to apparatus, machinery, processes, appliances, methods, manipulations, operations, or otherwise, which he may have learned in connection with his employment by the plaintiff.

Motion granted as aforesaid, with \$10 costs of motion to each of the defendants to abide the event.

So ordered.

(108 Misc. Rep. 696)

PUBLIC SERVICE COMMISSION, SECOND DIST., et al. v. IROQUOIS NATURAL GAS CO.*

(Supreme Court, Special Term, Erie County. September, 1919.)

1. GAS $\Leftrightarrow$ 13(3)—MANDAMUS WILL LIE TO COMPEL NATURAL GAS COMPANY TO CONNECT MAINS WITH BUILDINGS.

Mandamus will issue against a natural gas company, at suit of the Public Service Commission and the city served, to compel it to connect its mains in streets of the city with buildings fronting on such streets on request of the owners, subject to all reasonable regulations, though in the winter there is some difficulty in supplying enough gas for all present connections, the new connections amounting to only about a 6 per cent. increase.

2. GAS $\Leftrightarrow$ 1—PUBLIC SERVICE COMMISSION CAN COMPEL NATURAL GAS COMPANY TO MAKE CONNECTIONS.

Where the Public Service Commission made an order to limit the service of a natural gas company in a city, which order was annulled by the court, the annulment relegated the parties to the status before the order was made, which showed applications for gas connections, refusals, and complaints filed with the commission, and under Public Service Commissions Law, § 74, it can interfere by mandamus to compel the gas company to make the connections.

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Order affirmed 189 App. Div. 545, 178 N. Y. Supp. 230.

Application for writ of mandamus by the Public Service Commission, Second District, and the City of Buffalo, against the Iroquois Natural Gas Company. Application granted.

Ledyard P. Hale, of Albany, for the Commission.

William S. Rann, of Buffalo, for city of Buffalo.

Henry W. Killeen, of Buffalo, for intervener.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, for Iroquois Natural Gas Co.

POOLEY, J. This is an application for a writ of mandamus to compel the gas company to connect, or cause or permit to be connected, its mains in certain of the streets of the city of Buffalo with buildings fronting on such streets, on request of the owners of said buildings and subject to all reasonable regulations. The writ is asked on the theory that the gas company has failed or neglected to make gas connections on proper demand.

The answer denies this, and sets up the affirmative defense that it has furnished all available gas, whether produced from sources owned or controlled by it or purchased from other producers; that upwards of 70 per cent. of gas heretofore furnished in recent time has been that purchased from other producers, namely, from Pennsylvania, and delivered at the state line; that in a proceeding before the Public Service Commission in 1917, it appearing that the supply of natural gas was gradually diminishing and the demand increasing, and that the supply furnished during severe winter weather was inadequate in amount and varying in pressure, and that much inconvenience and suffering was caused to those depending upon said gas for heat and light, the commission made an order directing the gas company to cease making any further connections; that defendant complied with said order; that the Public Service Commission in June, 1918, continued the investigation and further ordered that customers using the gas for domestic purposes should have first right, and that it was necessary to restrict the use of gas during the winter months to conserve the supply for domestic consumers, and that from December 15th in each year until the following March 15th domestic consumers should have preference over industrial consumers, and that industrials should not be furnished with gas when there was not sufficient for domestic consumers, and that gas should not be used for heating furnaces originally constructed for coal during the same period; that, notwithstanding, there were periods of shortage; that on July 15, 1919, the commission on its own motion made an order requiring the defendant to show cause why the provision in the order of December 13, 1917, prohibiting taking on new customers, should not be modified or annulled, and after a hearing the commission on July 31, 1919, made an order annulling so much of the order of December 31, 1917, as prohibited the taking on new consumers, on the ground that the Supreme Court had, since said order was made, rendered a decision to the effect that the commission had no authority to limit the number of customers, and that defendant alleges

that such was not the effect of the said decision; and that defendant has been notified that their gas supply by purchase will be reduced beginning November, 1919, by 45,000,000 cubic feet per month, and further reduced in January, 1920, which will necessitate the shutting off during January, February, March, and April completely of from 5,000 to 6,000 consumers, in order to render adequate service to the remaining consumers. In short, the answer avers that the gas company has not now and will not have sufficient gas to supply its customers already on its lines.

It appears that a large percentage of the gas is lost through leakage, and that an additional large percentage is wasted by the customers, and it is contended that, if these losses could be overcome, there would be sufficient for all. It is not clear where the leakage occurs. If it is due to faulty equipment, it would seem reasonable to expect that some method could be devised to overcome it. The waste of gas by consumers can be prevented. They could be required to install means to regulate the use of gas. They could be restricted to a minimum per diem use of gas, having regard for requirements for light, heat, and cooking. It is a matter of common knowledge that there is a practical method of determining the amount of heat required to keep the rooms in any given house up to a heat of 70 degrees in cold weather, according to the cubic contents. Gas consumed in excess of these requirements would form a basis for a penalty. There may be other considerations, perhaps more potent, to solve this question of waste; but the gas company should assume the burden of providing the methods and regulations necessary to bring about the desired result.

The questions involved here have been the subject of judicial decision. In *People ex rel. Municipal Gas Co. of the City of Albany v. Pub. Service Com.*, 224 N. Y. 156, 120 N. E. 132, the court affirmed an order of Appellate Division, Third Department, 184 App. Div. 922, 170 N. Y. Supp. 1106, which confirmed, on certiorari, a determination of the Public Service Commission:

"The appeal presents the single and clear-cut question: Assuming that the price of \$1 per 1,000 feet is confiscation, has the Legislature vested in the Public Service Commission the power to authorize the relator to charge in the city of Albany a greater price?"

Chapter 227, Laws of 1907, fixed the maximum price of \$1 for the City of Albany. Section 72 of the Public Service Commissions Law (Consol. Laws, c. 48) provides that the commission may fix the maximum price, not exceeding that fixed by statute. It was held that the commission can exercise only such powers as have been specifically conferred by statute; that question is not between the gas company and the state; it is between the commission and the state; that chapter 227 may be involved as to the gas company as a taking of property without just compensation, but as to the commission it, read with the provision of section 72, is an unmistakable and valid restriction upon the power of the commission.

As was said by Cochrane, J., in *People ex rel. Pavilion Natural Gas Co., and People ex rel. Tri-County Natural Gas Co. v. Pub. Serv.*

ice Com., 188 App. Div. 36, 176 N. Y. Supp. 163, the Legislature enacting the statute bearing upon the subject of natural gas probably did not have in mind the possibility of a failure of supply, and at page 41 of 188 App. Div., at page 165 of 176 N. Y. Supp.:

"Its provisions have reference to improvements and changes due to a failure on the part of the owners or operators in respect to their equipment or methods, and not to a failure on the part of nature in supplying the commodity. If it had been the legislative purpose to grant such power to the commission as has been exercised in making the order under consideration [discriminating as between consumers], it would have been done in unmistakable terms, and not left as a matter of inference."

In that instance the commission on July 9, 1918, made an order dividing the customers into two classes, domestic and industrial, and providing that from December 1st to April 1st no natural gas should be furnished to any industrial consumer without special permission of the commission, and that no domestic consumer should be permitted to use more than 25,000 cubic feet in any one month. The reason given was that the Pavilion Company does not and cannot furnish sufficient gas to its customers during the winter months, and that it is necessary to restrict the use during the winter months for the purpose of conserving the supply for domestic consumers. The order is based on the inability of the gas company to furnish gas, "because nature is not sufficiently liberal in its supply." The commission found its authority in sections 65 and 66 of the Public Service Commissions Law. Neither these sections, nor sections 71 and 72, nor any other statutory provision, in my opinion either expressly or by implication authorizes this order. The court holds (188 App. Div. 41, 176 N. Y. Supp. 166):

"These relators have from time to time extended their lines into the various municipalities at considerable expense with the approval of the commission. They are lawfully there. They have received franchises from such municipalities, and have entered into contract obligations with the consumers residing therein. The commission cannot destroy or interfere with these contract rights and obligations. Undoubtedly, if the consumers are dissatisfied with the service they are receiving, they can discontinue their patronage or rely on whatever contract rights they possess against the relator. This may be the remedy which nature suggests for an insufficiency of supply which nature cannot produce. The commission can within certain limits regulate the price. But as long as a consumer is willing to pay for what he is receiving, although he may not be receiving all he desires, the commission has no power to deprive him of that privilege, or to deprive the relators of his patronage."

In *Park Abbott Realty Co. v. Iroquois Nat. Gas Co.*, 102 Misc. Rep. 266, 168 N. Y. Supp. 673, affirmed 187 App. Div. 922, 174 N. Y. Supp. 914, a peremptory writ of mandamus was demanded by the owner of a lot on Englewood avenue, Buffalo, through which street and in front of which lot the gas company has a main for piping its gas, to compel the gas company to connect its main with relator's property, on which the owner has built a dwelling house. Other houses on the same street, either side of the house in question, are being served with gas from the main in the street. On application to the gas company for a connection, the application was denied on

the ground that the Public Service Commission made an order December 13, 1917, forbidding the gas company from making further connections. The application had in fact been made before the making of the order by the commission, but the connection was not made at that time, probably because the building was not ready for it. The writ was granted, holding that the order of the commission, so far as it related to the relator, was unreasonable and arbitrary, and therefore void. The Appellate Division affirmed (187 App. Div. 922, 174 N. Y. Supp. 914), with the memorandum:

"Held, that since the gas company refused to furnish the relator with gas solely by reason of the order of the Public Service Commission of the Second District, made December 13, 1917, our decision is based on the lack of legislative authority, express or implied, for that part of the order of the Public Service Commission involved. All concur."

It appears to have been determined, therefore, that the commission cannot fix a rate in excess of that fixed by statute, that the commission cannot discriminate between customers having equal rights to the use of the gas, and that it has no power to deprive a consumer of gas which he has contracted to take from the gas company.

[1] The Park Abbott Case, while the mandamus was allowed in an individual case, compelling the gas company to connect its main with a single house, the court did not decide whether or not a company must make connections and furnish gas to new consumers on streets piped for gas, even in face of a failing supply, which is the question here presented. I think that the line of reasoning in the opinion in the Pavilion Gas Case is applicable here. This is not a case involving the rates of charges, whether or not the gas company can afford to furnish gas at 30 per cent. net per 1,000 feet. It is a question of contract, based upon a public franchise. Streets in the city have been piped, constituting an invitation to the property owners to use the gas. The franchise provides that the gas company will supply natural gas to all consumers, and when the gas was abundant they encouraged the people to use it. Property on streets having the gas was sold because of the opportunity to obtain a desired fuel and light. Houses were built and equipped for it. We are now confronted with the claim that the gas company cannot furnish sufficient gas for those already in connection, and that therefore those whose houses are on the same street, though not connected, should be refused, although their neighbors are supplied. Now, the franchise was not based upon the idea that an adequate amount of gas would be delivered, nor did the gas company contract for an adequate supply. There is little, if any, complaint as to the supply during the greater part of the year. The strain comes in the cold weather, when at times it seems impossible to obtain an adequate supply. But the applicants say that they are not demanding a greater supply than the company can furnish, but are claiming to share in that which is available.

It appears that the company has 94,000 consumers, and that probably 5,000 more, mainly owners of dwellings, wish to connect. This would be less than 6 per cent. additional, which would mean, in the present conditions, that all would have to be content with 6 per cent.

less gas. This might easily be overcome by the limitation of leakage and waste. I think all householders especially should have the use of gas on streets where the mains are laid. Whether or not they get enough, or all they want, will depend upon whether or not the company can furnish it. If it cannot by reasonable diligence provide it, the consumers will have to be content with what they get, or resort to such remedies as they may have, but which are not within the contemplation of this proceeding. The company cannot be compelled to perform the impossible, but to do its utmost to give service to all who are entitled to it, without discrimination.

[2] It is urged that the commission has no power to interfere by mandamus until it has made an order respecting service which the company fails to obey. The commission made an order to limit the service, which was annulled on review by the court. This relegated the parties to the status before the order was made, which showed applications for gas connections, refusal, and complaints filed with the commission. Section 74 of the Public Service Commissions Law is the authority under which the commission is acting, and provides for this proceeding whenever they are of the opinion that the company is failing or omitting to do anything required by law or by order.

The application is granted.

MICHIGAN CENT. R. CO. v. ACHESON GRAPHITE CO.

(Supreme Court, Special Term, Niagara County. September, 1919.)

PLEADING $\Rightarrow$ 333—FAILURE TO PLEAD TO COUNTERCLAIM IN TIME EXCUSED.

Plaintiff will be relieved from his default, resulting from the discussion between counsel of the legal propositions, and allowed to demur or reply to the counterclaim, as it may conclude; merits and good faith being shown.

Action by the Michigan Central Railroad Company against the Acheson Graphite Company. On motion to relieve plaintiff from default in pleading. Motion granted.

Locke, Babcock, Spratt & Hollister, of Buffalo, for plaintiff.

Cohn, Chormann & Franchot, of Niagara Falls, for defendant.

POOLEY, J. Motion by plaintiff for permission to serve demurrer to defendant's counterclaim, or for such other relief as may be proper. The point raised is whether a demurrer or a reply is the proper pleading. The discussion of the legal propositions between counsel has resulted in the plaintiff being in default, and the motion is to relieve this default.

I think good cause has been shown why this default should be disposed of, and the plaintiff be permitted to plead. It is unnecessary for me at this time to pass upon the proposed pleading, because the plaintiff may conclude to serve a reply, instead of a demurrer. Incidentally, I may call attention to the case of Penn. R. R. v. Bellinger,

$\Rightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

101 Misc. Rep. 105, 166 N. Y. Supp. 652, in Erie Special Term, Sears, J., where it is held that a shipper may counterclaim for damages to the goods growing out of the shipment, in an action for freight charges thereon. Whether or not it would be permissible to counterclaim for damages to property other than those involved in the shipment is not decided.

The cases in the United States court holding the opposite are cited by Sears, J., and disclose unanswerable reasons for the rule in cases which afford opportunity to evade the statute. Our court has probably gone as far as it will in the Bellinger Case, where the counterclaim is for damage to goods growing out of the same transaction, and I am in accord with it, for the reason that the carrier has summoned the shipper into court, demanding payment of freight charges, to which, if defendant is right, the carrier is not entitled, because of its failure to carry and deliver safely and in good order.

In the case now before us, the plaintiff sues for \$192 freight charges, and the defendant sets up a counterclaim of \$3,000, damages resulting from delay in delivery.

The laches of plaintiff is excused, and plaintiff is allowed to serve such pleading as it deems best, within 10 days. Under rule 23, the papers show merits and good faith.

(108 Misc. Rep. 668)

In re LYNCH.

In re KINLOCH.

(Supreme Court, Special Term, Albany County. September, 1919.)

1. ELECTIONS §141—INDEPENDENT NOMINATION MUST COMPLY SUBSTANTIALLY WITH STATUTE.

If the substantial requirements of Election Law, § 123, providing for independent certificates of nomination, have not been satisfied, it is improper to authorize the name of an independent candidate for mayor to be printed on the ballot at the general election in the city.

2. ELECTIONS §154(1)—ON APPLICATION TO ADJUDGE INDEPENDENT NOMINATION CERTIFICATE VOID, COURT MUST DO JUSTICE.

Under Election Law, § 125, on application for order adjudging an independent nomination certificate for mayor to be insufficient and void, as not meeting the requirements of section 123, the Supreme Court must make such decision and order as justice may require.

3. ELECTIONS §144, 155—SIGNATURE OF WITNESS TO INDEPENDENT CERTIFICATE OF NOMINATION NOT IN COMPLIANCE WITH STATUTE.

An independent certificate of nomination for mayor of a city, where the witness did not sign his name on the same line and opposite the name of each voter's signature, but up and down the page perpendicular to the voters' signatures, was not in compliance with Election Law, § 123, though the defect might be cured, if responsibility for the witness' signature could be fixed, by re-signing his name properly after the certificate had been declared insufficient, on application for order to that effect; proper proof being made that the witnesses had actually witnessed bona fide signatures of qualified voters.

4. ELECTIONS §155—FAILURE TO SHOW RESIDENTIAL QUALIFICATION OF WITNESSES TO FREEHOLDERS' SIGNATURES, CURABLE DEFECT.

The defect in an independent certificate of nomination for mayor of a city, that it does not appear that certain witnesses to signatures are

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freeholders in the county or residents thereof for the last preceding five years, may be cured by the affidavits of the witnesses that they do possess the qualification of residence.

5. ELECTIONS §144—PETITION FOR INDEPENDENT NOMINATION IN TWO SECTIONS MUST BE READ AS ONE.

Where a petition for independent nomination for mayor of a city is in two sections, they must be read together as one, and the witnesses covered by the character certificate in the first section must be deemed to be covered as to the second section also.

6. ELECTIONS §155 — OMISSION OF CHARACTER CERTIFICATE TO WITNESSES FROM PETITION CURABLE.

The omission of a petition for independent nomination for mayor of a city to embrace a character certificate as to three witnesses to the signatures of voters is excusable, and can be cured in the form required by law.

7. ELECTIONS §144, 155—CHRISTIAN NAME MAY BE OMITTED FROM SIGNATURES TO CERTIFICATE OF INDEPENDENT NOMINATION.

Election Law, § 123, requires only the signatures of the signers on an independent certificate of nomination, and whatever is capable of identifying the signer is sufficient, though the Christian name is omitted, while any error in form or failure to disclose identity can be cured as an excusable omission, on submission of proper proofs by the signer.

8. ELECTIONS §144—REGISTRATION AND VOTING IN MILITARY CAMP SUFFICIENTLY QUALIFY VOTER AS WITNESS TO INDEPENDENT NOMINATION.

Registration and voting in a military camp by one in the military service during the particular year was a proper registration, within the meaning of Election Law, § 123, sufficient to qualify such voter as a witness to an independent certificate of nomination.

In the matter of the application of John Lynch for an order decreeing and adjudging the certificate of the independent nomination for mayor of the city of Troy, N. Y., of Osman F. Kinloch, as the candidate of the Independent Citizens' League, at the general election to be held November 4, 1919, to be insufficient, invalid, and void. Decision against the petition for independent nomination, unless additional proof submitted.

Thomas S. Fagan, of Troy, for petitioner.

George W. Donnan, of Troy (Andrew J. Nellis, of Albany, of counsel), for respondents.

Herbert F. Roy, of Troy, for board of elections.

HINMAN, J. [1] This is an application for an order under sections 125 and 134 of the Election Law (Consol. Laws, c. 17), decreeing the certificate of independent nomination for mayor of the city of Troy, N. Y., of Osman F. Kinloch as the candidate of the Independent Citizens' League at the next general election, to be insufficient to meet the requirements of section 123 of the Election Law, which provides for such independent certificates of nomination. If the substantial requirements of this section are not satisfied, it is improper to authorize the name of Osman F. Kinloch to be printed upon the ballot at the general election in the city of Troy, N. Y.

[2] Upon this application the court must make such decision and order as justice may require. Election Law, § 125. The statute

requires that such an independent certificate of nomination shall be signed by at least 5 per centum of the total number of votes cast for Governor at the last gubernatorial election in the city of Troy. It is conceded that the number of signatures required in this case was 1,278. It is also conceded that there are 1,394 names of alleged signers upon this petition, being 116 more than the required number. There are, however, certain objections made to large numbers of these signatures, which, if valid objections, would not permit the court to count such signatures in reaching the determination that the required number had signed.

The main objection deals with the authentication of the signatures by witnesses thereof. In making independent nominations and authenticating certificates thereof, section 123 of the Election Law prescribes certain procedure and forms. Two methods of making the certificate are prescribed: One method is for the voter to sign the certificate of independent nomination and add to his signature his place of residence and take the required oath himself before an officer authorized to administer oaths. The other method is that there shall be a witness to the signature of the voter, and that such witness shall see the voter sign, shall hear him declare it to be his intention to support the candidate at the polls, and shall thereupon in the presence of the voter sign himself opposite the signature of the voter and in his presence.

[3] The first objection made to the certificate of Dr. Kinloch is that such certificate does not appear to be witnessed, as required by law, in that the witness did not sign his name on the same line and opposite the name of each voter's signature, for whom he acted as a witness, but that the witness simply signed his name once for several names of the voters. In other words, the voters subscribed their names, writing them across the page of the certificate, while the witness signed his name up and down the page in a direction perpendicular to the signatures of the voters.

For reasons which I will detail later I have reached the conclusion that the method adopted did not conform to the statutory requirements. It is impossible to determine, from the certificate itself, whether the witness did actually do the things which he was required to do with reference to the requisite number of signers. He was required, among other things, to sign his name opposite the voter's signature. This requirement he did not fulfill, although he states and makes oath that he did this thing. The fact that the witness stated and made oath that he did a thing, which plainly he did not do, requires explanation. Matters of substance cannot be corrected by the court without a particular authorization by the Legislature. If, however, the substantial requirements of the statute were complied with, and there was simply a mistake in recording the name of the witness in the proper place and on the proper line, the court would have the power under the statute, which permits it to make an order in the premises such as justice requires, to permit this irregularity to be rectified. Mistakes, omissions, and irregularities which do not involve any substantial requirement of the statute, but relate to the

record merely of the facts required to exist, may be corrected by the court as justice requires such procedure.

What are the substantial things required by the statute to be done in the making of an independent certificate of nomination? The statute requires: (1) That a qualified voter of the city of Troy should sign and state his residence and declare his intention to support the candidate at the polls; (2) that a qualified witness should witness the signature of a person known by him to be the person signing and whom he saw sign, and who declared to him his intention to support the candidate at the polls, such witness then signing his own name opposite the name of the signer and in his presence.

The primary function of the independent certificate of nomination is to indicate that a certain percentage of the qualified voters of the city of Troy intends to support the candidate.

So far as a witness has failed to clearly indicate upon the face of the petition the signatures witnessed by him he has to that extent failed to make it clear that the persons signing are qualified voters of the city of Troy who intend to support the candidate at the polls.

As a safeguard against fraud, and with the purpose to hold some one responsible under oath for the authenticity of the signatures of qualified voters and to assure the good faith of the support of the candidate, the law requires that either the signer shall swear to the facts, or that some one knowing the signer shall make a similar oath as a witness; and if the witness' method is adopted, the law requires that he shall have certain qualifications, namely, that he shall be a man of substance in the community, or at least that he shall have dwelt long enough there to have demonstrated his good character and honesty, and who shall have indicated that he is not a mere floater or colonizer, by having registered from the same address, or the same election district, for the last two preceding general elections.

Thus his identity, his character, and his political record might be easily detected and traced, and in the event of any falsity in his oath, he might be the more readily punished for his crime in the manner permitted by subdivision 4 of section 123 of the Election Law. It was intended that irresponsible witnesses from other communities, or even from other states, should not be permitted to be imported for the purpose of defrauding the public and other bona fide candidates in the preparation of such a petition and then be afforded easy escape from criminal prosecution and imprisonment for at least 3 months, as fixed by that statute.

Thus the qualifications of the witness are substantial requirements of the statute and cannot be ignored by the court. Nor can the court conclude that justice requires other than that the witness shall clearly indicate on the face of the petition just what signatures he is witnessing. That is the reason why the statute requires his signature "opposite" the signature as to which he signs as a witness. Otherwise, he might easily escape criminal prosecution for witnessing a false and fraudulent signature by afterwards maintaining that he did not witness the signature, that his name was not opposite it, and was not intended to be included amongst the names of persons as to

whom he made oath that he knew them and saw them sign; and he might plausibly and incontestibly claim that other signatures were added after the sheet had left his hands.

In order that the responsibility may be fixed either upon the signer or the witness for the authenticity of the signature, which is clearly the policy of the statute, I can only hold that the certificate in question is defective, in so far as the witnesses have failed to sign their names opposite each signature witnessed and on the same line therewith. There are 1,188 of the signatures which are defective in this respect, thus leaving only 206 unobjectionable signatures, when 1,278 are required.

It seems to me, however, that this is a defect that can be cured, if in fact, the substantial requirements of the statute are met, namely, that a sufficient number of qualified voters have signed, and have either sworn to the necessary facts themselves, or have signed in the presence of qualified witnesses who knew them and saw them sign, and to whom they declared their intention of supporting the candidate in question at the polls, and that the witnesses signed their names in the presence of each such voter. The affixing of the signature of the witness in a particular place on the certificate was intended only as a guaranty of the good faith of the signature. If responsibility for the signature can be fixed, and the thwarting of criminal prosecution may be avoided, by the performance of that clerical act at this time, the full requirements of the statute would be met, and justice would be done.

If, in fact, a signer of the certificate is not a qualified voter entitled to vote for the candidate, or if the witness chosen was not a qualified witness, or if the signer failed to sign in the presence of the witness, or failed to declare to the witness his intention to support the candidate at the polls, or if the witness failed to sign his name in the presence of the signer of the certificate, the court cannot modify or excuse any such fact. The court can only order the correction of the recording of these facts.

Thus, if there were doubt as to the name and address of a signer, because not written legibly enough to be read and identified, the court might permit the real signer to verify his signature. So, if a mistake had been made by a witness in setting forth his qualifications to act as such, proof could be entertained by the court to correct the error; also, if, in fact, the signer did sign in the presence of the witness, or did declare his intention to support the candidate at the polls, or if the witness did sign his name in the presence of the signer, but the witness failed to state one or more of such facts in his oath, justice would require that the omission of the recording of that fact be corrected by permitting the witness to make oath to that which actually transpired.

So, too, if the witness were led by the character of blank furnished to him and in turn furnished to the candidate by a representative of the board of elections, which was so ruled that the narrow column left for the witness' signature of his name might readily indicate to him that the requirements of the law would be satisfied if he wrote his

name lengthwise in the column opposite the names witnessed by him, rather than crosswise on the line with each signature witnessed, it seems to me that fraud could not be presumed in the act, but rather that it would be an excusable omission, which could be cured. To permit him now to place his signature in the proper place to conform with the legal requirement would be simple justice, in that it would be affording an opportunity to him to simply record the facts in which the law is interested by pointing out definitely and certainly the signatures to which his oath as witness related. This gives concrete interpretation to the indefinite expression embraced in the statutory oath required by witnesses to be taken as set forth in the phrase "as to whose signatures deponent has signed as a witness above." Election Law, § 123, subd. 2.

The difficulty with which I am confronted, however, is that there is no proof before me that the witnesses did comply with the matters of substance required by the statute as to all the signatures claimed by the respondents to have been witnessed by them. The method of signature adopted by the witnesses makes it just as impossible for me to assume what names were intended to be authenticated by their oaths for the purposes of this proceeding as it would be in a criminal proceeding to punish for a false oath, to which I have referred as the chief object to be served in having the signatures of the witnesses recorded in the proper place and on the proper lines. It is claimed by the respondents that each signer is a qualified voter of the city of Troy, but there is no proof before me that the persons whose names appear actually signed their names. That is the very question intended by the statute to be proved on the face of the petition. The face of the petition does not prove it, because of the method adopted by the witnesses in signing their names. So far as appears from the face of the petition, names might have been added which were not witnessed at all by these witnesses. Names might have been fraudulently placed there by other persons, and, if so, that fact could not be successfully disproved by anything appearing upon the face of the petition. This is the very thing intended to be prevented by the requirements of the statute as to having the signatures witnessed by a responsible person, who would swear that he knew the signers, and who could be punished if he swore falsely.

If it were a fact, and proof thereof was submitted to me, that these witnesses did actually witness the bona fide signatures of qualified voters, whom they personally knew, in an aggregate number sufficient to meet the requirement of the statute, and there was simply an excusable mistake in the recording of the names of the witnesses in the proper place upon the certificate, justice would require that I permit the irregularity to be corrected. As there is no proof before me, however, in relation to the actual persons, and the number of them, to be affected thereby, I am without power to order the correction, and the consequent filing of the certificate as a valid petition upon compliance therewith. Moreover, it is not the province of the court to do so, and justice does not require the authorization of a "fishing expedition" to determine whether the facts would authorize

such a correction. Irresponsibility cannot be commended by the court to such an extent. The court cannot act, except upon proper proofs as to the compliance with the substantial requirements of the statute. Such proof would consist of the submission of the affidavits of each of the witnesses, to whom objection has been made, stating the names of the signers actually witnessed by them, that the witness knew each of such signers, that the witness saw each of them sign, and heard each of them declare his intention to support the candidate at the time of signing the certificate, and that he signed his name in the presence of each such signer. Upon this proof the penal provisions of the statute would be satisfied, because upon the petition and such an affidavit responsibility could be fixed for criminal prosecution, in the event of any false statement of any of the material facts above mentioned.

[4] Other objections to the certificates have been filed. The first of these is that certain witnesses do not possess the qualifications required by law, in that it does not appear in the certificate that they are freeholders in the county, or were for the last preceding five years residents of the county. This objection has been cured by the affidavits of the witnesses that they do possess the qualification of residence. This is a mere excusable omission, which I have held is curable.

[5, 6] Another objection is that the petition failed to contain a certificate of the good character of three witnesses, and that the petition was filed in two sections, and no certificate of good character was attached to the second section. The two sections, however, must be read together as one petition, and the witnesses covered by the character certificate in the first section must be deemed to be covered as to the second section also. The character certificate as to the three witnesses not covered at all in the petition has been supplied before me in the form required by the law, and I hold that to be an excusable omission which can be cured.

[7] Another objection raised is that a number of the alleged signers of the certificate are women who have not signed their Christian names. Reference is made by the complainant to the requirement of the law as to the signature of the registry book, which specifically requires the Christian names to be given. Section 155, Election Law, subdivision 1. This requirement was not, however, embodied in the provisions of the law as to signature upon an independent certificate of nomination. There the law requires only the signatures of the signers, and whatever is capable of identifying the signer is sufficient. Moreover, any error in form, or failure to disclose identity, could be cured as an excusable omission upon submission of the proper proofs by the signer.

Objections are also raised as to the qualification of three witnesses, upon the ground that they were not registered from the same address or in the same election district for the last preceding two general elections. It is not clear from the proofs submitted as to whether Alson D. Sickler meets one of these requirements. While the certificate seems to indicate that he registered from the same address in

both years, his own affidavit in this proceeding casts doubt upon it, so that I cannot determine whether or not he is a qualified witness, without the submission of further proof.

[8] Walter J. Rogers is charged with not having registered for the year 1918, but it appears by his affidavit that he was in the military service at the time, and was registered and voted that year in a military camp. I hold that to be a proper registration, within the meaning of section 123 of the Election Law, sufficient to qualify him as a witness to an independent certificate of nomination.

Harry O. Dusenbury by his own admission is not a qualified witness, since he states in his affidavit herein that he did not register anywhere for the year 1917. His disqualification invalidates 9 signatures.

Therefore my conclusion must be that insufficient facts have been presented to me in support of this petition to permit me to authorize the certificate to be filed as a valid certificate of independent nomination, at least without the submission to me of the additional proofs referred to herein. If the parties represented here cannot agree upon a time necessary to furnish such proofs, if the required facts are susceptible of proofs, application may be made to me by the respondents at any time for the fixing of a date for such submission upon one day's notice to the other parties.

(108 Misc. Rep. 42)

GOULD et al. v. GOULD et al.

(Supreme Court, Special Term, New York County. July, 1919.)

1. TRUSTS $\S$ 166(2)—REFUSAL TO CARRY OUT TESTAMENTARY DIRECTIONS
GROUND FOR REMOVAL OF TESTAMENTARY TRUSTEE.

Where whole scheme of will showed testator's express insistence that estate should be divided into six separate trusts, and codicil repeated direction that such shares, accounts, and transactions pertaining thereto should be kept entirely separate and never mingled, absolute and continued refusal of one of the testamentary trustees, who practically controlled entire estate, to carry out such direction, is legal ground for his removal.

2. TRUSTS $\S$ 166(1)—REMOVAL OF TESTAMENTARY TRUSTEE ORDERED FOR
CHARGING UNAUTHORIZED COMMISSIONS AND TAKING SECRET PROFITS.

Where will fixed compensation of testamentary trustee, and forbade further compensation, his receipt of large amount as a commission and as a secret profit on sale of stock of trust estate, and his retention thereof for eight years, and until a motion to remove him as trustee, and his refusal then to pay interest thereon, was a dereliction of duty, and his then repayment of amount to estate did not so palliate original wrong as to justify the court in either approving or overlooking it.

3. TRUSTS $\S$ 231(1)—TESTAMENTARY TRUSTEE MUST NOT ALLOW INDIVIDUAL
INTEREST TO CONFLICT WITH DUTY.

A testamentary trustee must act, not only for the benefit of the trust estate, but also in such a way as not to gain any advantage, directly or indirectly, except such as the law specifically gives him, and owes an undivided duty to the beneficiary, and must never place himself in a position wherein his personal interest will conflict with the interest of the beneficiary.

$\hookrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. TRUSTS $\Leftrightarrow$ 166(2), 167—REMOVAL OF TESTAMENTARY TRUSTEE FOR MINGLING TRUST FUNDS WITH HIS OWN AND USING THEM AS SUCH.

In action by executors and testamentary trustees for an accounting and court's approval of their acts, in which all necessary parties are served with summons and complaint, and had notice of a motion to remove a trustee and appeared thereon, court had jurisdiction to entertain motion, and should grant it, where it satisfactorily appears that such trustee had continuously mingled trust funds with his own, and used them as his own property, contrary to direction of will, and was entirely ignorant of, or defiant of, principles governing administration of trust funds.

5. TRUSTS $\Leftrightarrow$ 167—IN ACTION FOR ACCOUNTING, NOTICE OF MOTION TO REMOVE TRUSTEE NEED NOT BE GIVEN DAUGHTERS OF TRUSTEE DULY SERVED.

In action by executors and trustees under a will against all parties interested in estate for an accounting and court's approval of their acts, with motion by certain interested parties for removal of a trustee, where two defendants, remaindermen and daughters of such trustee, though legally served with process, did not appear, one being out of the jurisdiction and the other appearing only specially, it was not necessary to serve them with a notice of a motion in the action to remove their father as trustee.

6. TRUSTS $\Leftrightarrow$ 167—JURISDICTION OF COURT TO REMOVE TESTAMENTARY TRUSTEES.

Executors and testamentary trustees, whose executorial duties had been completely performed before their action in the Supreme Court for an accounting and court's approval of their acts, making all interested parties defendants, could not complain that papers therein, moving for removal of one of such trustees, showed that he had not ceased to act as executor, and that Supreme Court had no jurisdiction to revoke letters testamentary, as there was no necessity for a decree separating his duties as executor and as trustee, and as Supreme Court has jurisdiction concurrent with that of the Surrogate's Court.

7. TRUSTS $\Leftrightarrow$ 167—MOTION FOR REMOVAL OF TRUSTEE MAY BE GRANTED ON ACCOUNTING.

Real Property Law, § 112, and Code Civ. Proc. § 768, relating to removal of trustees, etc., are permissive, and not exclusive, and nothing therein prohibits the removal of a testamentary trustee on motion in his action for an accounting, etc., as power of court to act comes from Constitution, specifically granting "general jurisdiction in law and equity."

8. COURTS $\Leftrightarrow$ 480(1)—HAVING FULL JURISDICTION OF CAUSE AND PARTIES, WILL ENJOIN ANOTHER SUIT FOR SAME PURPOSE.

In action by executors and trustees under a will for an accounting and for court's approval of their acts, making all interested parties defendants, the court, having acquired plenary jurisdiction of parties and subject-matter, will restrain prosecution of a separate proceeding for removal of a trustee, as a motion in such action for his removal, being incidental and ancillary, would come clearly within sound rule that, if full relief can be had in one suit, no other shall be allowed.

Action by George J. Gould and others, as executors and trustees under the will and codicils thereto of Jay Gould, deceased, against George J. Gould, individually and as receiver, etc., and others, for an accounting and an approval by the court of the acts of the executors and trustees, and a construction of certain parts of the will, with motion therein by Frank Jay Gould and others for the removal of George J. Gould as trustee, opposed by George J. Gould, trustee, and others. Motion granted.

Leonard & Walker, of New York City (Samuel Seabury and Walter B. Walker, both of New York City, of counsel), for defendant Frank

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Jay Gould; Coudert Bros., of New York City (Lorenzo Semple and Howard Thayer Kingsbury, both of New York City, of counsel), for defendant Duchesse de Talleyrand (formerly Anna Gould); Thomas S. Fuller, of New York City, guardian ad litem for infant defendant Helen Margaret Gould; Walter F. Carter, of New York City, guardian ad litem for infant defendant Dorothy Gould; and William Nelson Cromwell, of New York City, guardian ad litem for Marie, etc., de Castellane, Georges, etc., de Castellane, Charles, etc., de Sagan, Jason, etc., de Castellane, Helene, etc., de Talleyrand—for the motion.

Chadbourne, Babbitt & Wallace, of New York City (William Wallace, Jr., of New York City, of counsel), for George J. Gould; Alton B. Parker, of New York City, for Edwin Gould, individually and as trustee; Frank Lawrence, of New York City, appearing specially for Kingdon Gould and Jay Gould; and Stanchfield & Levy, of New York City (John B. Stanchfield and Siegfried F. Hartman, both of New York City, of counsel), appearing specially for George J. Gould, Jr., and Marjorie Gould Drexel—opposed.

Frank M. Gould, infant remainderman, opposed (although his guardian ad litem, William A. W. Stewart, of New York City, is neutral).

Helen G. Shepard, by her attorneys, De Forest Bros., of New York City, is neutral.

WHITAKER, J. This is a motion to remove George J. Gould as a trustee under the will of his father, Jay Gould.

Jay Gould died leaving a will, which was probated in January, 1893. The provisions of this will, so far as pertinent to the questions involved, are as follows: First, there were specific legacies and bequests made which, it is conceded, have been paid and satisfied. The will then provides as follows:

"Fifth. I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of every name and nature whatsoever and wheresoever situate of which I shall die seized or possessed, or to which I may be entitled at the time of my decease, unto my executrix and executors hereinafter named as trustees, the survivors and survivor of them, in trust for the uses and purposes following, that is to say:

"1. To hold or sell, convey or dispose of the same at public auction or private sale, at such time or times and on such terms as they or the survivors or survivor of them in their or his or her discretion shall deem advisable.

"2. To divide said real and personal estate or the proceeds thereof into seven equal parts or shares and to designate, hold and invest one such part or share for my said wife, and to collect and receive and pay or apply the rents, interest and income of the part or share so set apart for my said wife to her for her use during her natural life, and upon her death to pay, assign, transfer and convey the part or share so held in trust for her to such persons and in such proportions as she shall appoint and direct in and by her last will and testament; and in case of her failure to make such testamentary appointment, then to my children then surviving and to the issue of any deceased child share and share alike, per stirpes and not per capita.

"3. To designate, hold and invest one other such share for each of my children, George J. Gould, Edwin Gould, Howard Gould, Frank Gould, Helen M. Gould and Anna Gould, and to collect and receive and pay or apply the rents, interest and income from the part or share so set apart for each child to his or her use during his or her life; and upon the death of any of said children to

pay, assign, transfer or convey the part or share so held in trust for him or her to his or her issue in such proportions and at such times as he or she shall appoint in and by his or her last will and testament; and in case of failure to make such testamentary appointment, then to such issue absolutely in the proportions provided in and by the statutes of this state in cases of intestacy.

"4. In the event that any of my children shall die without issue, then to pay, assign, transfer and convey the part or share of the one so dying to my surviving children and to the issue of any deceased child share and share alike per stirpes and not per capita.

"Sixth. I direct that all securities in which said trust funds shall from time to time be invested be taken and held by said trustees in their name as trustees for the parties respectively for whose benefit the funds are severally set apart and held so that each of the trust funds herein provided for shall be kept separate and distinct from the others, and the accounts thereof shall be separately kept; and I authorize and direct my said executrix and executors and trustees to employ and pay out of the funds of my estate all the clerks and bookkeepers that may be necessary for this purpose. * * *

"Tenth. I hereby direct that all stocks, bonds and other securities belonging to me at my decease shall form part of the trusts created by this my will at such values as shall be placed upon them by my said executrix and executors and trustees, but I hereby authorize them, the survivors and survivor of them, to sell and dispose of the same or any of them whenever in their discretion they think proper. And I expressly direct that my executrix and executors and trustees, the survivors or survivor of them, are not to be held responsible or liable for or charged with any loss or depreciation that may arise by holding such securities or any securities forming part of the trust created hereby; and I hereby empower them, the survivors or survivor of them, to make such investments and reinvestments of the trust moneys in securities other than those in which trustees are authorized to invest by law, in the absence of testamentary direction, as they may think proper; and I further authorize and empower them, the survivors or survivor of them, to call in, change, invest and reinvest the said securities and investments and proceeds thereof whenever and as often as they may deem necessary.

"In the event of any differences of opinion among my executrix and executors and trustees as to the holding and retaining of securities or investments, or as to the calling in or making investments and reinvestments and management of the estate and of the trusts herein created, I direct that so long as they shall be five in number the decision of four of them shall be conclusive, and when and so long as their number shall be reduced to four that then the decision of three of them shall in like manner be conclusive.

"Eleventh. I nominate, constitute and appoint my wife, Helen D. Gould; my brother-in-law Daniel S. Miller, my son George J. Gould, my friend Thomas T. Eckert, and my second son Edwin Gould when he shall have reached the age of twenty-one years executrix and executors of and trustees under this my last will and testament: Provided, however, and the appointment of trustees in this my will is subject to this exception, that neither of the persons herein named as trustees shall be trustee of the fund, share or portion hereinbefore directed to be set apart and to be held for him or her or for his or her benefit, but as to such fund in the case of each of the beneficiaries who is also made a trustee herein the trust shall vest in and be executed by the others of the trustees herein named and the survivors and survivor of them. * * *

"Thirteenth. I desire and direct that in lieu of the commissions provided by statute to be paid to executors and trustees there shall be paid to my said executrix and executors and trustees for their services the sum of ten thousand dollars per annum each so long as they shall respectively act in the capacities aforesaid: Provided, however, and said appointments of said executrix, executors and trustees are subject to the further condition, that no commission or compensation shall be charged by or allowed to any of them for their services as executrix, executors and trustees other than as above provided, and if either shall decline to serve on said condition his or her appointment as such executrix or executor and trustee shall cease and terminate."

The first codicil provided for the division of the estate into six, instead of seven, separate trusts, the wife having died, and specifically confirms the direction that the residuary estate be divided into six separate trusts, and directs that—

"Said shares and the accounts and transactions pertaining thereto shall at all times be kept entirely separate and distinct and shall never be mixed or mingled."

The present trustees are George J. Gould, Helen G. Shepard, Edwin Gould, and Howard Gould.

The interested parties who have appeared in favor of the motion are as follows: Frank Jay Gould, life tenant; Duchesse de Talleyrand (formerly Anna Gould), life tenant; Helen Margaret Gould, infant remainderman; Dorothy Gould, infant remainderman; Marie, etc., de Castellane, infant remainderman; Georges, etc., de Castellane, infant remainderman; Jason, etc., de Castellane, infant remainderman; Charles, etc., de Sagan, infant remainderman; Helene, etc., de Talleyrand, infant remainderman.

Those who opposed the motion are as follows: George J. Gould, trustee and life tenant; Edwin Gould, trustee and life tenant; Kingdon Gould, remainderman; Jay Gould, remainderman; Marjorie G. Drexel, remainderman; George J. Gould, Jr., remainderman; Frank M. Gould, infant remainderman (although his guardian ad litem is neutral).

The only other appearance was Helen G. Shepard, who is neutral.

The executorial duties of the trustees have all been performed and completed.

The present action, in which George J. Gould, Edwin Gould, Helen G. Shepard (formerly Helen M. Gould) and Howard Gould, as executors and trustees under the last will and testament and codicils thereto of Jay Gould, deceased, are plaintiffs, and all the parties interested in the estate are defendants (in which action this motion is made), was begun in 1916, and asks for an accounting and the approval of the court of all the acts of the executors and trustees and a construction of certain portions of the will. The executors and trustees have administered the estate, which amounted to over \$80,000,000, for 23 years, and during that entire period have neither accounted nor attempted to account. It is manifest from all the facts before the court that the respondent George J. Gould was in practical control of the management of the entire estate. This, of course, was a natural consequence of the provisions of the testator's (Jay Gould's) will, which indicated that the testator had great confidence in the judgment, ability, integrity, and experience of the respondent, George J. Gould, and as matter of fact the will made him the sole arbiter under certain conditions.

The charges made against the respondent George J. Gould by the moving parties are substantially as follows:

(1) That George J. Gould has exercised a dominating influence in the management and administration of the property and investments of the estate of Jay Gould, of which he is executor and trustee, and has dictated its policy in all, or nearly all, important matters.

(2) That in the management of the estate he has habitually subordinated the interests of the estate, and his fiduciary obligations in respect thereto, to his individual and personal interests.

(3) That he has on numerous occasions taken advantage of his powers and opportunities offered to him by his official capacity as executor and trustee of the estate to make individual and personal profits for himself, for which he has not accounted to the estate, and to cause the estate to assume the burden of losses arising out of transactions which he had initiated for his personal account.

(4) That he has conducted speculations in securities in which the estate was interested in such a manner that when there was a profit he could and frequently did take it for himself, and when there was a loss he could and frequently did cause such loss to be assumed by the estate.

(5) That he has failed to exercise common prudence and diligence in making and keeping investments for the estate; that he has invested large portions of the estate in securities of a highly unsafe, speculative, and nonproductive character, and has kept such investments when he might and should have disposed of them, often for the purpose of serving some personal interest of his own, and frequently resulting in great loss to the estate, both of principal and income.

(6) That he has willfully and intentionally disregarded the interests of the life beneficiaries by investing large amounts of the funds of the estate in nonincome-producing securities and by keeping such investments for long periods of time.

(7) That through his dominating influence in the management of the estate he is principally responsible for the failure of the executors and trustees to divide the estate into separate shares as directed by the will.

(8) That he has habitually abused the discretion and powers intrusted to him by the testator for his own individual and personal benefit.

(9) That he has failed to keep proper, sufficient, intelligible, and correct accounts of the trust estate.

(10) That he has mingled the estate funds and transactions with his own, and has destroyed a large number of his own records and accounts, whereby the facts in regard thereto might appear.

(11) That he has shown by his conduct, his accounts, and his testimony that he has no adequate realization of the duties and obligations of a fiduciary.

It is also claimed that he made false quarterly statements to the parties interested in the estate, for the purpose of deceiving them, and that he is unfit to administer the estate intrusted to his care by reason of his dishonest actions, ignorance of his duties as trustee, and abuse of discretion, through which the estate has lost some millions of dollars.

There are a large number of specific instances of wrongdoing set forth in the moving papers, tending to prove the above allegations, and which set forth the most intricate, complicated, and involved stock and bond transactions, amounting to vast sums of money, some of which, it is alleged in the moving papers, resulted in large secret profits to George J. Gould personally, which were never turned into the

estate, and in which the property of the estate was used, and some of which resulted in losses, which losses were charged to the estate.

It is practically impossible to unravel and see completely through this apparent legerdemain of finance by the aid only of affidavits. Suffice it to say that, while most of the transactions themselves are admitted, the wrongfulness of them is either denied or attempted to be explained in such a way as to excuse George J. Gould of any violation of his duties as trustee, and although the evidence preponderates against George J. Gould's denials and attempted explanations, concerning some of these charges, inasmuch as these matters are controverted, the court will not pass upon them, nor base its determination on them in this motion.

[4] There are, however, three specific charges of dereliction of duty and abuse of trust that are admitted and indisputably proven. The first of these charges is the failure of the trustees to divide the estate into six separate trusts. The will contained specific and mandatory provisions that this should be done. The whole scheme of the will shows that the testator was especially insistent upon this direction. This is accentuated by the fact that subsequent to making the will his first codicil again reiterates the direction in most positive terms that—

"The said shares, accounts and transactions pertaining thereto shall at all times be kept entirely separate and distinct and shall never be mixed or mingled."

The trustees have entirely ignored this positive provision of the will. By thus doing, it is claimed, the respondent George J. Gould, was able to enter into the financial transactions above referred to. All the papers submitted show that he has had the entire estate practically under his control. The failure to create the six separate trusts was in direct defiance of the most positive directions of the testator; it tended to violate the statute against perpetuities and defeated the entire plan of the testator in the distribution of his estate. It deprived and continues to deprive each beneficiary of the protection and security which would have followed the separation of his or her fund. The creation of the separate trusts would have avoided the loss of one of the trusts being borne by the others. It would have avoided the anomalous position of a trustee being also the beneficiary. It would have prevented the use of the entire estate in individual business enterprises, and would have enabled each beneficiary to know approximately the extent of his or her interest.

It would seem unnecessary to cite judicial authorities to sustain the determination that the absolute and continued refusal of a testamentary trustee to obey the proper expressed directions of the testator is legal ground for his removal. The trustee is appointed expressly for that purpose, and when he persistently and intentionally refuses to perform the very purpose for which he is appointed, and acts directly contrary to that purpose, he should not be allowed to remain as trustee.

There is, however, judicial authority holding that the refusal or neglect of a testamentary trustee to follow the legal instructions of the testator is ground for removal. *Matter of Hoystradt*, 20 Misc. Rep.

265, 45 N. Y. Supp. 841; *Widmayer v. Widmayer*, 76 Hun, 251, 27 N. Y. Supp. 773; *Matter of Havemeyer*, 3 App. Div. 519, 38 N. Y. Supp. 292. There is no valid excuse nor justification shown in the papers for the failure and continuous refusal of the trustees to obey the express instructions of the testator to divide the estate into six separate trusts.

[2] There is another charge against the trustee George J. Gould, which does not relate to failure or neglect to carry out the directions of the will, but relates to an alleged wrongful affirmative act on the part of George J. Gould. The facts which constitute the alleged wrongful act are conceded, but the wrongfulness of the act is denied, and the conduct of George J. Gould in relation thereto is sought to be justified. The facts concerning this alleged wrongful act are substantially as follows:

In the early part of June, 1909, the estate owned 210,028 shares of the capital stock of the Western Union Telegraph Company. Thomas L. Chadbourne, who was in the employ of George J. Gould, and who was his attorney, and who acted as his agent in the transaction, negotiated, at the sole request of George J. Gould, a sale of this stock at \$75 a share, and the purchaser agreed, in consideration of getting 29,000 shares, to pay a bonus of \$10 a share, making the price to the purchaser \$85 a share. The shares of the Goulds which were sold were held as follows: Estate of Jay Gould, 210,028; George J. Gould, individually, 7,823; Edwin Gould, individually, 10,300; Frank J. Gould, 901. This made up the 229,052 shares which were sold by Thomas L. Chadbourne at the request of George J. Gould.

This stock was delivered and paid for by the purchaser, and George J. Gould received the money for the estate stock. Thomas L. Chadbourne, the agent of George J. Gould, received a commission from the purchaser of \$3.50 on each share bought by him. The total amount of this commission on the shares held and which were owned by the estate was \$735,098. This commission was paid by Thomas L. Chadbourne to George J. Gould, who thereafter returned to Thomas L. Chadbourne the sum of \$125,000. George J. Gould received from this transaction \$620,401.71 as a commission and secret profit on the sale of the stock belonging to the estate of which he is trustee. This profit was received in April, 1909.

George J. Gould kept the sum of \$620,401.71 as his own for a period of 8 years and made no mention of it. Not until after this action had been begun, and the facts alleged in the answer of the defendant Frank J. Gould disclosed the transaction, did George J. Gould pay over this commission to the estate, and even then he paid no interest, and even now positively refuses to pay any interest, notwithstanding he has had the money for a period of 8 years. Helen G. Shepard was never consulted concerning the sale of the Western Union Telegraph Company stock and had no knowledge of the transaction.

The repayment of this sum to the estate by George J. Gould, after having retained it for 8 years, furnishes no justification or excuse. *Matter of Havemeyer*, supra. This repayment was only made when the facts were disclosed by Frank J. Gould and were set up in his an-

swer as a ground for relief. The repayment was made after discovery of the wrong by those whose interests were adversely affected and 8 years after George J. Gould received the money. This belated restitution under pressure or apprehension of adverse proceedings does not so palliate the original wrong as to justify a court of equity in approving or overlooking it. It was not regret for or recognition of the wrong itself that caused restitution; it was the discovery of the wrong by others that seemed to awaken the trustee's conscience.

[3] The trustee George J. Gould, aided by his counsel, seeks to justify this transaction as a legal, ethical, and proper act. A number of cases are cited by counsel, none of which, however, in the opinion of this court, justify the respondent, even though he has returned the money. The rule laid down by the Appellate Division of the Supreme Court in *Pyle v. Pyle*, 137 App. Div. 568, 122 N. Y. Supp. 256, affirmed 199 N. Y. 538, 92 N. E. 1099, is directly applicable, and is as follows:

"It is a fundamental rule relating to the acts of a testamentary trustee that he must not only act for the benefit of the trust estate, but also in such a way as not to gain any advantage, directly or indirectly, except such as the law specifically gives him, for himself. He owes an undivided duty to his beneficiary, and he must not, under any circumstance, place himself in a position whereby his personal interest will come in conflict with the interest of his *cestui que trust*."

A trustee must act in good faith and will not be permitted to use his trusteeship for his individual advantage, benefit, or profit. *Getty v. Devlin*, 70 N. Y. 504; *Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667.

The compensation of George J. Gould as trustee is fixed by the will at \$10,000 a year, and probably the special legacy of \$5,000,000 was taken into consideration in determining the amount of such compensation. The \$10,000 was all the money George J. Gould was entitled to receive as trustee each year, and that sum was to be his compensation for the management of the estate, and the will forbids any further compensation.

[4] It is also further conceded that George J. Gould has continuously mingled the trust funds with his own funds and used them as if they were his individual property. As matter of fact, he has stated under oath that he considered that he sustained toward the estate funds and property a debtor and creditor relation, and that he so acted.

The foregoing admitted negative and affirmative acts, in the opinion of this court, not only justify, but require, a court of equity to summarily remove the trustee guilty of and primarily to blame for them. Especially is this true when the trustee not only justifies, but also maintains, that such negative and affirmative acts are in no way a violation of his duties as trustee, and in his prayer for relief in his action for an accounting he specifically requests the court to confirm and approve these improper acts.

The only inference to be drawn from this position taken by the trustee is that he is either entirely ignorant or boldly defiant of the ordinary principles governing the administration of trust estates; and the interests of *cestui que trusts*, and especially the infant remaindermen

who are particularly under the protection of the court, demand that George J. Gould should be removed as testamentary trustee.

The question has been raised, however, by way of preliminary objection, and vigorously maintained by oral argument and voluminous briefs, that this court has no jurisdiction in this action to remove the respondent by means of this motion. The preliminary objections to the right of the court to entertain this motion are as follows:

"(1) * * *

"(2) That this proceeding was improperly commenced by an order to show cause directed only to George J. Gould."

The answer to this contention is that George J. Gould is the only trustee whose removal is sought.

"(3) That the parties necessary to a proceeding for the removal of an executor and trustee are not before the court, because—

"(a) No proper service of the papers was made on any of the necessary parties other than the respondent executor and trustee; and

"(b) No attempt was made at service on certain of the necessary parties."

In answer to this objection, and its subdivisions, it is only necessary, in the court's opinion, to state that the motion is made in a pending action, in which action all the necessary parties were served with the summons and complaint, and that all the parties who appeared in this action have had notice of this motion and have actually appeared and are before the court.

[5] Those who did not appear in this action, but defaulted, are Lady Decies (formerly Vivien Gould), a daughter of George J. Gould and a remainderman, who is not within the jurisdiction of the court, and who has not been served with notice of this motion, and Marjorie G. Drexel, also a daughter of George J. Gould and a remainderman. Her attorneys, however, have appeared "specially."

As before stated, all the parties that were defendants in the action, with the exception of Lady Decies and Marjorie G. Drexel, have actually appeared on this motion. Inasmuch as these two defendants did not appear in the action, although legally served with process, and this motion being one brought in the action, it was not necessary, in the opinion of the court, to serve them with a notice of this motion. Moreover, they are the daughters of the trustee whose removal is sought. Had the respondent obeyed the express instructions of the will and divided the estate into separate trusts, they would have had no interest in this motion, because the respondent would not have been a trustee of the fund in which they had an interest. By raising the question he is really trying to take advantage of his own wrong. The presence of neither of them is necessary to a complete determination of this motion nor its enforcement. Ample justice can be done to these parties without affecting their interests injuriously (16 Cyc. 190); the motion being to protect their interests and to remove, and not to appoint, a trustee.

"(4) That the moving papers show that George J. Gould has not ceased to act as executor under the will, and that the Supreme Court has no jurisdiction to revoke his letters testamentary, a matter which is within the exclusive jurisdiction of the Surrogate's Court."

[6] This objection is, in the opinion of the court, based upon a mistaken statement of fact and an incorrect conclusion of law. The complaint itself shows that all the executorial duties have been completely performed, and George J. Gould is now actually acting as trustee, and has been for years, and not as executor, except in name. There was no necessity of a decree separating his duties as executor and trustee. *Matter of Kellogg*, 214 N. Y. 460, 108 N. E. 844, Ann. Cas. 1916D, 1298. Having brought this action in the Supreme Court, George J. Gould cannot object to its jurisdiction, which is concurrent with the jurisdiction of the Surrogate's Court. *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Ludwig v. Bungart*, 48 App. Div. 613, 63 N. Y. Supp. 91.

[7] Counsel states his main point in opposition to this motion as follows:

"This court can remove George J. Gould as testamentary trustee because of his alleged misconduct or unfitness only in an action or special proceeding brought for that purpose, and cannot remove him by an order made on motion in this action for a construction of the will and an accounting."

The statute relied upon to support this contention is section 112 of the Real Property Law (Consol. Laws, c. 50), which, so far as it is material to the question under discussion, provides as follows:

"Section 112. *Resignation or Removal of Trustee and Appointment of Successor.* The Supreme Court has power, subject to the regulations established for the purpose in the general rules of practice:

"1. * * *

"2. In an action brought, or on a petition presented, by any person interested in the trust, to remove a trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended, or who for any other cause shall be deemed to be an unsuitable person to execute the trust."

Section 768 of the Code of Civil Procedure provides as follows:

"Any proceeding which is required by statute to be instituted by petition may also be instituted by an affidavit setting forth the matter which it is required that the petition shall contain, accompanying a notice of an application for the relief which would properly be prayed for in the petition. * * *

In view of these provisions, the only question is as to the power of the court to grant the relief asked for in this motion. It is conceded by respondent that if this proceeding had been by petition, instituted as an independent and separate proceeding, there would have been no question as to the power of the court. The distinction is certainly very fine and technical. The same parties and the same facts are before the court upon this motion that would have been before the court upon a separate, independent proceeding. The court has acquired complete jurisdiction over the parties and the subject-matter.

The provisions of the statute are not exclusive. They are permissive. There is nothing in the statute prohibiting the removal of a testamentary trustee by motion in an action for an accounting, etc. The court does not derive its power to remove a testamentary trustee from this statute, as is claimed by counsel for the respondent. The court's power comes from the Constitution, which specifically grants it. "General jurisdiction in law and equity" is given by the Consti-

tution, and the power to remove a testamentary trustee is peculiarly an equitable power, which has always been exercised by the English Court of Chancery and the Supreme Court of this state. This power cannot be limited by the Legislature. *People v. Nichols*, 79 N. Y. 582, 590.

The court unquestionably has power to remove the respondent as testamentary trustee upon the trial of this accounting action, if in the opinion of the court the actions of the trustee require it (*Carrier v. Carrier*, 226 N. Y. 114, 123 N. E. 135), and the court should exercise that power in the present case in advance of the trial (which may not take place in a very long time), if in its judgment the admitted facts require such removal for the proper preservation of the trust estate (*Matter of Fernbacher*, 17 Abb. N. C. 339; *Matter of Mallon*, 38 Misc. Rep. 27, 76 N. Y. Supp. 879).

Counsel for respondent in their brief lay great stress upon two injurious consequences that will result to the respondent, should the court determine that the relief sought may be had by means of this motion:

First, "the right of the trustee to be heard in open court and to adduce common law evidence on the disputed questions of fact," and, second, "the right to appeal from an order of the Appellate Division to the Court of Appeals."

In answer to the first alleged injurious consequence it is only necessary to state that the respondent has been fully heard, and the facts which this court holds are sufficient to require the removal of the respondent are admitted. No further evidence is required. Moreover, in a proceeding by petition under the statute, the facts would be submitted in the form of affidavits. *Matter of Warren*, 125 App. Div. 169, 172, 109 N. Y. Supp. 202; *Matter of Keller*, 142 App. Div. 454, 127 N. Y. Supp. 16.

In so far as the right to appeal is concerned, either party has a right to appeal to the Appellate Division from either the granting or denial of the motion. It does not seem necessary to argue the proposition that the action of the court should not be determined or controlled by the Code provision in regard to the right of the parties to appeal to the Court of Appeals.

There is an action pending in which the respondent is a plaintiff as trustee and all interested parties are defendants, all of whom have been duly served with process and have appeared, with the exception of two who are in default. All the infants have appeared by guardians duly appointed, who almost unanimously request the removal of the respondent, as above stated. It is admitted, and the court has found, that the respondent trustee has failed to do and has done things which, for the preservation of the estate, requires his removal. All necessary parties are not only actually before the court, but they have been fully heard. They are, it is true, before the court by means of this motion, instead of a separate proceeding.

It is claimed by the respondent's attorney that there is no precedent for removing the respondent trustee by means of the present motion, and, by reason of there being no precedent, he contends that, notwithstanding all the necessary parties are before the court and have

been fully heard, and that the issues and evidence are exactly the same as though the parties had been brought in by means of an action or independent proceeding, the court, nevertheless, has no jurisdiction to remove the respondent by motion. While the court thinks there is precedent for the removal of the respondent by means of this motion, even assuming that there is no direct precedent, the fact that the court has heretofore failed to exercise a power is neither an argument nor presumption against the existence of such a power. A court of equity will not refuse to exercise a power simply because there may be no judicial precedent for its exercise.

In *People v. Norton*, 9 N. Y. 176, the court, speaking through Rugles, C. J., said:

"The Court of Chancery had general jurisdiction of all cases of trust, and had the power by its general authority, independent of any statute, to displace a trustee on good cause shown. * * * It is said that this must in all cases, according to the course and practice of that court, be done by bill and not upon petition. But a departure from the usual practice of the court in doing an act which the court has authority to do, does not render the act void."

In *Youngs v. Carter*, 10 Hun, 194, Mr. Justice Daniels, in discussing the equitable jurisdiction of the Supreme Court, said:

"* * * It now extends to all cases of law and equity, by virtue of the provision of the Constitution. * * * The authority given, in terms, is 'general jurisdiction in law and equity,' and that, of necessity, includes all cases which may be properly comprehended by established and existing equitable principles. The test of jurisdiction cannot be restricted to the existence of some definite precedent for the action which may be brought. That would destroy the flexibility required to maintain the utility of the court, in the demands necessarily made for the exercise of its authority in new cases always arising out of the enterprises and progress of society. The novelty of the case can form no well-founded objection to the jurisdiction over it, if it falls within the limits of any defined equitable principle. That must constitute the test of the court's authority, and not the existence or absence of precedent for the case over which it may be invoked."

Mr. Justice Follett, in *Davis v. Zimmerman*, 91 Hun, 489, 36 N. Y. Supp. 303, restated the same principle, and said:

"The Supreme Court of this state has original and general jurisdiction of all cases in law and equity * * * with unlimited power to protect the rights of persons and property by adopting and enforcing all of the remedies afforded by an enlightened jurisprudence which are not inconsistent with the Constitution of the state, and it is its privilege and duty to mold and expand its processes, so as to afford adequate protection to the rights of all citizens."

[8] It is not only, therefore, the opinion of the court that it has ample power to remove the respondent trustee by means of this motion, but it is also the opinion of the court that inasmuch as the court has acquired plenary jurisdiction of the parties and the subject-matter through the action for an accounting, in which action power of removal is incident and ancillary, that the court would and should actually restrain the prosecution of any separate proceeding instituted for that purpose. Such proceeding would come clearly within the sound and sensible rule that if full relief can be had in one suit, no other shall be allowed. *Groshon v. Lyon*, 16 Barb. 461; *Foot*

v. Bruggerhof, 84 Hun, 473, 32 N. Y. Supp. 397; Metropolitan Trust Co. v. Stallo, 166 App. Div. 649, 152 N. Y. Supp. 173.

Reducing the objections and demands of the respondent trustee to a minimum, the real substance of them is that, notwithstanding all necessary parties are in the court and have been heard, they should nevertheless be driven out, simply because they entered through the wrong door.

In conclusion, the court desires to say that the affirmative acts alleged against George J. Gould do not involve the cotrustee, Helen G. Shepard. She evidently knew little of the very complicated transactions carried on by George J. Gould, and trusted him absolutely, as an honest woman with an unsuspecting mind would naturally trust a brother in whom their father had imposed such implicit confidence.

There have been other questions raised and discussed by the parties at great length. While these questions have been considered, they are, in the opinion of the court, incidental and subsidiary to the main question. To discuss them would serve no practical purpose.

The motion to remove George J. Gould as one of the trustees of the estate of Jay Gould is granted, and an order to that effect may be entered.

Motion granted.

(189 App. Div. 90)

In re FRIEDLANDER.

(Supreme Court, Appellate Division, Second Department. October 3, 1919.)

1. EXECUTORS AND ADMINISTRATORS §89—EXECUTRIX CARRYING ON DECEASED'S BUSINESS CHARGED WITH CARE OF ORDINARILY PRUDENT BUSINESS MAN.

An executrix, authorized by the will to operate testator's business, was required only to exercise such a degree of care in realizing on the accounts due the business as is exercised by the ordinarily prudent business man, though she has the burden to prove that claims were not lost through her negligence.

2. COURTS §202(5)—SUPREME COURT ON APPEAL FROM SURROGATE ON FACTS, MAY REVIEW AND TAKE FURTHER EVIDENCE.

Under Code Civ. Proc. § 2763, where an appeal from a surrogate's decree is taken on the facts, the Supreme Court is not solely a court of review, but has the same power to decide questions of fact that the surrogate had, and in its discretion may receive further testimony or documentary evidence, and appoint a referee.

3. EXECUTORS AND ADMINISTRATORS §93(2)—EXECUTRIX AUTHORIZED TO CONTINUE BUSINESS ACCOUNTABLE ONLY FOR GOOD FAITH.

An executrix, who under the will was authorized to continue testator's business as long as it was deemed for the best interests of the estate, was accountable only for good faith in the exercise of the discretion vested in her, and was not responsible for errors of judgment.

4. PARENT AND CHILD §3(2)—MOTHER AS EXECUTRIX ENTITLED TO ALLOWANCE FOR SUPPORT OF CHILDREN OUT OF THEIR TRUST ESTATE.

A mother, as executrix of her deceased husband's will, held entitled to proper allowance for past expenses in the support of her infant children out of the income of a trust estate devoted by the will to their support, education, and maintenance.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from Surrogate's Court, Kings County.

In the matter of the judicial settlement of Lillian B. Friedlander, now Lillian B. Leavitt, as executrix, etc., of Joseph B. Friedlander, deceased. From a decree of the Surrogate's Court, settling her accounts, the executrix appeals. Decree modified in accordance with the opinion, and, as modified, affirmed.

See, also, 185 App. Div. 936, 172 N. Y. Supp. 892.

Argued before JENKS, P. J., and PUTNAM, BLACKMAR, KELLY, and JAYCOX, JJ.

Max D. Steuer, of New York City (Henry Danziger, of New York City, on the brief), for appellant.

Everett V. Abbot, Harry M. Marks, Hugo Wintner, and Henry L. Moses, all of New York City, for respondents.

BLACKMAR, J. The record of the case is long and the accounts intricate and complicated, chiefly for three reasons: First, the power granted the executrix to continue the business; second, the provision of the decree appealed from, which vacates a final decree made by the surrogate's predecessor in office, dated April 11, 1907, settling the accounts of the executrix; and, third, the basing of the accounts on the vacated decree. We shall confine ourselves to stating the conclusion at which we have arrived on the points presented to our consideration by the appellant, with a brief statement of the reason therefor. The accounts as filed admitted a balance of assets for distribution of \$3,513.99. The decree charged the appellant with a balance of \$107,219.56. The appellant claims that the decree was erroneous in the following respects:

A. The payment to J. A. Solomon should have been allowed, \$1,827.93.

B. The executrix should not have been charged with the uncollected debts due the business, \$10,715.44.

C. She should have been credited with loss in the business after October 24, 1908, \$4,400; less profits, \$1,726.47—\$2,673.53.

D. She should not have been charged with the sum of \$2,598.80 allowed N. Bernstein, and with \$5,342.36 allowed to L. Bernstein on the sale of the business—\$7,941.16.

E. She should have been allowed for the maintenance of the infants, \$45,993.71.

F. The interest item charged against her, amounting to \$33,032.16, should be modified as required by any allowance which may be made.

We will consider the claims separately:

A. The respondents admit that the payment of \$1,827.93 should be allowed.

[1] B. The executrix, having been authorized by the will, had, at the time the accounts were filed, uncollected debts amounting to \$10,715.44. The surrogate held that the executrix was acting within the scope of the power conferred on her by the will in continuing the business up to a certain time. He then charged her with the uncollected debts of the business, without any inquiry whether they were collectible, or whether any of them were lost through her fault or negligence. In our opinion, the same rule does not apply to the debts

incurred by an executor in running a business under the authority of the will as to debts due the testator. Merchants do not go to the expense of reducing all claims to judgment. As the executrix was running a commercial business, she was required to exercise such a degree of care in realizing on the accounts due as is exercised by the ordinarily prudent business man. The question is whether the claims were lost through the negligence of the executrix. As she has all the information, she should furnish the evidence. To that extent she has the burden of proof; but she has been held responsible for these uncollected debts, practically as an insurer, without any inquiry whatever as to whether they or any of them were lost through her fault or negligence.

[2] Where an appeal from a surrogate's decree is taken upon the facts, this court is not solely a court of review, but has the same power to decide questions of fact that the surrogate had, and it may in its discretion receive further testimony or documentary evidence and appoint a referee. Section 2763, Code Civ. Proc. We therefore, by order dated October 4, 1918, referred the matter back to the referee, to ascertain what, if anything, the executrix has collected on the uncollected accounts, to sell the remainder of them at public auction, and upon the evidence taken, and such new evidence as may be offered, to ascertain whether any portion of said claims, and, if so, how much, has been lost through the misconduct or neglect of the executrix. The referee made his report, dated January 27, 1919, to the effect that the executrix had collected on these accounts a net sum of \$3,250.98, that the parties had agreed that the remainder were worthless, that a sale of them would be a useless and unnecessary expense, and that "the executrix is not to be charged with misconduct or neglect in failing to collect any portion of said uncollected claims." We confirm the report of the referee, and, as a result, allow to the executrix the sum of \$7,464.46, with a proper readjustment of interest.

[3] C. The surrogate has charged the executrix with loss in the business, incurred since October 24, 1908, amounting to \$2,673.53. The decision is based on a finding by the referee that in continuing to carry on the business beyond a certain date the executrix "failed to exercise that amount of care, prudence, and intelligence that persons of ordinary care, prudence, and intelligence would exercise in the management of their own affairs." A consideration of the evidence shows a situation where there was a serious question whether the business should be kept running pending a sale. The executrix had tried to sell the business. She received an offer that was approved by the surrogate; but the sale fell through on account of delays, and the order recites that the delays were caused by the contestant. The executrix continued the business in a limited way, hoping for a sale. She had to judge the situation as she saw it. The referee judged after the fact. She was acting within the scope of her power as conferred by the will. She was authorized to continue the business "as long as they deem it for the best interest of my estate." She was the only executor, and the discretion as to how long the business should be continued was given to her. So long as she acted in good faith, she

incurred no liability. It is a question of good faith, and not of wisdom, or the exercise of such care as another would have used. To her care, prudence, and intelligence the decision was confided, and she is accountable only for good faith in the exercise of the discretion. *Walbridge v. Brooklyn Trust Co.*, 143 App. Div. 502, 128 N. Y. Supp. 686; *Perry on Trusts* (5th Ed.) vol. 2, § 511; *Haight v. Brisbin*, 96 N. Y. 132; *Williams on Executors*, vol. 3, p. 608. She should have been credited with the item of \$2,673.53 and \$310.20 interest to November 4, 1910, or \$2,983.73.

D. We think the surrogate was right in refusing to credit the executrix with the allowance made by her to her two brothers, N. and L. Bernstein, in the sale of her business to them.

[4] E. The executrix claimed an allowance of \$45,993.71 for the support and education of the infants. This was disallowed, as not sufficiently proved. Under the express trust created in the will the executrix had the right, and it was her duty, to devote the income to the support, education, and maintenance of the children during their minority. It appears that she has supported, educated, and maintained them, but has been allowed nothing therefor. This is unjust. She claims that this large sum was income paid over to herself as guardian, for which she is entitled to credit, being accountable in her capacity as guardian only. But this claim was not supported by the evidence, and it was rightfully rejected. Her right to use the estate for the infants is confined to the income, and it becomes necessary, therefore, to determine what the income is. The respondents in their brief compute the net income up to the date of the last account at \$23,025.46. There is an error in their calculation, due to deducting from the gross income schedules C and D, whereas a portion only of said schedules was allowed by the Surrogate. Correcting the statement accordingly, we have the sum of \$33,547.53. Moreover, the respondents rightfully contend that the sums drawn from the business, as shown in the last statement of income, while the business was losing money, is not income. This amounts to \$4,726.47. Deducting this, we have as net income \$28,821.06. But the appellant accounted to Elizabeth for \$4,041.80, so that the income available to the other infants is \$24,789.26. The appellant, if she has expended this, or any portion thereof, for the infants, has not accounted for it as a trustee should account. She has relied on the fiction that the money was turned over to herself as general guardian, and seems to have filed accounts therefor. In the interest of justice these accounts should not be closed in a way to bar the appellant forever from the chance of obtaining an allowance for the proper use of the income. *Earl, J.*, in *Beardsley v. Hotchkiss*, 96 N. Y. 201, 219, says:

"There is no doubt of the power of an equity court to make to a father a reasonable allowance for the past and future support of his minor children, out of their property, in his hands, or in the hands of their trustees."

In *Matter of Kane*, 2 Barb. Ch. 375, Chancellor Kent held that in a proper case an allowance might be made to a father for past support of minor children out of the estate.

We think that this is a case where the principle so enunciated may

be applied, and a proper allowance made to the mother for her past expenses in the support of the infant children in her care, out of the income of a trust estate which by the will was devoted to their support, education, and maintenance. We have before us the history of the transactions from the beginning, the record of the accounts filed by the appellant, not only as executrix, but as guardian, and voluminous testimony, and we see no reason why an end cannot be made to this long drawn out controversy, by determining what is a just allowance to be made to the applicant for her expenses in the support and education of the child and three stepchildren, who were minors at the time the account was filed. On the settlement of the accounts of the appellant as guardian of Elizabeth, such an allowance was made by agreement, and \$500 a year was allowed for board and care. In consideration of all the evidence, we think a just and reasonable allowance for the support, education, and maintenance of the four infants would be \$15,000, and we therefore make such allowance.

The accounts should be modified by deducting from the amount chargeable to appellant:

A. The amount paid to Solomon.....	\$ 1,827.93
B. Amount uncollected accounts.....	7,464.46
C. Loss in business after October 4, 1908.....	2,983.73
E. Allowance from income.....	15,000.00
The executor has already accounted as guardian of Elizabeth...	4,031.80

Total deduction\$31,307.92

Interest on said amounts from November 4, 1910, to June 29, 1916, at 6 per cent., was charged against the executrix on the whole balance, including the above amounts. Interest on the allowance for the same time and at the same rate should be computed 10,618.60

The executrix has been charged interest on a sum which she has paid to Elizabeth. This is error. It is unimportant as the decree was drawn, but, as modified, it will introduce error, if not corrected 5,878.14

Making a total allowance of\$47,304.66

The decree should be modified in accordance with the opinion, and, as modified, affirmed, without costs.

Settle order. All concur.

(188 App. Div. 949)

PEOPLE v. TEIPER.

(Supreme Court, Appellate Division, Fourth Department. May, 1919.)

On rehearing. Order of reversal amended.

For former opinion, see 186 App. Div. 830-844, 175 N. Y. Supp. 197.

PER CURIAM. Motion granted, and order of reversal amended, so as to read as follows:

"Judgment of conviction and order reversed, and new trial granted. The said reversal and granting of a new trial are ordered for errors of law, and as a matter of discretion; the verdict against defendant being against the law, and justice requiring a new trial. Opinion by Kruse, P. J. All concurred, except Foote, J., who dissented in a memorandum, and De Angelis, J., not voting."

Held, the judgment of conviction was reversed for the reasons set forth in the opinion. The order as drawn inadvertently limited the grounds of reversal, and practically withdrew most of those stated in the opinion. The order should be amended to conform to the opinion. See 186 App. Div. 830-844, 175 N. Y. Supp. 197.

(108 Misc. Rep. 96)

PEOPLE v. LOWENDAHL

(Court of General Sessions, New York County. July, 1919.)

1. CRIMINAL LAW ~~§~~250—DISORDERLY CONDUCT TENDING TO BREACH OF PEACE NOT A "CRIME."

On proof that defendant, while a passenger on a train en route to New York City, uttered certain seditious remarks, the Magistrate's Court in that city, before whom he was charged with disorderly conduct tending to a breach of the peace, in violation of the New York City Consolidation Act 1882, §§ 1458, 1459, had no jurisdiction to summarily adjudge defendant guilty and impose sentence, under Code Cr. Proc. § 187, giving jurisdiction to courts of any county through which train passes if a crime is committed on a railway train, etc., as disorderly conduct, tending to a breach of the peace, is not a "crime."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Crime.]

2. CRIMINAL LAW ~~§~~250—CITY MAGISTRATE, ON COMPLAINT FOR DISORDERLY CONDUCT TENDING TO BREACH OF PEACE, SHOULD HOLD ACCUSED FOR DISORDERLY CONDUCT.

Where City Magistrate had no jurisdiction, under Code Cr. Proc. § 137, of a case of disorderly conduct tending to a breach of the peace, in violation of the New York Consolidation Act 1882, §§ 1458, 1459, based on defendant's seditious remarks on a train en route to New York City, the magistrate should have entertained a complaint for disorderly conduct under Penal Law, § 720, making it a misdemeanor to use disorderly language annoying passengers on railroads, etc., for purpose of holding him for trial in Court of Special Sessions.

Knur Joel Lowendahl appeals from a judgment of conviction in a City Magistrate's Court of disorderly conduct tending to a breach of the peace. Reversed, and defendant remanded to City Magistrate's Court.

Frederick J. Sullivan, Asst. Dist. Atty., of New York City, for the People.

Emil E. Fuchs, of New York City, for defendant.

ROSALSKY, J. The defendant above named was adjudged guilty in the Tenth District City Magistrates' Court, Borough of Manhattan, of disorderly conduct tending to a breach of the peace, and he was sentenced to the workhouse for the definite period of six months.

The record of the proceedings in the court below shows that on the 25th day of September, 1918, the defendant was a passenger on the Empire State Express of the New York Central Railway, bound for New York, and that while on said train, and prior to having reached the county of New York, the defendant uttered certain seditious remarks, for which he was apprehended when the train reached 125th street in the borough of Manhattan.

~~§~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] The principal question to be decided on this appeal is whether section 137 of the Code of Criminal Procedure is applicable to a case of disorderly conduct tending to a breach of the peace, in violation of sections 1458 and 1459 of the Consolidation Act (Laws 1882, c. 410).

Section 137, *supra*, provides as follows:

"When a crime is committed in this state, in or on board of any railway engine, train or car, making a passage or trip on or over any railway in this state, or in respect to any portion of the lading or freightage of any such railway train or engine car, the jurisdiction is in any county through which, or any part of which, the railway train or car passes, or has passed in the course of the same passage or trip, or in any county where such passage or trip terminates, or would terminate if completed."

As it will be observed, section 137, *supra*, vests jurisdiction in the courts of New York county if a crime is committed on a railway train, etc. Under the Penal Law, crimes are divided into felonies and misdemeanors. The courts have held that disorderly conduct tending to a breach of the peace is not a crime.

In *People ex rel. Burke v. Fox*, 205 N. Y. 490, 90 N. E. 147, the Court of Appeals held that disorderly conduct, which in the opinion of the magistrate tends to a breach of the peace, is an offense against a police regulation, but is not a "crime," in the strict sense of that term as used in the Code of Criminal Procedure.

In *Steinert v. Sobey*, 14 App. Div. 505, 507, 508, 44 N. Y. Supp. 146, 148, Chief Justice Cullen said:

"But, whatever be the correct and accurate definition of the word 'crime,' I think that it is not used in the Code of Criminal Procedure in a sense broad enough to include petty offenses subject to summary convictions by a magistrate. In the Code crimes are divided into felonies and misdemeanors, and no provision is found for the trial of either before a magistrate, as such. * * * It thus appears that, however inaccurate or illogical the distinction may be, summary proceedings for petty offenses leading to disorder have been considered, not as prosecutions for crimes, but for offenses against police regulations."

[2] Upon the evidence the learned magistrate had no authority to make a summary disposition of the case against the defendant; but he should have entertained a complaint of disorderly conduct, as provided in section 720 of the Penal Law (Consol. Laws, c. 40), which makes it a misdemeanor for—

"any person who shall by any offensive or disorderly act or language, annoy or interfere with any person in any place or with the passengers of any public stage, railroad car, ferry boat, or other public conveyance, or who shall disturb or offend the occupants of such stage, car, boat or conveyance, by any disorderly act, language or display, although such act, conduct or display may not amount to an assault or battery."

Had the magistrate acted under section 720, *supra*, he would have had jurisdiction of the charge against the defendant, for the purpose of holding him for trial in the Court of Special Sessions. For the reasons herein stated, the judgment of conviction must be reversed, and the defendant is remanded to the City Magistrate's Court, so that a proper charge may be formulated against him.

Judgment of conviction reversed, and defendant remanded to the City Magistrate's Court.

Judgment reversed.

(108 Misc. Rep. 102)

In re MANCINI.

(Surrogate's Court, Montgomery County. July, 1919.)

1. BASTARDS ⇐3—LEGITIMACY FROM MARRIAGE OF PARENTS PRESUMED.

Where parents of boy, 6 years of age in May, 1919, 3 months before his birth agreed to get married, and mother knew that father was furnishing a house, so that they might live there as husband and wife, and was known by his name, and bore him another child, the presumption is that boy, who is and had been living with his maternal grandparents in same city as his father, is legitimate.

2. GUARDIAN AND WARD ⇐10—APPOINTMENT OF FATHER WITHIN JURISDICTION OF SURROGATE'S COURT.

Petition of the father of a boy under the age of 14, and presumptively legitimate, to be appointed his guardian, may be granted by Surrogate's Court, under Code Civ. Proc. §§ 2510, 2643, 2649, though the mother, who was married to another in 1915, opposes the application.

3. GUARDIAN AND WARD ⇐18(7)—APPOINTMENT OF FATHER SHOULD PROVIDE FOR ACCESS TO BOY BY MOTHER.

An order appointing father of a boy under age of 14 years, presumptively legitimate, as his guardian, should provide that the mother, though since married to another, should have access to the boy at such times and in such manner as may be proper for his best interests.

Application by Jerry Mancini to be appointed guardian of John Mancini, his infant son under the age of 14 years. Application granted, on condition of security, etc.

Christopher J. Heffernan, of Amsterdam, for petitioner.

W. Arthur Kline, of Amsterdam, for respondent.

SPONABLE, S. This matter comes before the surrogate on the petition of the father, Jerry Mancini, to be appointed the guardian of the person of John Mancini, an infant, aged 6 years in May, 1919. The application is opposed by the mother of the infant, Mary Delos Denton, now the wife of Ernest Denton, to whom she was married on November 29, 1915, and with whom she resides at 158 Forbes street, Amsterdam, N. Y. The petitioner, the father of the infant, also resides in the city of Amsterdam, N. Y. The infant is now, and has been for some time past, living with its grandfather and grandmother, Peter Delos and Louisa Delos, the father and mother of the mother of said infant, on Forbes street in the city of Amsterdam, N. Y.

The Surrogate's Court has power to appoint a guardian for this infant upon such an application as has been made in this proceeding. Code Civ. Proc. §§ 2510, 2643, 2649.

"The Surrogate's Court has the like power and authority to appoint a general guardian of the person or of the property, or both, of an infant, which the chancellor had, on the thirty-first day of December, eighteen hundred and forty-six. It has also power and authority to appoint a general guardian, of the person or of the property, or both, of an infant whose father or mother is living, and to appoint a general guardian of the property only, of an infant married woman. Such power and authority must be exercised in like manner as they were exercised by the Court of Chancery, subject to the provisions of this act." Code Civ. Proc. § 2643.

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

It seems that chapter 742 of the Laws of 1907, amending the Domestic Relations Law (Laws 1896, c. 272), again made common-law marriages in this state valid. *Matter of Hinman*, 147 App. Div. 452, 131 N. Y. Supp. 861, affirmed 206 N. Y. 653, 99 N. E. 1108; *Meister v. Moore*, 96 U. S. 76, 24 L. Ed. 826; *Matter of Smith*, 74 Misc. Rep. 11, 133 N. Y. Supp. 730; *Matter of Reinhardt*, 95 Misc. Rep. 413, 160 N. Y. Supp. 828; *Matter of Ziegler v. Cassidy's Sons*, 220 N. Y. 98-111, 115 N. E. 471, Ann. Cas. 1917E, 248.

Keeping in mind the fact that the question in this case should be determined, so as to promote the interests and for the welfare of the infant, it might be well before discussing the facts to briefly consider the rules of law heretofore applied in disposing of similar questions.

In *Tracy v. Frey*, 95 App. Div. 579, 88 N. Y. Supp. 874, in which the leading cases upon marriage and legitimacy of children are cited and discussed, the court says:

"In the absence of proof, the presumption is of marriage arising out of cohabitation in the apparent relation of husband and wife, of the innocent and lawful character of such relationship and of the legitimacy of children which are the fruit of such a union. In no branch of the law is the presumptive rule more rigidly enforced. * * * The relation in its inception was meretricious, and although there was no proof of any ceremonial marriage or other contract of marriage thereafter, yet, as the parties continued to cohabit together, and declarations were made, * * * it was held that a marriage subsequent to the commencement of the illicit relation would be presumed, and that a finding of a subsequent contract of marriage between the parties would be upheld, although there was no direct proof establishing the same."

Also:

"Where it is admitted that the cohabitation of the parties is illicit in its origin, the presumption is that it so continues, and before it can be characterized as a lawful relation proof is required of such acts and circumstances as indicate that the relation has ceased to be illicit and become matrimonial."

The case above cited quotes Judge Vann, in *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106, in speaking upon this subject:

"It is sufficient if the acts and declarations of the parties, their reputation as married people, and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife."

"The presumption of marriage, from a cohabitation apparently matrimonial, is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence." *Matter of Hynes v. McDermott*, 91 N. Y. 451-459 (43 Am. Rep. 677).

The presumption is that John Mancini is a legitimate child. *Matter of Biersack*, 96 Misc. Rep. 163, 159 N. Y. Supp. 519.

[1, 2] In making the application of rules of law above cited, unless it has been shown by the facts in the case before me that Jerry Mancini, the father, is incompetent to act as guardian, what must be the logical conclusion? Would this court be promoting the interests

of and be looking after the welfare of the infant by a decision inferring that he is the illegitimate child, and, if not directly, indirectly causing him and his name to bear such a stain throughout the remainder of his years? I think not. Had Jerry Mancini, the father, and Mary Delos, the mother, agreed to get married? Had they agreed to live together as man and wife? Did they live as man and wife? The mother says that she went to Schenectady to get married. If we take this as true, there can be no other inference but that there had been an agreement to get married. He had furnished a home on Center street in Amsterdam, which the mother knew of, and knew that it was being so furnished, so that she and Jerry might live there as man and wife, and the mother says that they had agreed to be married. This all happened three months before this infant, John Mancini, was born. They went to live at the house which Jerry Mancini, the father, had furnished, and they lived there together in such manner as any man and wife would live. The neighbors called her "Mrs. Mancini," she was known as "Mrs. Mancini," and it was generally understood that they were husband and wife and even her father and mother, Peter Delos and Louisa Delos, thought they were man and wife. Their relations were such that another child was born.

I cannot help but conclude, from these facts and many others that might be cited, that John Mancini is the legitimate child of Jerry Mancini. It has not been shown that Jerry Mancini is incompetent to act as the guardian of his son, and, therefore, upon the facts in the case, not forgetting that the mother has in her custody and under her control the younger child, and inasmuch as she consented in writing that the father have the custody and control of this infant, I will grant the application of the petitioner.

[3] I should like, however, to have such appointment conditioned with the provision that the mother should have access to her son at such times and in such manner as might be proper and conducive to the best interests of the infant, and the order appointing the father the guardian may provide for some access to the infant on the part of the mother.

The order may be settled by the attorneys for the respective parties appearing before me at a designated term, by agreement or upon notice, and the amount of the security then fixed, when I will also hear arguments as to the terms and conditions of the mother's access to her child.

Decreed accordingly.

(108 Misc. Rep. 107)

In re KEAN et al.

In re VAN CORTLANDT'S WILL.

(Surrogate's Court, Westchester County. July, 1919.)

1. EXECUTORS AND ADMINISTRATORS §=122(2)—TEMPORARY ADMINISTRATORS HAVE TO DO ANYTHING NECESSARY TO PERFECT CHOSE IN ACTION.

The general power of temporary administrators, under Code Civ. Proc. § 2597, "to secure and preserve the estate," implies the further power to do whatever is requisite to perfect a chose in action.

2. EXECUTORS AND ADMINISTRATORS §=122(2)—CERTAIN PREFERENTIAL PAYMENTS NOT CLAIMS AGAINST ESTATE, BUT AGAINST COLLATERALS PLEDGED.

Where an order of the surrogate, not appealed from, authorized temporary administrators to arrange with firms, etc., for sale of preferred stock held by them as collateral, and authorized pledgees to effect such sale and to apply proceeds to reduction of debit balances due and owing to them by estate, such preferential payments were not claims against estate in the first instance, but against the stock pledged as collateral.

3. EXECUTORS AND ADMINISTRATORS §=122(2)—SETTLEMENT OF ACCOUNTS—PARTIES ENTITLED TO OBJECT.

Where unappealed order of surrogate authorized temporary administrators to arrange to sell preferred stock pledged as collateral, and authorized pledgees to make such sale and apply proceeds on their debit balances, parties plaintiff in an action against decedent in his lifetime for a money judgment, now pending against his executors, on settlement of accounts of such administrators and executors, under Code Civ. Proc. § 2768, subd. 3, defining "debts" and "creditor," might object to such preferential payments; but where account indicated that such sale and payment realized a profit to estate, and consequently to creditors, they could not be injured, if ultimately securing judgment in their action.

4. EXECUTORS AND ADMINISTRATORS §=308 — ACCOUNT CHARGEABLE WITH PAYMENT TO GENERAL DEVISEE BEFORE PAYMENTS TO CREDITORS.

Account of executors would be charged with money transferred to a general devisee, a legatee of testator, in advance of the payment of the claims of creditors.

Proceeding upon the judicial settlement of the accounts of Hamilton Fish Kean and another as temporary administrators and as executors of Robert B. Van Cortlandt, deceased. Decree that executors be charged with certain sums paid out by them.

See, also, 177 N. Y. Supp. 789.

Crescens Hubbard, of White Plains, for executors.

James B. Ludlow, pro se.

W. Bourke Cockran, of New York City, for objectors.

SLATER, S. In the matter of the accounting of the temporary administrators of decedent, Otto Schiff and others appear as objectors. They are plaintiffs in an action now pending in the Supreme Court, against decedent in his lifetime and now against the execu-

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tors and others, to obtain a money judgment. Section 2768 of the Code of Civil Procedure, subdivision 3, defines the word "debts" as including every claim and demand upon which a judgment for a sum of money or directing the payment of money could be recovered in an action, and the word "creditor" includes every person having such a claim or demand. Therefore they have the right to appear at this time and object.

[1-3] The objection is made to certain payments to Kean, Taylor & Co., Bank of Manhattan Company, Davies, Thomas & Co., Union Trust Company, and the United States Mortgage and Trust Company. Section 2682 of the Code provides for the order of payment of debts against an estate. The powers of temporary administrators are set forth in section 2597. Among the general powers granted is one "to secure and preserve" the estate. The doings of temporary administrators are regulated entirely by the order of the surrogate. The surrogate may by order authorize the temporary administrator to pay funeral expenses or any expenses of the administration of his trust. He may also direct the payment of a legacy. Under section 2599, any time after completion of the publication of the notice to creditors, the surrogate may empower the temporary administrator, prior to an accounting, upon proof and his satisfaction that the assets exceed the debts, to pay the whole or any part of a debt due to a creditor. The temporary administrators claim that by order of the former surrogate of this court, dated May 3, 1918, they were empowered to pay certain debts to the creditors named in the objection filed herein, in these words:

"Ordered, that the said temporary administrators be and they hereby are authorized to arrange with any and all of said firms and corporations holding as collateral second preferred stock of the Gulf States Steel Company for the exchange of said preferred stock for common stock of said company or for the sale of said preferred stock, and that such firms and corporations be and hereby are authorized to effect such sales and to apply the proceeds thereof to the reduction of the debit balances due and owing to them respectively by the estate of the decedent."

This order was not appealed from, and therefore I will assume at this time that upon this accounting it stands with full force. Even admitting that it was made at a time when the court was without power to make it, unless it had power under the general equitable powers given by the Code, I conclude that these preferential payments were not claims against the estate in the first instance, but against the stock which had been pledged as collateral security. The temporary administrators, upon order of the court, would have the right to pay the maturing debt for which collateral was pledged. The general power to secure and preserve the estate implies the further power to do whatever is requisite to perfect a chose in action, for the power to do an act includes the power to do all that is reasonably necessary to do it effectively. *Matthews v. American Central Ins. Co.*, 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. Rep. 627. By the sale of the stock and the payment of these preferred creditors

from this primary fund, the account indicates that the estate has been able to realize a profit from the "right" which belonged to the stock, to the benefit of the entire estate and consequently to any and all creditors. I cannot observe that any money has been lost to the general estate by the payment of these preferred debts, or that any right of the objectors has been invaded, should they ultimately secure a money judgment.

[4] Otto Schiff and others also object to the fact that the executors have transferred certain moneys to the general devisee and legatee of decedent, Columbia University in the City of New York. The executors were without power to do this until the payment to creditors had been made, and I must decline to permit the account to approve of these payments, and the executors must stand charged with these sums of money so paid to Columbia University.

Decreed accordingly.

(108 Misc. Rep. 111)

In re KREUSSER et al.

(Surrogate's Court, Westchester County. July, 1919.)

1. WILLS §820(1)—WHETHER LEGACY CHARGE ON REAL ESTATE MATTER OF INTENT.

Whether a legacy is a charge upon real estate of a testator is always a question of his intention.

2. WILLS §820(3)—LEGACIES INTENDED TO BE PAID FROM PERSONALTY NOT A CHARGE ON REALTY.

Where a will giving executors discretionary power of sale provided that if proceeds of the residuary estate, in which testator's wife was given a life estate, were insufficient to pay certain legacies, which were less than the personalty, they should be paid pro rata, and that any excess, after all other legacies had been paid in full, should be divided equally among certain persons, the realty was not charged with payment of legacies, but it was the intention that they should be paid from the primary personal estate, so far as it might go after expenses were paid, and to create a life estate in the wife in the balance of estate, and on her death to pay the legacies.

Proceeding upon the judicial settlement of the account of Louise F. Kreusser and others, as executors of John Kreusser, deceased, with request that the court construe the will of testator as to payment of legacies. Will construed, and decree to be entered accordingly.

George Haas, of New York City, for executors.

Guernsey Price, of New York City, for Anna Beyrodt.

SLATER, S. On this accounting, the court is asked to construe the will of decedent in so far as it may relate to the payment of legacies. The decedent provided for the payment of his funeral ex-

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penses and made a specific gift of his household furniture to his wife. By the third paragraph he disposed of certain jewelry and gave \$500 in 5 cash legacies of \$100 each. By the fourth paragraph he gave \$7,600 in 15 cash legacies of specified sums of varying amounts. Included among the last-mentioned legatees is Anna Beyrodt, who is contending that the legacies under the third and fourth paragraphs should be paid in full at this time.

[1, 2] It appears that at the time the decedent made his will, and also at the time of his death, he had about \$11,000 personal property, and the legacies under these two paragraphs amounted to \$8,100. The expenses of the estate, being a primary charge upon the personalty, reduce the money in hand at the present time to about \$5,000 or less for the payment of these legacies. The question is raised whether the legacies in these two paragraphs are not a charge upon the realty. Whether a legacy is a charge upon real estate of a decedent is always a question of testator's intention. *Carley v. Harper*, 219 N. Y. 295, 114 N. E. 351. A legacy is charged upon real estate when at the time of making the will the testator's personalty is considerably less than the amount of the legacies, indicating an intention upon the part of the decedent to have the legacies paid out of real estate.

This state of facts does not obtain here, because the legacies of the third and fourth paragraphs of the will are less in amount than the personalty, and I conclude that it was not the intention of the decedent to charge his real estate with the payment of the legacies in these two paragraphs of his will. In the fifth paragraph of the will the decedent gives and bequeaths all the rest, residue, and remainder of his estate, real and personal, to his executors in trust, to pay the net income thereof to his wife during life, and upon her death the executors are directed to sell the real and personal estate and pay over the same to 21 beneficiaries therein named in varying amounts specified aggregating \$47,400.

The sixth paragraph of the will states:

"If there be not sufficient sums of money realized on the sale of my residuary estate to pay the above set forth legacies and bequests in full, then such legacies shall be paid pro rata, but should there be more moneys on hand, then such excess and such other moneys as may have reverted back to my estate by reason of the death of any of my legatees not leaving issue shall *(after all the other legacies herein provided have been paid in full)* be divided equally share and share alike unto and between Anna Beyrodt and all of my nephews and nieces and whom the said Anna Beyrodt and my said nephews and nieces I do hereby constitute, declare, make and appoint them to be the legatees of my said residuary estate."

This paragraph is followed by discretionary power of sale. The testator had in mind the withholding of a division of his estate until after the death of his wife and the payment of the "above set forth legacies and bequests in full," referring to those named in the fifth paragraph of the will.

The clause in the sixth paragraph, "after all the other legacies herein provided have been paid in full," is very significant, and indicates to a very marked degree what the testator had in mind, and I conclude that the scheme of his will was to pay the legacies under the third and fourth paragraphs from the primary personal estate, so far as it might go, in the balance of the estate to create the life estate of his wife, and upon her death to pay the specified legatees the specified amounts. If there was a deficiency to have those legacies paid pro rata. If there was an excess occasioned in any manner, that the other legacies, meaning the legacies in the third and fourth clauses, should be paid in full, and then the general residuary estate, if any, should pass to Anna Beyrodt and his nephews and nieces.

I so construe the will of the decedent and direct that decree be entered accordingly.

Decreed accordingly.

(100 Misc. Rep. 1)

PEOPLE ex rel. FRANKLIN MILLS CO. v. COLLINS et al., Board of Education.

(Supreme Court, Special Term, Erie County. October 9, 1919.)

1. SCHOOLS AND SCHOOL DISTRICTS §102—EDUCATION LAW CONSTRUED WITH TAX LAW.

Education Law, providing in sections 410-412 for school district tax on personal property "liable for tax," but nowhere defining property that is liable, is not an entirely separate and independent statute, but one to be interpreted and construed in connection with the Tax Law.

2. SCHOOLS AND SCHOOL DISTRICTS §102—PROPERTY PAYING INCOME TAX UNDER STATUTE EXEMPT FROM SCHOOL TAX.

Manufacturing corporations, within Emerson Act (adding article 9a to Tax Law) § 208, subd. 3, by payment of income tax under sections 215, 219h are exempt under section 219j, from school district tax provided for by Education Law, §§ 410-412, though Emerson Act does not specifically refer to or repeal any of the provisions of Education Law, since Education Law is to be construed in connection with Tax Law, and property exempted under Tax Law from all taxes in lieu of a percentage of income to be paid is no longer taxable even for school purposes.

3. CONSTITUTIONAL LAW §70(3)—WISDOM OF LAW IS FOR THE LEGISLATURE.

Courts have nothing to do with the wisdom of the law; such questions being for the Legislature.

4. STATUTES §188—CONSTRUCTION ACCORDING TO LANGUAGE EMPLOYED.

Statutes must be construed according to language employed, and where no ambiguity exists and the language is apt and the construction plain, courts cannot correct supposed defects, or depart from the language used in deference to supposed intent.

Separate certiorari proceedings by the People of the State of New York, on the relation of the Franklin Mills Company, on the relation of the Wiard Plow Company, on the relation of the Batavia Rubber Company, and on the relation of the Johnston Harvester Company, against Lewis D. Collins and others, as members of and comprising the Board of Education of Union Free School District No. 2, of Batavia, Genesee County, N. Y., to review the action of the Board of Education of Union Free School District No. 2, of Batavia, Genesee County, assessing personal property for school purposes. Relief granted relators.

Edward A. Washburn, of Batavia, for relators.

Bayard J. Stedman, of Batavia, for respondents.

WHEELER, J. The above-entitled proceedings come before this court by virtue of writs of certiorari to review the action of the board of education of Union Free School District No. 2 of Batavia in assessing the relators upon personal property for school tax purposes.

It is conceded the relator in each case is a manufacturing corporation within the definition of the so-called Emerson Act, section 208, subdivision 3, of chapter 726 of the Laws of 1917, adding article 9a to Tax Law (Consol. Laws, c. 60). The relators contend that by virtue of section 219j of that act they are exempted from any assessment on any personal property after the act in question took effect.

On the other hand, the respondents contend that the section re-

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ferred to does not operate to withdraw the personal property of manufacturing corporations from the operation of the general Education Law, which provides a method of assessing property and collecting taxes for educational purposes. The cases presented for decision raise purely questions of law, to wit, a judicial interpretation of the force and effect of the Emerson Act as regards the Education Law and the power to tax manufacturing corporations on personal property for school purposes.

The Emerson Act materially changed the system of taxation in the state. This legislation was enacted in furtherance of a report of a committee appointed to examine and report on the general tax situation in the state. This report recommended:

"(1) The abolition of the present tax on personal property; (2) the withdrawal of general business corporations from the provisions of section 182 of the tax law; and (3) the imposition of an income tax on individuals and general business corporations, including manufacturing corporations."

Pursuant to this report a bill was drafted and passed by the Legislature, which became chapter 726 of the Laws of 1917. This act imposes a tax of 3 per cent. on the net income of the corporation (section 215), and provides that from the revenue so received the state comptroller shall pay into the state treasury two-thirds of the amount, and distribute and pay the balance to the treasurers of the several counties where the corporations are located (section 219h).

Section 219j then provides:

*"After This Article Takes Effect Manufacturing and Mercantile Corporations Shall Not be Assessed on Any Personal Property. * * * After this article takes effect manufacturing and mercantile corporations shall not be assessed or taxed upon their capital stock as provided for in section twelve of this chapter, nor shall they be required to pay the franchise tax imposed by section 182 of this chapter."*

The language of the section quoted is broad and explicit, exempting manufacturing corporations from all assessment on any of its personal property. The respondents, however, contend that inasmuch as the act of 1917 does not in express terms refer to or repeal any of the provisions of the Education Law, and as the Education Law constitutes a separate and distinct chapter of the statutes of the state, it could not have been the intention of the Legislature by chapter 726 of the Laws of 1917 to in any manner modify or alter the provisions of the Education Law (Consol. Laws, c. 16), and that the personal property of manufacturing and mercantile corporations is still taxable for the purpose of raising revenue for educational purposes. To a certain extent the Education Law does constitute a separate and distinct chapter, but we shall presently see that certain sections of that law must necessarily be read and construed in connection with the Tax Law of the state, of which chapter 726 of the Laws of 1917 forms a part.

Section 410 of the Education Law provides that—

"After a tax shall have been voted by a district meeting, for a purpose arising during the current school year, the trustees shall assess it, and make out the tax list therefor and annex thereto their warrant for its collection."

Section 411 of the law provides that—

"School district taxes shall be apportioned by the trustees upon real estate within the boundaries of the district which shall not be by law exempt from taxation."

The second subdivision of the section provides that—

"The trustees shall also apportion the district taxes upon all persons residing in the district, and upon all corporations liable to taxation therein, for the personal estate owned by them and liable to taxation."

Section 412 provides, for the purpose of ascertaining the valuation of taxable property, the trustees shall ascertain it "so far as possible, from the last assessment roll of the town," etc.

[1] It is to be noted that by the Education Law the assessment against corporations is to be only on "the personal estate owned by them and liable for taxation." The Education Law nowhere undertakes to define what personal property of a corporation is "liable for taxation." It nowhere lists the personal property to be exempt. Consequently, in order to ascertain for what personal property a corporation may be assessed or taxed, we necessarily must consult and read the other statutes of the state, and particularly the general Tax Law of the state declaring the exemptions from taxation. It follows that the Education Law is not an entirely separate and independent statute, but one to be interpreted and construed in connection with the general Tax Law, and if by the general Tax Law certain property is legally exempted from all taxes in lieu of a percentage of income to be paid, then it remains no longer taxable even for school purposes. To illustrate: Real estate mortgages are required to pay a recording tax, and when paid the holder of the mortgage is entitled to exemption from personal tax on that security for the amount represented. We think no one would contend that the trustees of a school district could claim the right to consider such mortgages property "liable for taxation" because the act exempting them from further taxation contained no reference to the Education Law. What we say in reference to mortgages is equally true of real estate purchased by pension money.

[2] We therefore are of the opinion that, in order to limit the jurisdiction of school trustees to assess personal property of manufacturing corporations, it was not necessary for the Legislature to make specific reference to the Education Law; but it was sufficient by appropriate language to enlarge the exemption, and place the personal property of corporations in the list of property exempted. The act of 1917 simply limited the class of property against which school boards could assess taxes for school purposes. This the Legislature has power and authority to do; and the act is just as effective as though it had undertaken to amend the Education Law by an added section to that act itself. Indeed, it is manifest that the method pursued in the Emerson Act was the appropriate method of exempting corporate personal property, not only from general taxation, but from taxation for school purposes as well.

[3, 4] We find nothing ambiguous in the act of 1917, so far as the question now under consideration is concerned. It may be that the

statute works a hardship on certain school districts. As to the wisdom of the law the courts have nothing to do. The Legislature is the sole judge of those questions.

"All statutes must have a construction according to the language employed, and where no ambiguity exists, courts cannot correct supposed defects." *Benton v. Wickwire*, 54 N. Y. 226.

Where language is apt, and the construction plain, it cannot be departed from in deference to any supposed intent. *Matter of Village of Middletown*, 82 N. Y. 196; *Matter of Simmons*, 151 App. Div. 444, 135 N. Y. Supp. 921; *People v. Long Island R. R. Co.*, 194 N. Y. 130, 87 N. E. 79.

We are of the opinion the relators are entitled to the relief asked. So ordered.

WHITNEY et al. v. CONSIDINE INVESTING CO. et al.

(Supreme Court, Special Term, Westchester County. September 20, 1919.)

1. ADVERSE POSSESSION §79(3)—POSSESSION UNDER CERTIFICATE OF SALE FOR DRAINAGE ASSESSMENT NOT ADVERSE.

Adverse possession under a claim of title cannot be founded on a mere tax lease, such as a certificate of sale for years for drainage assessment.

2. QUIETING TITLE §12(7)—CONSTRUCTIVE POSSESSION FOLLOWING LEGAL TITLE SUFFICIENT TO SUSTAIN ACTION.

Constructive possession following legal title to fee is sufficient, in absence of hostile possession, for maintenance of action for cancellation, as a cloud on title, of certificate of sale of the land for years for drainage assessment.

3. DRAINS §88—ACQUIESCENCE WILL NOT PREVENT OWNER OF FEE FROM ASSAILING TITLE UNDER SALE FOR DRAINAGE ASSESSMENT.

Mere acquiescence will not create an estoppel in pais, and prevent the owner of the fee assailing title or interest under a certificate of sale of land for years for drainage assessment.

4. JUDGMENT §747(1/2)—CONCLUSIVENESS OF ORDER OF CONDEMNATION AS TO OWNERSHIP OF AWARD.

Final order in condemnation proceeding for part of land sold for years for drainage assessment does not bar action by owner of fee to cancel the certificate of sale for assessment and to determine ownership of award; title not being involved in a condemnation proceeding.

5. LIMITATION OF ACTIONS §60(10)—ACTION FOR REMOVAL OF CLOUD NOT BARRED WHILE OWNER IN POSSESSION.

Right of an owner in possession to maintain action to remove cloud is a continuing one, never barred by statute of limitations, while he remains such owner in possession.

6. DRAINS §88—PARTY ATTACKING SALE OF LAND FOR DRAINAGE ASSESSMENT MUST SHOW NONCOMPLIANCE WITH LAW.

Under Laws 1869, c. 888, § 13, declaring a certificate of sale for years for assessment for swamp drainage presumptive evidence of all facts stated, it is not enough for one attacking the certificates as a cloud on title, that the record does not show compliance with requirements of the statute, but he must prove noncompliance.

7. DRAINS §35—APPLICATION TO COUNTY JUDGE SUFFICIENT TO GIVE JURISDICTION IN DRAINAGE PROCEEDINGS.

There was no lack of jurisdiction in drainage proceedings because application was to county judge, and order appointing commissioner was

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by him, as provided by Laws 1869, c. 888, §§ 1, 2, though this was after the adding, by Laws 1871, c. 303, of section 20, declaring all powers and jurisdiction vested by the act in the county judge to be vested in the County Court; the intention being either that proceedings under the act should have the effect of court proceedings though by and before the county judge, or to vest the court with concurrent jurisdiction.

8. DRAINS ⇐35—ORDER BY COUNTY JUDGE IN DRAINAGE PROCEEDINGS PRESUMABLY ORDER OF COURT.

Assuming application to and order by the county judge, in swamp drainage proceeding, should have been to and by the County Court, the form may be disregarded, and it will be deemed, in the absence of proofs to the contrary, that it was a court proceeding and a court order, if at the time there was a term of the County Court in session.

9. DRAINS ⇐88—PRESUMPTION OF REGULARITY IN SALE FOR DRAINAGE ASSESSMENT.

The presumption of regularity in swamp drainage proceedings, arising by provision of Laws 1869, c. 888, § 18, from certificate of sale for assessment, extends, if necessary, to presumption of a term of the County Court being in session at time of application and order, in form, to and by the county judge.

10. DRAINS ⇐27—OWNER OF LAND NEED NOT JOIN IN PETITION FOR DRAINAGE OF SWAMP LANDS.

Under Laws 1869, c. 888, § 1, the owner need not join in petition for drainage of swamp lands; it being permissible to construe the word "and" as "or," to give a reasonable construction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, And.]

11. DRAINS ⇐28—PETITION NEED NOT SHOW PERSONS BENEFITED BY DRAINS DESIRED.

Petition under Laws 1869, c. 888, § 1, for drainage of swamp lands, required to state the owners of lands to be "affected," need not state who will be benefited, which can only be determined by the commissioners when assessing benefits; lands affected meaning those which it will be necessary to acquire for the drainage.

12. DRAINS ⇐32—DEFECTS IN COMMISSIONERS' OATH WERE IRREGULARITY.

Want of venue in the official oath of commissioners in drainage proceedings, provided for by Laws 1869, c. 888, § 3, is not a jurisdictional defect, but a mere irregularity, curable if objected to, and waived in the absence of objection.

13. DRAINS ⇐32—DELAY IN GIVING BOND OF COMMISSIONER'S TREASURER WAIVED.

Any delay in giving bond of treasurer of commission in a proceeding for drainage of swamp lands, provided for by Laws 1869, c. 888, § 3, was an irregularity, waived where all the parties proceeded to final order with knowledge when the bond was filed, and without objection.

14. DRAINS ⇐32—BOND OF COMMISSIONER'S TREASURER PROPERLY RAN TO PEOPLE.

Bond of commission's treasurer, in a drainage proceeding commenced before amendment of Laws 1869, c. 888, § 3, by Laws 1886, c. 636, § 3, being given after the amendment, properly ran to the people, instead of to the supervisor of the town.

15. DRAINS ⇐32—DEFECT IN MAP SHOWING SWAMP LAND DRAINAGE WAIVED.

Any defect in the map provided for in swamp drainage proceedings by Laws 1869, c. 888, §§ 6, 7, was a mere irregularity, which not being pointed out when approved and ordered filed by the court, was waived.

16. DRAINS ⇐88—DESCRIPTION OF LANDS IN NOTICE OF SALE FOR UNPAID ASSESSMENTS SUFFICIENT.

Description of land in publication of notice of sale for assessment for swamp drainage under Laws 1869, c. 888, § 13, held sufficient; it referring to filed map approved by court, under which it could be readily located.

17. DRAINS $\S$ 88—CERTIFICATE OF SALE CONSTITUTES AUTHORITY TO PURCHASER TO TAKE POSSESSION.

Provision of Laws 1869, c. 888, § 13, that certificate of sale for unpaid assessment for draining swamp lands shall authorize and empower the purchaser to take possession, does not mean that certificate shall in terms authorize purchaser, but merely that it shall constitute authority.

18. DRAINS $\S$ 88—THAT CERTIFICATE OF SALE CONTAINS UNAUTHORIZED PROVISION FOR LEASE DOES NOT INVALIDATE CERTIFICATE.

That commissioners exceed their authority under Laws 1869, c. 888, § 13, and in a certificate of sale for years of land for swamp land drainage assessment provide for a lease, and thereafter execute one, does not invalidate the certificate; but such provision and lease merely are void.

19. DRAINS $\S$ 88—RIGHTS OF PURCHASERS FOR YEARS ON SALE FOR ASSESSMENT THOSE OF LIFE TENANTS.

Under Laws 1869, c. 888, § 13, the rights of purchasers for years of land sold for assessment for swamp land drainage are those of a life tenant for such number of years; the land reverting at end of the period to the owner at the time of sale or his successor in interest.

20. EMINENT DOMAIN $\S$ 152(1)—COMPENSATION OF PURCHASERS FOR YEARS OF LAND SOLD UNDER DRAINAGE ASSESSMENTS.

Where land, sold for a term of years under Laws 1869, c. 888, § 13, for swamp land drainage assessment, is condemned, the purchaser for years is entitled to the income of the award for such years, and at end thereof the corpus goes to the reversioners.

Action by Constant F. Whitney and others against the Considine Investing Company and others to cancel certificate of sale for assessment under drainage acts as a cloud on title and to determine ownership of award for portion of land condemned by state. Judgment in accordance with opinion.

See, also, 176 App. Div. 157, 162 N. Y. Supp. 507; 104 Misc. Rep. 688, 173 N. Y. Supp. 66.

Merrian & Ticknor, of Mt. Kisco, for plaintiffs.

Rockwood & Lark, of New York City, for defendants.

YOUNG, J. This action is brought to cancel a certificate of sale given under the drainage acts as a cloud on the title to certain lands in Yorktown, and to determine the ownership of an award for a portion of such lands condemned by the state.

In 1883 Silas C. Whitney was the owner of the premises in question. On November 5th of that year a petition under the Drainage Act (Laws 1869, c. 888) was presented to the county judge of Westchester county, who thereupon made an order appointing commissioners. A motion was made for the removal of one of the commissioners, which was denied by the county judge for want of power, and Whitney appealed to the General Term, which reversed the order of the county judge. *Matter of Underhill*, 32 Hun, 449. The commissioners thereafter made and filed their report, determining the necessity of such drainage, and petitioned the Supreme Court for the appointment of commissioners of appraisal of the easement over the land of Whitney necessary to be acquired. An order was thereupon made on December 12, 1885, appointing such commissioners of appraisal, who thereafter made their report, awarding him \$225 for the easement taken, which

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

was confirmed by an order made June 12, 1886. Pursuant to this order the amount of the award was paid to Whitney and his receipt taken, which is dated August 25, 1886. The drain commissioners thereafter made and filed their statement of the costs, expenses, etc., and levied an assessment upon the land deemed benefited by the drainage; Whitney's assessment being \$2,000.

Pursuant to the statute, Whitney appealed to the County Court from the decision of the commissioners as to such assessment, and on January 19, 1889, an order was made by the County Court granting leave to the commissioners to file the map required by the statute nunc pro tunc as of January 11, 1898, within 10 days from the date of the order, on payment to the appellant of certain costs, and upon such payment and filing the determination appealed from was confirmed. The map was filed January 21, 1889, the costs paid, and a receipt of Whitney's counsel therefor taken. Whitney thereupon took an appeal from the order of confirmation to the General Term of the Supreme Court, which affirmed the same. *Matter of Underhill*, 53 Hun, 633, 6 N. Y. Supp. 716.

It is asserted by counsel for both parties to this action that Whitney's appeal to the General Term was never prosecuted, but as appears from one report the appeal determined July 2, 1889, was from "an order affirming report of drainage commissioners." 53 Hun, 633, 6 N. Y. Supp. 716. The other report states that Whitney "appealed to the County Court from the acts and determinations of the commissioners and from the decision of the County Court sustaining the validity of the proceeding" to the General Term. It is quite evident, therefore, that Whitney did prosecute his appeal, and that it was determined adversely to his contention. I am further confirmed in this by referring to the opinions given in both courts; the same question being discussed in both. It also appears that the same counsel who argued the appeal in the General Term (53 Hun, 633, 6 N. Y. Supp. 716), on July 25, 1889, filed objections to the taxation of the costs of such appeal upon the ground that the statute provided that the appeal should be heard as an appeal from an order. However, as Whitney did not pay the assessment, the commissioners published notice of sale for November 9, 1889, and sold the land assessed to Edward C. Neil for 999 years. This certificate, as subsequently amended, is the basis of defendant's claim to the property, for, although a lease based upon this was subsequently made, it is of no importance, because it is not provided for in the statute.

On February 27, 1895, Silas C. Whitney conveyed his homestead property to his two sons, who are plaintiffs in this action. The description of the property does not include the land in question, but bounds the property conveyed on the east and south by "O'Neill's swamp," by which name the land in controversy had come to be generally known. Edward C. Neill died September 4, 1907, and letters of administration upon his estate were duly issued. Silas C. Whitney died, and the plaintiffs in this action are his heirs at law.

The defendant Considine Investing Company claims through mesne assignments of the certificate of sale and lease; the other defendants

claim interests in portions of the property derived from the defendant Considine Investing Company.

About 1912 a portion of this land was acquired by the state by condemnation proceedings. Commissioners of appraisal were appointed and made their awards. Plaintiffs were parties to the proceeding, and a map was filed by Constant F. Whitney, which showed the premises in question, not as belonging to plaintiff, but as "land of N. Tekulsky" (swamp), and bore this notation:

"The location of the boundary between lands of Whitney and lands of Tekulsky, by the courses here shown, is approximate only; there being no definite data or monuments from which this said boundary can be properly located. The courses here shown were assumed for the purpose of computing the area of the Whitney property."

The award was paid to defendant Considine Investing Company upon condition that it give a bond to indemnify the state against plaintiffs' claim. It also appears from the testimony that many disputes occurred between Constant F. Whitney and Neill as to the location of the boundary line between the properties, but no question seems to have been raised by Whitney that Neill's title or interest was not good. There is also testimony that Neill and his successors in interest exercised various acts of ownership over the premises, or some portion thereof, such as the erection of sale signs, pasturing of cattle, payment of taxes, etc., and that defendant Considine Investing Company also leased and conveyed a portion of the property, upon which a one-story building was erected.

The defendants assert the validity of the certificate of sale and of the proceedings upon which it is based, claim adverse possession for more than 20 years, set up the 10 and 20 year statute of limitations, and allege estoppel and that plaintiffs are not in possession and cannot maintain the action.

[1] No adverse possession by defendants has been shown. Concededly their only claim of title is under the certificate of sale. They cannot under that instrument claim a fee. Their possession is not, therefore, within the meaning of the Code, adverse or hostile to plaintiffs' title, but is in recognition thereof. It has been frequently held that adverse possession under a claim of title cannot be founded upon a mere tax lease. *Miller v. Warren*, 94 App. Div. 192, 87 N. Y. Supp. 1011, affirmed 182 N. Y. 539, 75 N. E. 1131.

[2] In my opinion the constructive possession following the legal title in plaintiffs, there being no actual hostile occupancy shown, is sufficient to enable them to maintain this action. *Bliss v. Johnson*, 94 N. Y. 235; *Whitman v. City of New York*, 85 App. Div. 468, 83 N. Y. Supp. 465.

[3-5] I do not think any question of estoppel in the ordinary sense arises in this action. Mere acquiescence will not create an estoppel in pais, and prevent plaintiffs from assailing defendants' title or interest under the certificate. It is also clear that the final order in the condemnation proceedings presents no bar to plaintiffs' right to maintain this action, for no question of title was or could be involved in

that proceeding. See *N. Y. C. & H. R. Co. v. Mathews*, 144 App. Div. 732, 129 N. Y. Supp. 828. Whether the final order in the drainage proceedings and the order of affirmance of the General Term constitute an estoppel of record or *res adjudicata* is a question which involves the validity of the proceedings and the certificate of sale, and will be considered in that connection. Neither can the defendants successfully invoke the statute of limitations, for it is well settled that the right of an owner in possession to invoke the aid of a court of equity to remove a cloud on his title is a continuing right, never barred by the statute of limitations while he is such owner in possession. *Ford v. Clendenin*, 215 N. Y. 10, 16, 109 N. E. 124, Ann. Cas. 1917A, 658, and cases cited.

With these preliminary questions disposed of, the remaining question is whether the certificate in question and the drainage proceeding from which it resulted are valid, and, if so, the rights of the parties in the land and the award. The statute which is applicable to the proceeding in question is chapter 888, Laws of 1869, as amended by various enactments.

Section 1 provides that any person owning or possessing swamp lands and desiring to drain the same, and "any person or persons who shall deem it necessary for the public health" that any such swamp shall be drained, might present a petition, duly verified, to the county judge of the county in which such lands lie.

Section 2 provides that the county judge, if satisfied that such drainage is necessary, shall thereupon appoint a commission of three persons, freeholders in the county where the lands are situated, to hear and determine whether it is necessary for the public health that such lands be drained.

Section 3 provides for the making and filing of an official oath, the organization of the commission, and appointment of a chairman and treasurer. The original act provided that the treasurer should, when the amounts to be collected by him exceeded \$500, give a bond with sufficient sureties to the supervisor of the town, to be approved by the county judge, for the faithful performance of his duties. A subsequent amendment, made in 1886, however, provided that the bond should be to the people of the state of New York. Chapter 636.

Section 4 provides that after notice to the petitioner and the parties named in the petition, in such manner as they shall order, the commissioners should proceed by personal view or otherwise to determine the necessity for drainage.

Section 5 provides that the commissioners file in the county clerk's office their determination and give notice of such filing by publishing at least two times "in some newspaper printed in said town in which the lands are situated, or if there be no such newspaper, then in the newspaper printed in the nearest town thereto," and by mailing a copy of the notice so printed to the addresses of each person interested in the lands not personally served. It also provided for an appeal to the county judge by any party aggrieved by giving written notice of appeal to the commissioners within 10 days after the last publication of notice, and that the county judge should thereupon, on motion of

either party and on at least 10 days' notice to the appellant, proceed to hear the appeal and determine the same.

Section 6 provides that, if it be determined by the commissioners or the county judge that such drainage is necessary for the public health, the commissioners should cause an accurate survey and a map of the lands to be made, showing all the lands proposed to be drained, etc.

Section 7 provides that they shall, on completion of such map, certify the same and cause it to be filed in the county clerk's office.

Section 8 relates to the fees and expenses of the commission and the raising of funds.

Section 9 provides for the payment to the owner of damages for the land taken, and if the commissioners cannot agree that they shall proceed to acquire title to an easement over such lands by condemnation.

Section 10 provides for the making by the commission of a detailed statement of the costs, expenses, land damages, and compensations, and that they shall determine the sum to be assessed and apportion the same among the several owners or occupants of lands benefited by the drainage in proportion to the amount of benefit received. It also provides that a copy of such statement be filed in the county clerk's office and that written or printed notice be given to each person whose lands are assessed. It further provides that any person feeling himself aggrieved may appeal from the decision of the commissioners to the court, by serving a notice of said appeal within 10 days after service upon him of the notice of filing such statement, and within 10 days thereafter make a full statement of the ground of his appeal and file a certified copy thereof in the county clerk's office, and present the said statement to the court, which should thereupon proceed without further delay than such as was necessary to give proper notice to the parties interested to hear and finally determine the appeal.

Section 11 provides that within 30 days after filing the above statement, or if appealed from within 30 days after notice to the commissioners of the final determination of the appeal, they shall levy the assessments provided for and proceed to collect the same, etc.

Section 12 provides for an accounting and audit of the commissioners' collections and disbursements.

Section 13 provides that if any of the assessments are not paid within 30 days after the same shall have been made and demanded from the owner of the land assessed, etc., the commissioners shall make a proper description of the land on which the unpaid assessment is made, and cause the assessment and description to be published for 6 weeks in a paper published in the town, or, if none, in one published in the nearest town to the land, together with a notice that if the assessment is not paid, with the expense of advertising, on or before a certain day designated, not less than 6 weeks from the first publication, the lands will be sold at public auction to the person who shall take them for the shortest period and pay the assessment, expenses, and interest, and that on the day designated, or an adjourned

day, the premises shall be sold, and upon receiving the money bid the commissioners shall give the purchaser a certificate of such sale, which shall be presumptive evidence of all the facts stated, and shall be recorded in the office of the county clerk as evidence of mortgage sales under the statute is recorded—

"and the said certificate shall authorize and empower the purchaser therein named or his assignee (such assignment to be in writing duly acknowledged and in like manner recorded) on the 1st day of April, July, October or January then next to enter into and take possession of the said land so sold and to use, occupy, and enjoy the same with the rights of a life tenant during the time for which he shall have purchased the same, unless the same shall be deemed as herein provided."

Section 14 provides for redemption from the sale upon certain terms within 15 months from the date of sale.

All subsequent sections, except section 20, contain provisions not material to the controversy here. Section 20, which was added by the Laws of 1871, chapter 303, provides as follows:

"All the powers and jurisdiction vested by this act, in the county judge or in the county judge and justices of the sessions when associated with such officer, are hereby vested in the County Court of the county in which such swamp lands or some portion of them are situated, and all proceedings heretofore commenced before the county judge or county judge and justices of sessions when associated with such officer and now pending and undetermined, are transferred to and vested in the County Court of the county in which such proceedings were so commenced and pending, with full power and jurisdiction in such court to conduct such proceedings to a final determination subject to the provisions of the act hereby amended. * * *

Plaintiff contends that the drainage proceedings, resulting in the certificate of sale in question, contained many defects, all of which they assert are jurisdictional and render the certificate and defendants' title thereunder invalid. These defects may be summarized as follows:

- (1) That the petition by which the proceeding was commenced was addressed to the county judge, and the order thereupon was by the county judge, and not the County Court, as required by the statute.
- (2) That the owner of the lands affected did not join in the petition.
- (3) That the names of the owners of land to be affected (benefited) were not shown.
- (4) That the oath of the commissioners was void, for the reason that it contained no venue.
- (5) That the treasurer's bond was not given at the time required, and when given was to the people of the state of New York, and not to the supervisor, as required by the statute.
- (6) That no notice was given to the parties named in the petition before the commissioners made their determination.
- (7) That notice of filing the commissioners' determination was not given in the manner provided by statute.
- (8) That no map from an accurate survey was prepared, and that the one filed did not comply with the statute.
- (9) That there is no record proof that a demand was made upon the owner for payment of the assessment.

(10) That no proper description of the land was published.

(11) That there is no proof that the notice of sale was published for the statutory period, or that it was published at all, the affidavit being unverified, and that it was not published in the proper town.

(12) That the certificate did not contain an authorization to the purchaser to take possession at the time required by statute.

(13). That the certificate provided for a lease after 15 months, which was unauthorized by the statute.

[8] The certificate is made by the statute presumptive evidence of the facts stated. This disposes of some of plaintiffs' objections, for it is incumbent upon them to prove the defects. It is not enough that the record does not show that certain requirements of the statute were not complied with. They must prove that they were not so complied with.

The sixth, seventh, ninth, and eleventh objections above conflict with this principle. In the absence of proof to the contrary, it is presumed that notice was given by the commissioners before making their determination, that notice of filing and proper publication was made, that there was due demand of payment of the assessment, and that the notice was properly published for the requisite time and in the town required. It might well be that Bedford was the nearest town containing a newspaper at the time it was there published, and Peekskill at the time of the subsequent publication the nearest town then containing a newspaper.

[7] The original application and the order made thereon was in strict compliance with the language of the statute then in force. It is true that section 20, added in 1871, vested jurisdiction in the County Court; but at the time it was so added no amendment was made to the provisions of the statute requiring applications to be made to the county judge. Indeed, it seems to have been the intent of the Legislature to retain all portions of the statute in their original form, so far as they specified the county judge as the particular judicial officer to conduct the proceeding. The same act which added section 20 to the statute also amended sections 6, 10, and 16, and continued the procedure before the county judge. The apparent confusion thus resulting may, I think, be cleared up by construing the statute as a whole in either of two ways: (1) That the Legislature intended by section 20 that all proceedings under the act should be and have the effect of court proceedings, although conducted by and before the county judge, who was the presiding judicial officer of the County Court; (2) that it did not divest and transfer the power and jurisdiction of the county judge to the County Court, but simply vested that court with concurrent jurisdiction. Under either construction, the procedure here attacked was proper, and jurisdiction was acquired. It was not until 1886 (chapter 636) that the Legislature amended the statute so as to require all proceedings to be in the County Court, and changed the various sections by substituting the "County Court" for the "county judge." In the proceeding in question all subsequent applications and orders were made in the County Court.

[8, 9] But there is a further answer to plaintiffs' contention. As-

suming that the original application should have been addressed to the County Court, and that the order made thereupon should have been a court order, the mere form of the papers may be disregarded. If at the time of such application and order there was a term of the County Court in session, it will be deemed, in the absence of proof to the contrary, that it was a court proceeding and a court order. *Aiken v. Aiken*, 96 Misc. Rep. 561, 562, 160 N. Y. Supp. 876, and cases cited; *Sweeney v. O'Dwyer*, 197 N. Y. 499, 503, 90 N. E. 1129. As there is no proof to the contrary, the statutory presumption of regularity arising from the certificate of sale obtains.

[10] The owner of the land is not by the statute required to join in the petition. The statute simply provides that any person owning swamp lands may present the petition, but it also provides, "and any person or persons who shall deem it necessary for the public health" that such lands be drained may present the petition. In my opinion that is the correct meaning of the statute. If necessary, the word "and" may be construed "or," in order to give a reasonable construction to this statute. See *People v. Frudenberg*, 209 N. Y. 218, 220, 103 N. E. 166, and cases cited.

[11] It was also unnecessary to show the names of the owners who will be benefited by the drainage. The word "affected," as used in this section, clearly means the lands which it will be necessary to acquire for the drainage. The owners or persons who will be benefited by the improvement can only be determined by the commissioners when the time for making the assessments for benefits arises, as provided in the later provisions of the act.

[12] I do not think the want of venue contained in the commissioners' official oath is anything more than an irregularity, which might have been cured, if objected to, but was waived by failure to object. I think there is a distinction between an official oath, such as required here, and the affidavit which is required to be annexed to a tax roll, and which the courts have held must comply strictly with the statute. It seems to me that the oath required by this statute is similar to that required of a referee, a juror, or arbitrator, and it has been held that want of such an oath is waived by failure to take timely objection. See *Collinson v. Wier*, 91 Misc. Rep. 501, 504, 154 N. Y. Supp. 951, and cases cited. I do not, therefore, think that the want of venue on the official oath of the commissioners constituted a jurisdictional defect.

[13, 14] There is no proof in the case that the treasurer's bond was not given seasonably. The statute provides that he shall, when the amount to be collected or received exceeds \$500, give a bond. No particular time is mentioned. But in any event, if not given at the proper time, it was a mere irregularity, which might be waived, and in my opinion was waived, because the parties all proceeded to a final order in the proceeding with full knowledge of the time when such bond was filed and without objection. The fact that the bond was made to the people of the state of New York, instead of to the supervisor of the town, is not a defect at all, but was in strict compliance with the statute in force at the time it was given. It is true

the original statute required it to run to the supervisor, but under the amendment made in 1886 (chapter 636) it was provided that the bond should be to the people. As this bond was made and filed in 1889, it was therefore in proper form.

[15] I think the map and survey was sufficient. It was before the County Court on the appeal by Whitney from the determination of the commissioners fixing the assessment and was then approved by Judge Mills (then county judge) and ordered filed nunc pro tunc on payment of certain costs to Whitney's counsel, and thereupon the determination of the commissioners was confirmed, the costs were paid and accepted by Whitney's counsel and on appeal to the General Term this order was affirmed as above noted. Any defect in the map was a mere irregularity, and, if not then pointed out, was waived. I think, therefore, that Whitney was clearly concluded as to this defect by the final order, and that the plaintiffs here, his successors in interest, are equally concluded.

[16] I also think the description of the land is sufficient. It refers to the map filed and approved by the court, and I think under it the land could be readily located.

[17] The objection that the certificate of sale did not in terms authorize the purchasers to take possession at the times mentioned in the statute is not well taken. In my opinion the statute did not require any such statement in the certificate itself. The true meaning and intent of the language used is in my opinion that the certificate of sale to the purchaser should furnish sufficient authority for him to take such possession. If the Legislature had intended to require as a condition of the validity of the certificate that such authorization should be stated in the certificate itself, it would have expressed such intent in clear and appropriate language.

[18] The mere fact that the commissioners exceeded their authority, and undertook to provide in the certificate of sale for a lease, and thereafter executed such lease, does not invalidate the entire certificate. The provision in question is, of course, void, as is also the lease; but no claim is made by defendants under either. As this provision of the certificate may be stricken therefrom, and the lease disregarded, I do not see that it is of any importance.

In considering these objections, I have not been unmindful of the general rule that ordinarily statutes of this character are to be strictly construed, and that substantial compliance is required to support a certificate of sale. But this statute is somewhat different from those considered in most of the cases cited in plaintiff's brief. Ordinarily, the assessing officers act without any supervision by higher authority during the course of their proceedings and until their final determination, which is then, and not until then, subject to review by the courts. In the statute under consideration, however, practically every step taken was required to have and did have the approval and direction of the County Court. It is also provided in this statute:

"That the County Court may at any time correct any manifest error in any of the proceedings under this act when such correction shall be in furtherance of justice, and the said court may allow such amendments and make such or-

ders and impose such terms as shall promote the objects of this act and be equitable to all parties." Section 14.

It seems to me, in view of these provisions, that the Legislature intended a somewhat liberal construction of the provisions of the statute to accomplish the end in view. I apprehend, however, that this would not justify a noncompliance by the commissioners with jurisdictional requirements; but it seems to me that all of the alleged defects pointed out by the plaintiffs were such as might have been, during the course of the proceeding itself, amended upon being brought to the attention of the court by any party claiming to be prejudiced or affected thereby. By failing so to do the parties in my opinion waived such defects. These defects were therefore mere irregularities, and not jurisdictional. None of the grounds of objection now asserted were laid as grounds for Whitney's appeal to the County Court from the final determination of the commissioners, although the statute required a statement of the grounds upon which the appeal was based (section 10), and it was held by the County Court upon such appeal that no objection not stated in the grounds filed would be considered by the court. See opinion of Mills, C. J., filed.

The proceeding was begun, Whitney appeared at every stage thereof, contested it bitterly, and a final determination was made, was approved by the County Court, and confirmed, in spite of opposition by counsel appearing for Whitney; an appeal was taken to the General Term of the Supreme Court, and the order of the County Court affirmed. It seems to me quite clear that the commissioners, the County Court, and the General Term acquired jurisdiction of the parties and of the subject-matter, and that Whitney and his successors in interest, the plaintiffs here, were therefore concluded by the final order in the proceeding. To hold otherwise would be in my opinion in effect to review and reverse the final determination of the County Court in a special proceeding of which it had jurisdiction, both of the parties and subject-matter. I think this court has no such power. Certainly it has no right or authority to set aside or reverse the orders and decrees of the former General Term. I therefore hold that the certificate of sale was valid, and it only remains to consider the rights of the parties thereunder.

[19] The statute under which it was made is somewhat unique. It provides that such certificate shall authorize and empower the purchaser therein named, or his assignee, at the times mentioned in the statute, "to enter into and take possession of the said land so sold and to use, occupy and enjoy the same with the rights of a life tenant during the term for which he shall have purchased the same," unless redeemed. The certificate, therefore, gives the defendants and their successors in interest a right to the possession and use of the land for the balance of the term of the certificate, 999 years, with the same rights and privileges which a life tenant would have enjoyed, and at the termination of this estate the land reverts to plaintiffs' successors in interest.

[20] The rights of the parties to the award are similar. Defendant Considine Investing Company is entitled to the income for the re-

mainder of the term, and the corpus of the award then goes to plaintiffs' successors in interest. The award must therefore be paid into court, unless defendant Considine Investing Company consents to accept a gross sum in lieu of its interest, in which event a computation may be made of the sums to which plaintiffs and defendant Considine Investing Company are respectively entitled.

Decision and judgment may be settled on notice.

(108 Misc. Rep. 705)

NELSON et al. v. NELSON et al.

(Supreme Court, Special Term, Westchester County. September 20, 1919.)

1. STATUTES $\S$ 239—IN DEROGATION OF COMMON LAW STRICTLY CONSTRUED.

A statute in derogation of the common law must be strictly construed.

2. DESCENT AND DISTRIBUTION $\S$ 14—DISTRIBUTION OF PROPERTY COMING TO INTESTATE FROM FATHER BY DEVISE, GIFT, OR DESCENT.

Under Decedent Estate Law, $\S$ 88, providing, if there is no heir entitled to take under preceding sections, the inheritance, if it shall have come to the intestate on the part of the father, shall descend in certain specified ways, the property must have been an inheritance when it came to the intestate, and must have come to intestate on the part of intestate's father directly, either by devise, gift, or descent.

3. DESCENT AND DISTRIBUTION $\S$ 12—PURCHASE AT PARTITION SALE OF FATHER'S ESTATE VESTS TITLE IN DAUGHTER BY PURCHASE AND NOT BY DESCENT.

Where a daughter inherited from her father as tenant in common with her brother and others, and her brother bid in the land on partition sale, the deed being made to him and her, they thereby becoming seized in fee as tenants in common of the entire property, the brother's share of which, on his death intestate, descended to her, no part of the land descended to her from her father, within the contemplation of Decedent Estate Law, $\S$ 88, so as to exclude the relatives of her mother from sharing therein on her death intestate, since the effect of the partition was to vest her undivided half in her by purchase, and not by descent.

Action for partition by William H. Nelson and another against George H. Nelson and others. Interlocutory judgment directed in accordance with the opinion.

Ticknor & Ticknor, of Mt. Kisco, for plaintiffs.

P. A. Anderson, of Peekskill, for defendant Louis Dean and others.

Thomas F. Keogh, of New York City, for defendant Newey.

Geller, Rolston & Horan, of New York City, for special guardian.

YOUNG, J. This action is brought for the partition of certain real property, and involves a dispute as to the respective shares of the several tenants in common. The property was formerly owned by John B. Sarles and Reuben B. Sarles, his brother, as tenants in common. John B. Sarles married Antoinette (or Annette) Waters. He died in 1885, seized of a half interest in the property, and leaving William Henry and Mary Ella Sarles, his children and heirs at law, who succeeded to his one-half interest in the property. Reuben died in December, 1900, intestate and without issue, and his one-half interest in the property descended one-half to his sister Prudy

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Nelson, and the remaining half of his interest to William Henry and Mary Ella Sarles.

In 1901 a partition suit was brought; the property was sold thereunder and bid in by William Henry Sarles, but the referee's deed was made to William Henry and Mary Ella Sarles, so that they became seized in fee of the entire property as tenants in common, each owning a one-half interest. William Henry Sarles died intestate and without issue on February 4, 1919, and his one-half interest in the property thereupon descended to his sister, Mary Ella Sarles, so that when she died on March 1, 1919, she was seized in fee of the entire property.

Antoinette Waters, the wife of John B. Sarles, the father of Mary Ella, had two sisters, Janie Marshall and Almira Wright. Janie Marshall died leaving one child, Laura Marshall, who also died before Mary Ella Sarles. Almira Wright died leaving four children—Edward Wright, Bell Hoag, Alice Curry, and Flora Dean. Edward Wright died intestate leaving a daughter, Laura Newey. Bell Hoag also died intestate leaving two children—Wright Hoag and Flora Hoag. Alice Curry died intestate and without issue, and Flora Dean died intestate leaving two children—Louis Dean and Flora Dean.

The controversy between the parties arises under the provisions of section 88 of the Decedent Estate Law (Consol. Laws, c. 13), which, so far as material, provides as follows:

"If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of the father, shall descend:

"1. To the brothers and sisters of the father of the intestate in equal shares, if all be living.

"2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

"3. If all such brothers and sisters shall have died, to their descendants.

"4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, or if all have died, to their descendants. But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate."

The expression "where the inheritance shall come to the intestate on the part of the father," or "mother," as the case may be, is defined to include every case where the inheritance shall have come to the intestate by devise, gift, or descent from the parent referred to or from any relative of the blood of such parent. Decedent Estate Law, § 80. It has also been held that, where an intestate dies seized of land which he has inherited from his brother, such land will not be regarded as having come to the estate on the part of his father, because of the fact that the intestate's brother inherited the land from

his father, as this section does not require that the estate be traced back further than the immediate ancestor of the person last seized. *Hyatt v. Pugsley*, 33 Barb. 373.

The plaintiff and the defendants George and Henry Nelson are descendants of Prudy K. Nelson, a sister of the father of Mary Ella Sarles. The defendants Laura Newey, Wright Hoag, Flora Hoag, Louis Dean, and Flora Dean are descendants of Almira Wright, a sister of the mother of Mary Ella Sarles. It is contended by plaintiff and the guardian ad litem for the defendants Nelson that a portion of the property came to the intestate on the part of her father, and that therefore the relatives on the mother's side are excluded from any share in that portion. The other parties to the action contend that by reason of the partition suit the intestate acquired a one-half interest by purchase, and not by descent from her father, and that the other one-half interest she acquired by descent from her brother, so that none of the property came to her on the part of her father, and that by virtue of the statute above quoted the mother's relatives are entitled to share in the property. As will be seen, therefore, the case turns upon the question as to the effect of the partition suit.

I do not think the cases cited by plaintiff's counsel support his contention. The decision in *Hartman's Estate*, 4 Rawle (Pa.) 39, rested upon the fact that a distributee purchased the property at an appraised value pursuant to the provisions of a codicil giving him the privilege, and he was held to have taken under the will as a gratuitous devisee. But the law of Pennsylvania seems to be that where a distributee elects to take the land, and it is not sold as provided by the will, he takes a new acquisition. *Simpson v. Kelso*, 8 Watts (Pa.) 247; *Burr v. Sim*, 1 Whart. (Pa.) 252, 29 Am. Dec. 48.

Brower v. Hunt, 18 Ohio St. 311, merely decides that where, pursuant to directions in a father's will, an actual partition of lands was made by commissioners among his children, two of whom thereafter exchanged the parcels allotted to them by conveyance, reciting, but actually without any, money consideration, and one of them thereafter died intestate, the parcel conveyed to him in this exchange was acquired by purchase and not by descent. It has now been definitely decided in Ohio, however, that a purchaser at a sheriff's sale in partition takes by purchase only the shares of his cotenants, and that the partition does not change the status of his own share, which he still holds by descent. *Lawson v. Townley*, 90 Ohio St. 67, 106 N. E. 780.

The Ohio statutes relating to partition are somewhat different from our own. In a partition proceeding in that state commissioners are appointed, who make actual partition, if possible. If this cannot be done, they report the fact, with the appraised value of the property, and any of the parties may elect to take the land at such value upon payment to the other parties of their proportion. If no such election is made, an order of sale to the sheriff is issued by the court and a public sale is had; and where a party purchases he receipts to the sheriff for his own share of the purchase money and pays the balance in cash.

In the case last cited the court did not follow or comment upon the rule intimated in *Freeman v. Allen*, 17 Ohio St. 527. In that case the

court distinguished between the election of a party to take the property at its appraised value and his purchase at public sale, saying:

"A plain distinction is made between the two cases in the amount of money to be paid. In the case of a sale—which may be to any one—full payment is required. But in case of an election—which can be made by parties only—payment of the amount due to the other parties is all that is required. The theory of the statute would seem to be that upon a sale the entire title may pass to the purchaser, but that on an election by a party only so much passes as is not already vested in him; or, in other words, that the election operates, in consideration of money paid, to extinguish the title of all parties except that of the party taking it. The party who elects to take the land is thus left with a title cast upon him by law to the extent of his inheritance, and with the residue of the title to the full estate perfected by his own act. It follows that his title comes in part by descent, and in part by purchase."

In Indiana, however, it has been held that a widow who purchases at a commissioner's sale in partition proceedings land of which her husband died seized, paying no money, but assuming a mortgage and receipting for her distributive share of her deceased husband's estate, takes by purchase and not by descent. *Spencer v. McGanagle*, 107 Ind. 410, 8 N. E. 266.

[1, 2] So far as I have been able to learn, Ohio and Indiana are the only states whose courts have passed upon the specific question involved in the case at bar. Decisions in other states are, of course, dependent largely upon their statutes and the policy of their law. How far the courts of this state will follow them depends upon the extent to which rulings coincide with the policy of our own law. In determining the policy in this case, we may start with the proposition that the statute involved is in derogation of the common law, and must therefore be strictly construed. The property must have been an inheritance when it came to the intestate, and it must have come to her on the part of her father directly, either by devise, gift, or descent. *Kidney v. Waite*, 178 App. Div. 260, 165 N. Y. Supp. 671.

In *Champlin v. Baldwin*, 1 Paige, 562, it was held that property did not come to a daughter by descent from her mother, where it was purchased for her by her father with moneys belonging to her deceased mother. In *Nicholson v. Halsey*, 1 Johns. Ch. 417, a daughter was held to have acquired a legal estate by purchase to lands for which her father had paid, but received no conveyance, and which were thereafter conveyed to her by one who had taken title thereto after her father's death in trust for her benefit.

It has also been held in this state that, where actual partition of land is made between heirs, the character of the part set off to each heir is not changed by reason of the partition, and that the estate in such parcels is derived, not from the decree, but by descent. *Adams v. Smith*, 20 Abb. N. C. 60; *Conkling v. Brown*, 8 Abb. Prac. (N. S.) 345.

These decisions, while they do not involve the precise question here presented, illustrate how closely the courts have construed this statute. The question is purely legal, and its solution does not depend upon equitable considerations. In the language of Lord Mansfield, quoted

in *Champlin v. Baldwin*, *supra*, "What equity has one set of heirs more than another?"

Did the share of this property which originally came to Mary Ella Sarles on the part of her father so continue within the meaning of the statute until her death, or did the partition sale operate to extinguish her title by descent and create a title in her by purchase? Of course, if the partition sale was nothing more in legal effect than a means of purchase of the outstanding titles, other than her own, if in law it had no other effect than a mere division of the estate, the question is at once solved. But it seems to me that the sale in partition went much further than this. It is, of course, true that the real purpose of a partition suit is to divide the land in specie among the cotenants, and if that is impossible to sell it and divide its proceeds. What, then, is the result of such a sale? The realty is undoubtedly converted into personalty, and is consequently no longer an inheritance. In this case, whether the money arising from that conversion was used in part payment of the purchase price, or whether the purchase price was otherwise paid, it seems to me that what Mary Ella Sarles acquired by her purchase at the sale was so acquired independently of any right or interest which had descended from her father. She bought in competition with the whole world, with no other right to purchase than was enjoyed by a mere stranger to the title. She undoubtedly had an absolute right to sell her lands and convert them into money, and thus destroy the ancestral nature of the estate and break the line of descent, even though she thereafter repurchased the same lands. Clearly heirs at law have no vested right in their ancestors' property which must be preserved inviolate for their benefit. In my opinion the partition sale effected precisely the same result. Her ancestral real estate was converted into money, and the line of descent broken. It also seems clear that after the partition sale the only property which she possessed which came directly from her father was her share in the proceeds of sale. It seems equally clear that the like share in the real property could not also be said to have come directly from her father.

In actual partition the division of the land itself and the allotment and transfer of title of portions equal to the respective shares of the tenants in common therein is confined exclusively to such tenants. No stranger to the title may obtain through such a proceeding any interest in the property. On the other hand, at a partition sale the entire property and the title thereto is thrown upon the market, and he who will, be he tenant in common or otherwise, may purchase. In other words, a tenant in common who purchases stands in no better nor worse condition at the sale, by reason of his tenancy than a stranger. He secures through his purchase the same thing, in the same way, upon the same terms and conditions, and by virtue of provisions of the same decree. Clearly a stranger purchasing at such sale acquires his title by purchase. What process of reasoning compels the application of a different rule to the purchase by a tenant in common?

The mere fact that one of the tenants in common bids in the property at the sale and takes a referee's deed does not make him any the less a purchaser because he may pay on account of the purchase price the

portion of the proceeds of sale representing his share or interest in the property. It must be borne in mind, although it is usual in partition suits to allow the tenant in common who purchases at the sale a deduction from the purchase price equivalent to the amount of his share in the proceeds of sale, he has no absolute right to such deduction. In theory he pays the entire purchase price, obtains his deed, and upon distribution receives his share of the net proceeds. As far as appears from the record in the partition suit referred to, William Henry and Mary Ella Sarles paid their purchase money, received their deed, and subsequently their share in the proceeds of sale.

It will also be observed that, although William Henry Sarles was the purchaser at the sale, the referee's deed ran to him and Mary Ella. Whether he bid in the property at the sale for himself and his sister, or whether she subsequently, and prior to the execution of the deed, purchased from him a half interest and took an assignment thereof, does not appear from the record, and is really of no importance. If the referee's deed, however, had been to William Henry Sarles, and Mary Ella Sarles had then purchased from him and taken a deed of a half interest, paying in part therefor with moneys received as her share in the proceeds of sale, no one will contend that such title was not secured by purchase. I can see no distinction in principle between that and the actual transaction that occurred. It was in any event, in my opinion, a purchase.

Clearly, the purchaser at such a sale, whether a tenant in common or otherwise, takes the entire title, including his own share or interest in the property, not by virtue of its descent from his ancestor, but because he is the highest bidder and has paid the price. Were he not such bidder, his interest in the property by descent would be of no avail. The land itself is freed from every claim of the former owners, or of any one claiming under them while they held it as cotenants. In other words, the interest of a tenant in common in the land as such is effectually divested by a partition sale, and neither he nor any one claiming under him as such tenant can assert his former tenancy as a basis of title as against the purchaser. It is merged in the entire title conveyed by the referee's deed. Thereafter it attaches to the proceeds of sale which represents the land sold, and a cotenant's share therein is measured by his former interest in the land.

I think this shows the distinction between an actual partition and a partition sale. The former is an actual division and allotment to each cotenant of his share in the land. He gets nothing more than he already has, except that, where it was previously undivided, it is now divided, and a particular portion of the property allotted to him exclusively. The latter involves no division or allotment of the land itself, but the entire title thereto goes to the purchaser. The division and allotment to the cotenants is their respective shares in the proceeds of sale. It is, of course, true, as urged by the guardian ad litem, that the purchaser acquired only the interest of all the tenants in common, parties to the suit; but that principle applies simply to the extent of the title conveyed by the referee's deed, not to the descendible quality arising from its derivation.

[3] I conclude, therefore, that no part of the land in question descended to Mary Ella Sarles from her father, and that the relatives of her mother are entitled to share.

None of the brothers or sisters of the intestate's father and mother are now living; the only relatives being cousins and their descendants. There are therefore two stocks on the paternal and three on the maternal side, each of which is entitled to one-fifth. Plaintiff therefore takes one-fifth, defendant Newey one-fifth, and each of the defendants George and Henry Nelson, Wright and Flora Hoag, and Louis and Flora Dean one-tenth. This differs from the mode of division submitted by plaintiff, who makes but two stocks—one the sister of the intestate's father, Prudy K. Nelson, and the other the sister of her mother, Almira Wright. But provisions of the Revised Statutes similar to those contained in sections 86, 87 and 88 of the Decedent Estate Law have been construed in accordance with the division here directed. See *Hyatt v. Pugsley*, 23 Barb. 285; *Id.* 33 Barb. 373.

Decision and interlocutory judgment is directed in accordance with this opinion, to be agreed upon or settled on notice.

(108 Misc. Rep. 662)

In re LEON MAYER, Inc.

(Supreme Court, Special Term for Motions, Kings County. September 30, 1919.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⇐318—COSTS AND ALLOWANCE TO CREDITORS SUCCESSFULLY SURCHARGING ASSIGNEE'S ACCOUNT.

Under Debtor and Creditor Act, §§ 20, 21, the Supreme Court has power to award costs and an allowance for counsel fees, in unrestricted amount, on the accounting of an assignee for the benefit of creditors, payable out of the estate, to a creditor who has secured a determination surcharging the assignee over \$1,100, and depriving him of commissions and fees which might have amounted to more than \$600.

2. COSTS ⇐103—AWARD OUT OF FUND INCREASED BY INDIVIDUAL OF CLASS.

When all the members of a class share in the fund preserved or increased by the individual efforts of a member of a class, the member in equity must be awarded his costs, expenses, and counsel fees, payable out of the fund so preserved or increased, before its distribution.

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⇐318—AWARD TO CREDITOR, SURCHARGING ASSIGNEE'S ACCOUNT, OF SAME COSTS AS IN AN ACTION.

The costs that may be awarded by the Supreme Court from the estate, pursuant to Debtor and Creditor Law, §§ 20, 21, to a creditor on an accounting of an assignee for the benefit of creditors, are the same as in an action.

In the matter of the assignment of Leon Mayer, Incorporated, to Winfred B. Holton for the benefit of creditors. Costs awarded a creditor on accounting of the assignee.

Jules B. Baer, of New York City, for objecting creditors.

Edward J. Rose, of Brooklyn, for assignee.

CROPSEY, J. Has the court power to award costs and an allowance to a creditor upon the accounting of an assignee for the bene-

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

fit of creditors, payable out of the estate? This is the question here involved. If the power exists, it may well be exercised, when the creditor, as here, has been responsible for securing a substantial surcharge against the assignee.

Awards as allowances or counsel fees have been made by the courts, but that of itself would not justify the continuance of the practice, if the power to do so did not exist. This is a statutory proceeding, and, though the court has broad powers (Matter of Accounting of Morgan, 99 N. Y. 145, 148, 1 N. E. 406), they are given by statute. We must therefore find the power there. It is claimed that subdivision 17 of section 15 of the Debtor and Creditor Law (Consol. Laws, c. 12) contains the grant of this power. It provides that the court shall have power "to exercise such other or further powers in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator." This language is broad enough to cover the matter in question.

In the Surrogate's Court an allowance payable out of an estate may be made to a legatee or next of kin who succeeded on an accounting so the whole estate was benefited. *Osborne v. McAlpine*, 4 Redf. Sur. 1, 5. And a successful contesting creditor is a party who has "succeeded in a contest" within the provisions of the section (2746, Code Civ. Proc.) giving the surrogate power to award costs (Matter of Welling, 51 App. Div. 355, 359, 64 N. Y. Supp. 1025). But the costs and allowance that may be so awarded cannot exceed the amount specified in that section. Matter of Kreidler, 68 Misc. Rep. 412, 417, 124 N. Y. Supp. 628. So, if section 15 of the Debtor and Creditor Law is the one that gives the court power in general assignment matters to award costs and allowances, the limitation upon the amounts would be the same as upon the surrogate's power; and if there were no other provision in the law this section would be held to grant this limited power.

[1, 2] But there are other provisions of the Debtor and Creditor Act which specifically deal with this question. Section 21 reads:

"The court, in its discretion, may order a trial by jury or before a referee, of any disputed claim or matter arising under the provisions of this article. It may in its discretion award reasonable counsel fees and costs, determine which party shall pay the same, and make all necessary rules to govern the practice under this article."

Does this provision authorize an award of costs and counsel fees payable out of the estate? It plainly does authorize an award of costs and counsel fees in the court's discretion. And these may be allowed in a "matter arising under the provisions of this article." That language is comprehensive enough to include a contest upon an accounting of the assignee. See section 15, subds. 9, 10, 11, 12, Debtor and Creditor Law. And there is nothing to limit this power to the fees of the counsel for the assignee. Plainly counsel fees of any litigant were intended to be covered; and as there is no definite provision against directing that such fees and costs, when allowed, be paid out of the estate, such a direction may be made, unless there

is some prohibition in the statute against it. This it has been said is found in the language of the section quoted, which gives the court power to determine which party shall pay costs and counsel fees. *Matter of Manahan*, 10 Daly, 39, 40. This, however, does not seem to be the meaning of this clause. The determination as to which party shall pay the award is, like the making of the award itself, in the court's discretion. It is the equivalent of saying the court may settle how the costs and counsel fee, if allowed, shall be paid. This is the fair construction to be placed upon this provision. It imposes no limitation. The provisions of the Debtor and Creditor Law should be given a liberal construction. If such a limitation was intended it would have been clearly expressed.

Besides, there is every reason for holding the section gives power to award counsel fees to a creditor as well as to an assignee, and to direct payment out of the fund or by any party in the court's discretion. Section 20 of the act gives the court "the powers of a court of equity in reference to the trust and any matters involved therein." A court of equity has always had the power to make discretionary awards of costs and allowances payable either out of the fund or by one of the parties. If a creditor by his vigilance and activity is successful in securing a surcharge, which of course benefits the whole estate, it is fair that the estate should bear at least a portion of his expense. The creditor in this proceeding has secured a determination surcharging the assignee over \$1,100 and depriving him of all commissions and fees which might have amounted to more than \$600.

The court may award costs and counsel fee to the creditor, payable by the assignee; but it seems it may also, in its discretion, direct that the award be paid out of the fund. Certainly no other creditors could justly complain. Their interests in the fund having been materially increased by the diligence and activity of the one creditor, there is every reason why they should pay a portion of the expense. The diligent creditor, who secured this advantage to the estate, should not be penalized, and the slothful creditors, who did nothing, be rewarded. It is not an answer to say, as was said in *Matter of Manahan*, 10 Daly, 39, that the attorney for the creditor was all the time acting for his own client. This is true in one sense. But whatever benefited his client was of proportionate benefit to every other creditor. When the assignee, by the faithful performance of his duties, has created a fund for the benefit of creditors, his counsel fees are paid out of the estate. Why, in equity, should not the counsel fees of a creditor be similarly paid, when his efforts have resulted in increasing the fund to be divided among all the creditors?

In the administration of its equitable powers in these matters the court should so act as to accomplish justice to all. It is an established equitable principle, when all the members of a class share in a fund preserved or increased by the individual efforts of a single member of that class, the latter shall be awarded his costs, expenses, and counsel fees, payable out of the fund so preserved or increased before its distribution. *Trustees v. Greenough*, 105 U. S. 527, 531-533, 26

L. Ed. 1157; Central Railroad v. Pettus, 113 U. S. 116, 124, 5 Sup. Ct. 387, 28 L. Ed. 915; Woodruff v. N. Y., L. E. & W. R. R. Co., 129 N. Y. 27, 29 N. E. 251; Schoenherr v. Van Meter, 215 N. Y. 548, 109 N. E. 625; Jessup v. Smith, 223 N. Y. 203, 207, 119 N. E. 403; Strong v. Dutcher, 186 App. Div. 307, 174 N. Y. Supp. 352.

In Matter of Watt, 10 Daly, 11, and Matter of Manahan, 10 Daly, 39, the court refused allowances to counsel for creditors upon an accounting by an assignee. When those cases were decided, the General Assignment Act of 1877 (chapter 466, as amended by chapter 318, Laws of 1878) was in force. Section 26 of the 1877 act contained language practically identical with that in the present Debtor and Creditor Law with regard to the award of costs and counsel fees. But in neither of those cases is the decision based upon the ground of want of power. The court merely seemed to feel it was unwise to make such an award. In Matter of Barr & Co., 6 Misc. Rep. 526, 27 N. Y. Supp. 416, an allowance for counsel fees was made payable by the losing party, and in Matter of Oakley, 41 Misc. Rep. 652, 85 N. Y. Supp. 227, such an allowance was made for the counsel fees of the assignee payable out of the fund. And in Matter of Talmage, 39 App. Div. 466, 475, 476, 57 N. Y. Supp. 427, the court stated in general terms that section 26 of the 1877 act authorized an award of counsel fees as well as costs. It also stated it was immaterial whether the award was called an allowance or counsel fees.

Thus the courts have recognized that the power exists; and if the award may be made to the assignee for his counsel fees, there is no reason why it may not be made to a creditor for his counsel fees. The statute makes no distinction. It merely authorizes the award of counsel fees. It does not say to whom they may be awarded. If the power exists to make such an award of counsel fees to an assignee, it must exist to make a similar award to a creditor; and if the court has the power to make the award payable from the estate in the one case, it must have the like power in the other case. That this may be done has been expressly held in cases in other states. Krodel's Assigned Estate (No. 2), 27 Pa. Super. Ct. 421; Mitchell v. Tyler, 49 S. W. 422, 20 Ky. Law. Rep. 1249, 1252.

[3] The costs that may be awarded are the same as in an action. Matter of Rauth, 10 Daly, 52. It has been held that an award of counsel fees cannot exceed 5 per cent. of the amount involved; that is, that it must be limited to the amount of an additional allowance that might be granted in an action. Matter of Risley, 10 Daly, 44, 46. But the reason for this holding is not apparent in the language of the statute. That imposes no limitation. If the court's power is thus limited, the provisions of the statute are substantially nullified. Five per cent. of the amount involved in many instances would be wholly inadequate as a counsel fee; and as there is nothing in the statute to indicate such a limitation, and nothing to show that the award should be made on the basis of an additional allowance, the power of the court to fix the amount must be deemed to be unre-

stricted. In this proceeding the objecting creditor is allowed costs and a counsel fee of \$250, all payable out of the estate.

When the prior decision was made, confirming the referee's report and upholding all the surcharges against the assignee, it was not noted that the referee's report is in error in one regard. It states, in findings 17, 24, and 41, that the account of the assignee, as filed, shows that he charges himself with \$16,104.91 and credits himself with \$12,441.52. These figures are incorrect. The amended account, as filed, does not show this. The principal mistake in the referee's statement seems to have been caused by his including twice certain items. The amended account, as filed, shows in Exhibit A the gross receipts to be \$11,918.51, and the gross expenditures to be \$8,714.90. But Exhibit B shows the additional receipt (October 13, 1916) of \$641.65, and the additional expenditure (October 13, 1916) of \$373. Thus the total receipts were \$12,560.16, and the total expenditures \$9,087.90. This leaves, according to the amended account, as filed, in the hands of the assignee, \$3,472.26. To this, of course, the amount of the surcharge, totaling \$1,122.81, must be added, making a total of \$4,595.07, which is to be paid by the assignee as directed by the court's order which has been signed.

(189 App. Div. 904)

PINES v. TRAKTMAN et al.

RUDOLPH WALLACH CO. v. SAME.

(Supreme Court, Appellate Division, Second Department. October 3, 1919.)

1. ADVERSE POSSESSION $\S$ 114(1)—EVIDENCE INSUFFICIENT TO SHOW POSSESSION FOR TWENTY YEARS.

Evidence held insufficient to show that plaintiffs or their predecessors in title had had adverse possession of the premises for the statutory period of 20 years.

2. CHAMPERTY AND MAINTENANCE $\S$ 7(1)—QUITCLAIM DEED BY ONE OUT OF POSSESSION NOT SHOWN TO BE CHAMPERTOUS.

A quitclaim deed by the record owner of land, who was out of possession, cannot be deemed champertous, where the character of the possession at the time of the execution of the deed was not shown.

3. TAXATION $\S$ 734(5)—TAX DEED BASED ON SALE OF PROPERTY OF HOSPITAL INVALID.

Though an exemption from taxation in favor of the property of a hospital is personal to the owner, yet title based on a tax deed for taxes levied while the property was in the possession of the hospital cannot be upheld, on the theory that after conveyance by the hospital the exemption was lost, and the grantee could not assert the invalidity of the previous tax levy.

4. WATERS AND WATER COURSES $\S$ 203(1)—DISTINCTION BETWEEN CHARGE FOR WATER AS A TAX AND AS A VOLUNTARY PURCHASE STATED.

A rate or charge for supplying water, not based on the amount consumed, but determined with reference to the dimensions, value, exposure, use, etc., of a building, is a tax; but, where the charge depends upon the amount used, the transaction is a voluntary purchase.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tax.]

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

5. WATERS AND WATER COURSES $\Rightarrow$ 208(14)—FORECLOSURE FOR WATER CHARGES LESS THAN \$16 DENIED.

Where unpaid water charges for which premises were liable amounted to less than \$16, foreclosure should not be decreed; but the city of New York, in which the premises were located, should proceed in the manner indicated by Greater New York Charter, § 1017, under which the lien of the water charges will continue as a valid lien, etc.

Appeals from Special Term, Kings County.

Actions by Dora Pines and by the Rudolph Wallach Company against Libbie Traktman and others and Celia Moliver. From judgments for defendant Moliver in both actions, dismissing the complaints on the merits, plaintiffs appeal. Affirmed.

The following is the opinion of Benedict, J., at Special Term:

These two cases were by consent of counsel tried together. They are actions for the foreclosure of tax liens on certain premises in the borough of Brooklyn, and are defended by the defendant Celia Moliver, who holds the record title under a deed from the Roosevelt Hospital, on the ground that the premises, as the property of the Roosevelt Hospital, were exempt from taxation, and hence the tax liens are void. The corporation counsel has, accordingly, taken over the prosecution of the actions on behalf of the city of New York. The validity of the tax liens is sought to be supported mainly upon the ground that the premises were sold for taxes in 1887, and that the grantee under the tax deed entered into possession, and that he and his successors in interest have been in actual, open, and notorious possession thereof ever since, and hence, at the time of the levy of the taxes which form the basis of the liens under foreclosure, the title of the Roosevelt Hospital had been divested by adverse possession.

The Roosevelt Hospital acquired the title to the premises in question upon its incorporation on or about February 2, 1864, by Laws of 1864, chapter 4, under a deed of trust made by James C. Roosevelt Brown to John M. Knox, dated November 5, 1860, and the will of James H. Roosevelt, probated December 16, 1863. The particular provisions of these instruments it is unnecessary to set out. The Roosevelt Hospital never took actual possession of the premises and never collected any rents therefrom. By a quitclaim deed, dated June 17, 1915, and recorded August 23, 1915, the Roosevelt Hospital conveyed the premises to the defendant Celia Moliver. The taxes for which one of the tax liens was sold are taxes of the years 1900 to 1906, inclusive, and water rents for the years 1899 to 1907, inclusive. The taxes for which the other lien was sold are taxes of the years 1909 to 1912, inclusive, and water rents for the years 1908, 1909 and 1911.

[1] To substantiate the claim of adverse possession the plaintiff proved a chain of title beginning with a tax deed from the registrar of arrears of the city of Brooklyn to Frank J. Munson, dated June 29, 1887, and recorded July 18, 1887. This deed is claimed by defendant Moliver to be void, because of the exemption of the property of the Roosevelt Hospital from taxation, and this proposition is not seriously disputed. It was shown that Munson was in possession and received rents from the premises for some time before his death, which occurred on August 31, 1895; but it does not appear by any clear or convincing evidence how long before his death he took possession. It is impossible to make a finding not based on guesswork that the adverse possession of Munson under his tax deed commenced prior to 1895. I think the evidence would justify me in finding that the premises were held adversely from that time until 1912, or perhaps until August, 1914. Since that time the character of the possession has not been shown, as the person in possession at the time of the trial, and for two years before, one Otti or Otte, is not in the chain of title, and is not shown to have been paying rent to anybody who claimed under a deed. In my opinion, therefore, proof of ad-

$\Leftarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

verse possession falls short of the required 20 years. McMahon's possession was not shown to have been hostile to the record owner, and the first possession under a claim of title was that of Munson, the date of the beginning of which cannot be found to have been prior to 1895, as already stated. It is well settled that adverse possession must "be shown by clear and cogent evidence." *Cutting v. Burns*, 57 App. Div. 185, 187, 68 N. Y. Supp. 269, 271.

[2] The contention that the quitclaim deed from the Roosevelt Hospital to Cella Moliver was champertous is without merit, because the character of the possession, at the date of this deed, June 17, 1915, is not shown.

[3] It is contended by the plaintiff that the defendant Moliver is not in a position to contest the validity of the tax liens sought to be foreclosed, because the exemption of the property of the Roosevelt Hospital from taxation was a privilege personal to that corporation, which it could not transmit or transfer to any grantee. It is true that as soon as the hospital conveyed the property the exemption ceased. But to sustain the plaintiff's proposition would involve holding that the transfer of the property from the hospital to a private owner validated void taxes and void sales thereunder. If the property were exempt from taxation while it belonged to the hospital, any taxes attempted to be levied thereon during the period of such ownership were void, and constituted no lien upon the premises; and the attempted transfers of the alleged tax liens passed nothing to the plaintiffs in these actions which could be made the basis of a suit for foreclosure. Any person interested in the property can, I take it, defend such a foreclosure suit on the ground that the proceedings on which the alleged tax lien was founded are void, and hence that there is no lien to foreclose.

The authorities cited on behalf of the plaintiffs on this point are clearly distinguishable from the instant case. They cite, for example, *Mickes v. Tousley*, 1 Cow. 114, where a bailee of certain sheep sued a judgment creditor of his bailor and a deputy sheriff in trespass for taking and carrying away sheep on the ground that they were exempt from execution. It was correctly held that the exemption could be availed of only by the owner of the sheep. They also cite *People ex rel. Jones v. Feltner*, 157 N. Y. 363, 51 N. E. 1002, affirming 32 App. Div. 23, 52 N. Y. Supp. 622, where it was held that prior to chapter 347 of the Laws of 1897 property bought with pension money was not exempt from taxation where the title stood, not in the name of the pensioner, but of his wife. And they cite *City of Rochester v. Rochester Railway Co.*, 182 N. Y. 99, 118, 74 N. E. 953, 70 L. R. A. 773, affirmed 205 U. S. 236, 27 Sup. Ct. 469, 51 L. Ed. 784, where it was held that an exemption from liability to pay for a part of the paving of streets where street railroad tracks were laid was personal to the corporation to which the exemption was granted, and did not pass to its successor. But it is to be noted that in that case the pavement for part of which the defendant was held liable was laid subsequent to the transfer. The other cases cited by the plaintiff on this point have been examined with the like result—that they are all distinguishable from the instant case, because here the contention is that the transfer of the property validated void acts.

[4, 5] There remains the question whether the unpaid water rents constituted a valid lien on the premises in question, so as to give validity to the tax liens to the amount thereof. The Court of Appeals has recently stated the rule to be that a rate or charge for supplying water, not based upon the amount consumed, but determined with reference to the "dimensions, value, exposure, use," etc., of a building is a tax, but that where the charge depends upon the amount used the transaction is a voluntary purchase. *N. Y. Univ. v. Am. Book Co.*, 197 N. Y. 294, 297, 90 N. E. 819. In my opinion, therefore, the second lien is valid to the extent of the water charges for 1911, with interest, and no more. This amount is very small, \$15.74; and I am therefore of opinion that foreclosure should not be decreed, but that the city should proceed in the manner indicated by section 1017 of the Charter, under which the lien of these water rates will continue as a valid lien and may be sold again, if in the meantime they be not paid.

Judgment for the defendants in both actions, dismissing the complaints on the merits, without costs.

Argued before JENKS, P. J., and PUTNAM, BLACKMAR, KELLY, and JAYCOX, JJ.

Wm. P. Burr, of New York City, for appellants.

Fitzgerald, Stapleton & Mahon, of New York City (William J. Mahon and James M. Gorman, both of New York City, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs, upon the opinion of Mr. Justice Benedict at Special Term.

(189 App. Div. 62)

PUBLIC SERVICE COMMISSION FOR FIRST DIST. v. BROOKLYN
BOROUGH GAS CO.

(Supreme Court, Appellate Division, Second Department. October 3, 1919.)

1. JUDGMENT ⇐548—JUDGMENT DECLARING STATUTE FIXING RATE TO BE
CHARGED FOR GAS CONFISCATORY RES JUDICATA.

Despite Public Service Commissions Law, § 74, judgment of the New York Special Term of the Supreme Court in an action in equity by a gas company against the Public Service Commission to have declared unconstitutional, as confiscatory, Laws 1916, c. 604, amending Laws 1906, c. 125, to fix a maximum rate for gas of 80 cents per 1,000 feet throughout the borough of Brooklyn, which judgment, through adoption of the findings of the referee, determined that the rate of 95 cents per 1,000 feet fixed by Public Service Commission by its order of July 8, 1918, was without force, *held* conclusive on the Kings County Special Term of the Supreme Court in a summary proceeding taken by the Public Service Commission against the gas company to enjoin the collection of more than 95 cents per 1,000 feet for gas, the rate fixed by the commission's order of July 8, 1918.

2. JUDGMENT ⇐715(2)—JUDGMENT DETERMINING POWER OF PUBLIC SERVICE
COMMISSION TO FIX GAS RATE RES JUDICATA.

Judgment of the New York Special Term of the Supreme Court, in an action by a gas company to have declared unconstitutional Laws 1916, c. 604, amending Laws 1906, c. 125, to fix a maximum rate of 80 cents per 1,000 feet for gas throughout the borough of Brooklyn, and determining that the Public Service Commission, under Public Service Commissions Law, § 72, had no authority to enforce a 95-cent rate for gas after the abrogation of the statute, *held* conclusive, in a summary proceeding, pursuant to Public Service Commissions Law, § 74, as to the power of the commission to fix a new rate of 95 cents.

3. GAS ⇐14(1)—NOTICE TO PUBLIC SERVICE COMMISSION OF CHANGE OF RATE
NECESSARY.

Where maximum rate for gas of 95 cents per 1,000 feet specified by the Public Service Commission was actually in effect, the gas company could not enforce any new rate established by it on declaration of the invalidity of the rate as fixed by the commission until 30 days after it had given notice to the commission of change of rate, as required by Public Service Commissions Law, § 66, subd. 12, and until it had published the same.

4. GAS ⇐14(1)—FILING OF NOTICE OF CHANGE OF RATE, WHAT CONSTITUTES.

The order of the Public Service Commission of July 8, 1918, prohibiting a gas company charging in excess of 95 cents per 1,000 feet for gas, and the company's written acceptance of such order, constituted in effect the filing with the commission of notice of change of rate, as required by Public Service Commissions Law, § 66.

5. EVIDENCE ⇐43(1)—APPELLATE COURT WILL NOT TAKE JUDICIAL NOTICE OF
FACTS OCCURRING SUBSEQUENT TO APPEAL.

In a summary proceeding by the Public Service Commission, pursuant to Public Service Commissions Law, § 74, to enjoin a gas company from

charging more than 95 cents per 1,000 feet for gas, the Appellate Division held not under obligation judicially to notice certain facts occurring subsequent to the rendition of the judgment for the commission appealed from.

Appeal from Special Term, Kings County.

Summary proceeding by the Public Service Commission for the First District against the Brooklyn Borough Gas Company. From a judgment for plaintiff (104 Misc. Rep. 315, 171 N. Y. Supp. 937), defendant appeals. Modified and affirmed.

See, also, 106 Misc. Rep. 549, 175 N. Y. Supp. 28.

Argued before JENKS, P. J., and MILLS, RICH, KELLY, and JAYCOX, JJ.

Edward M. Bassett, of New York City (Wilson W. Thompson, of New York City, on the brief), for appellant.

Godfrey Goldmark, of New York City, for respondent.

Judson Hyatt, of New York City (William P. Burr, Corp. Counsel, of New York City, and John P. O'Brien, of New York City, on the brief), for city of New York, as *amicus curiæ*.

MILLS, J. This is an appeal by the defendant from a judgment entered in Kings county upon a determination of the Kings Special Term, in a summary proceeding taken by plaintiff by petition under section 74 of the Public Service Commissions Law (Consol. Laws, c. 48), which judgment enjoined defendant from charging or collecting from private consumers of gas more than at the rate of 95 cents per 1,000 cubic feet, with leave to defendant to apply at the foot of the judgment for relief from the injunction "on making it appear that a charge in excess of 95 cents per 1,000 cubic feet has, in any manner prescribed by law, become a lawful and reasonable maximum charge."

This proceeding was begun by petition dated August 5, 1918, upon which upon that date an order was made at the Kings Special Term, the same justice presiding, directing defendant to appear and make answer at said term on August 6, 1918. The defendant duly filed its written answer on August 13th, and the court proceeded at once to take the evidence of the parties, and upon the next day signed the judgment, without making any formal written decision or intermediate order. But the justice presiding filed an opinion which gives at considerable length his views and the reasons for his conclusions. As directed by the said preliminary order of August 5th, notice of the proceeding was given also to the corporation counsel of New York City, the Attorney General of the state, and the district attorney of Kings county. Each of those officials appeared before the court upon the hearing, and as well an attorney for consumers so appeared. But upon the argument here only the corporation counsel, of those officials, has submitted a brief. The said preliminary order also contained a stay of the appellant from charging or collecting at a higher rate than 95 cents during the pendency of the proceeding. Upon appearance of the parties before the court upon the original return day, August 6th, defendant made a motion to vacate that stay, and after quite full argument the presiding justice in effect, although in-

formally, denied that motion, but it does not appear that any order to that effect was entered.

The material facts are undisputed, and are the following:

Defendant supplies gas to private consumers in the Thirty-First ward of the borough of Brooklyn, which was formerly the town of Gravesend, and includes Coney Island, and also to such consumers in a part of the Thirty-Second ward. This proceeding, however, relates only to the Thirty-First ward. Chapter 125 of the Laws of 1906 established a maximum rate for the Thirty-First ward of \$1 per 1,000 cubic feet after the year 1910. Defendant complied with that requirement and charged at that rate after 1910, until, upon complaint of certain consumers, the petitioner the Public Service Commission, by order made July 8, 1913, fixed the rate of 95 cents per 1,000 cubic feet. That order was accepted by defendant, and that rate was not changed by the commission before this proceeding was taken and concluded. Chapter 604 of the Laws of 1916 purported to amend the said act, chapter 125 of the Laws of 1906, so as to fix a maximum rate of 80 cents throughout the borough of Brooklyn. Defendant did not attempt to comply with the latter law, but at once upon its going into effect brought an action in equity in this court, in New York county, against the petitioner herein, to have that act declared unconstitutional, as confiscatory, and to enjoin its enforcement against it. That action, being duly at issue, was referred to Hon. Charles E. Hughes as sole referee, to hear, try, and determine. On July 24, 1918, he, having fully heard the evidence and the arguments of the parties, filed his opinion, which at length discussed the evidence and the questions involved, and stated his views and conclusions, which latter were in effect that the said rate of 80 cents was as to this appellant confiscatory, and that therefore it, being the plaintiff therein, was entitled to the relief it asked. The opinion concluded with the statement: "Findings will be signed in accordance with this opinion." Brooklyn Borough Gas Co. v. Public Service Commission, 17 State Dept. Rep. 81, 112-114, 121. Judge Hughes' report was filed in the New York county clerk's office on August 13, 1918, and judgment thereon immediately entered, and the report and judgment were put in evidence in behalf of the appellant upon the hearing or trial hereof later upon the same day. The said report in its conclusions held:

(a) That chapter 125 of the Laws of 1906, as amended by chapter 604 of the Laws of 1916, so far as it fixes the maximum rate of 80 cents, etc., is confiscatory as to the plaintiff, and therefore unconstitutional and void as to the plaintiff.

(b) That the rate of 95 cents per 1,000 cubic feet fixed by the Public Service Commission by the said order made July 8, 1913, was superseded by said chapter 604 of the Laws of 1916, and that since its enactment, "and under the provisions of section 72 of the Public Service Commissions Law, which denies to the commission authority to fix a rate for gas in excess of that fixed by statute, the said commission has had, and now has, no authority to maintain or enforce said 95-cent rate, and said rate since said enactment has been, and is now, of no force or effect."

(c) That the provisions of chapter 125 of the Laws of 1906, fixing rates as above stated, were repealed by said chapter 604 of the Laws of 1916. Respecting this conclusion it may well here be noted that the referee's opinion shows that his view was that the holding of the act of 1916, invalid as against the appellant, did not serve to revive or keep in force the corresponding provisions of the prior act, namely, chapter 125 of the Laws of 1906.

(d) That the plaintiff, the appellant here, was entitled to judgment restraining the defendants from enforcing as against the plaintiff either the 80-cent rate or the 95-cent rate. Judgment accordingly was duly entered on August 13th, at 9 a. m. The record here does not contain the pleadings in that action. It contains only the referee's opinion and report and the judgment entered. We are therefore to assume that the findings and conclusions of the referee were within the issues raised by the pleadings.

The opinion of the learned trial justice herein declared that the entry of that judgment by the appellant's attorney was in violation of the said stay contained in the said preliminary order herein, and he emphatically declared that he would pay no attention to that judgment.

Very shortly after the referee had announced his opinion as above stated, and on July 30, 1918, appellant's president attempted to establish a rate of \$1.25 per 1,000 cubic feet to be charged and enforced after August 1st then next, and his said action was ratified by appellant's board of directors on August 10th. On August 2d notice of that action was given to petitioner, and that notice led to the institution of this proceeding. On August 3d the commission issued an order purporting to be made under section 66 of the Public Service Commissions Law, requiring appellant within two days to file with the commission a schedule showing its rates then in force, and the date on which the several charges went into effect, and the authority pursuant to which they were made, and directing that the appellant should file such schedule at least 30 days before any change in rate should go into effect. Thereupon appellant did file with the commission a schedule showing that its then rate was \$1.25. Before that filing defendant appellant had never filed with the commission any schedule or been ordered by the commission so to do.

There was no finding by the referee that the rate of 95 cents was confiscatory, although his opinion stated that it did not allow appellant a fair return upon its property, and the report was to the same effect. The report made the invalidity of that rate rest upon the present want of authority in the commission to maintain or enforce it, and the referee's opinion indicates that he based that conclusion upon his view that the act of 1916, attempting to fix a maximum rate of 80 cents, was effective to prevent the commission from fixing or maintaining any higher rate, even if the 80-cent rate was void as to this appellant, because under present conditions confiscatory. From the general tenor of the report and opinion it is perhaps likely that upon the evidence before him the referee would have held the rate of 95 cents confiscatory, had he taken the contrary view as to the effect of the act of 1916,

namely, that its invalidity as to this appellant under present conditions still left in force or revived as to it the former act of 1906.

The opinion of the trial justice herein indicates that he reached his conclusion herein against the appellant upon the following views or grounds, namely:

(a) That the judgment in the other action had been entered after this proceeding was commenced and in violation of the stay or temporary injunction herein issued on August 5th.

(b) That no judgment in another action could limit the power or duty of the court herein under said section 74 of the Public Service Commissions Law to "immediately inquire into the facts and circumstances * * * without other or formal pleadings, *and without respect to any technical requirement*" (italics mine).

(c) That the adjudged invalidity of the act of 1916 as applied to this appellant did revive as to it the validity of the prior act of 1906 and of the order of the commission made thereunder July 8, 1913, fixing the rate of 95 cents, notwithstanding the contrary decision and judgment in the said other action; and

(d) That even if the said order of July 8, 1913, be no longer in force, yet the attempt of the appellant to establish a rate of \$1.25 is an attempt to change its rate, and that under section 72 of the Public Service Commissions Law that change cannot be made, except with the consent of the commission; in other words, that even if the act of 1916 did repeal as to this appellant the act of 1906, and was in itself inapplicable to this appellant as to the rate of 80 cents, still under said section 72 the appellant could not change its then existing rate, except by proceeding under said section, which requires the consent of the commission.

In addition, the opinion of the justice states that the respondent commission claimed before him that in any event the appellant's alleged new rate of \$1.25 could not be effective until 30 days after it filed the same with the commission, as required by section 66 of that law; but I do not find in the opinion any expression of the view of the learned justice upon that particular contention.

[1] Apparently the first thing, and perhaps for the most part the only thing, to be determined by us as to this appeal, is whether or not the previous judgment in the other action between the same parties was, upon being put in evidence before the Special Term at the trial hereof, conclusive upon the court as to every fact found and conclusion of law made in and by that judgment, so far as the same matter was involved in this proceeding. Upon elementary principles it must be held to be so conclusive. Indeed, it is impossible to conceive of any material reason why it should not be held to be so conclusive. The reasons assigned by the learned justice in his opinion seem to be utterly unsound. Certainly the expression in the said section 74, "without respect to any technical requirement," can be given no such effect. The rule making the determination of a competent court of the same issue in a prior action between the same parties conclusive upon those parties and the court as well in another action or proceeding, the same issue being directly involved in both, is a matter of substance and can-

not be termed a mere technical requirement. Indeed, the learned trial justice evidently accepted the judgment in the other action as decisive of the issue of the invalidity of the act of 1916 as to the 80-cent rate thereunder, because he had before him no evidence other than the referee's report in that other action that that rate was confiscatory. That judgment, however, was no more binding upon the Special Term herein as to the 80-cent rate than it was as to the 95-cent one. The issue as to each was directly involved in and decided by the other action.

Even if it be true that the entry of the judgment in that other action on August 13th was in violation of the stay in this proceeding by the order of August 5th, as asserted by the learned justice in his opinion, still it is not perceived how even that would affect the binding force of the other judgment. But plainly the entry of that judgment was not a violation of that stay, as that stay did not in terms forbid such entry. Obviously all that was effected by the stay was to prevent appellant from changing its rate during the pendency of this proceeding. Indeed, it is evident that the learned Special Term justice at the first hearing had no idea that the entry of the judgment in the other action would be a violation of the stay in the order of August 5th, because counsel for the appellant herein at the first hearing, in asking for the brief adjournment from August 7th to 13th, which was granted to him, urged as his reason therefor that he had been working night and day for five days preparing the report for Judge Hughes to sign in accordance with his opinion, and the judgment to be entered in that action thereon, and hoped to have them completed and entered and served that very day, and that that judgment would determine the main questions involved in this proceeding and would dispose of the proceeding. I do not find that the learned justice then in any way intimated any contrary view. Indeed, when the corporation counsel demurred to being pressed so rapidly with the entry of that judgment, the learned justice merely remarked, "That is not before me;" and yet at the next hearing on August 13th the justice expressed even indignation at the fact that appellant's attorney had presumed in the interim to enter judgment in the other action, and declared that entry to be a violation of the said stay. It looks very much as though that view was an afterthought on the part of the justice; but, whether so or not, it was manifestly a mistaken view.

The situation thus presented here appears to be anomalous; at least, I recall none like it. It may well be briefly summarized thus: On August 13, 1918, this court by its New York Special Term, after full investigation and hearing of all parties and upon ample evidence, adjudged the 95-cent rate invalid and not binding upon the appellant, and enjoined the respondent commission from enforcing that rate; and yet on the very next day this court by its Kings Special Term, with that judgment in evidence before it, in another action or proceeding, namely, this one, between the same parties, adjudged right to the very contrary, and that, too, upon no other material evidence as to the facts, but really upon those found by the New York Special Term through its referee. That situation is most regrettable. It is naturally design-

ed, or at least likely, to bring judicial proceedings into public obloquy. The court at the Kings Special Term in this proceeding should have accepted the judgment of this court by the New York Special Term in the other action between the same parties as conclusive as to the validity of the 95-cent rate, as that was one of the issues directly involved and decided by that action; and it may be added that in view of the high character, legal and otherwise, of the learned and distinguished referee by whom the court in that other action made its decision, and the long and patient trial conducted by him, it should not have been an irksome matter for the learned justice at the trial hereof to have obeyed that general rule and to have accepted the judgment in that other action as decisive.

This conclusion as to the determining force of the judgment in the other action necessitates the reversal of the judgment appealed from here, without inquiry on our part into the merits of the difference of opinion between the learned referee and the learned justice as to the important point whether or not the adjudged invalidity of the act of 1916 as to this appellant revived as to it the act of 1906; the justice holding to the affirmative and the referee to the negative of that proposition. For us to express an opinion upon that point would be a mere dictum, and such an expression, therefore, should be avoided.

[2] There remains to be considered the last reason assigned by the learned justice in his opinion, namely, that in any event, even if the order of July 8, 1913, fixing the rate of 95 cents, has become inoperative, as decided by the referee in the other action, still appellant under section 72 of the Public Service Commissions Law could not change that then existing rate without the consent of the commission. Respondent's counsel here contends that that judgment is not to be regarded as *res adjudicata* as to the power of the commission to fix a new rate, as the question of that power was not at issue before the court in that action. I do not appreciate this attempted distinction. As above stated, we have not before us in this record the pleadings in that other action, and have therefore to assume that the nominal determinations therein were within the issues. In the referee's report there is a distinct conclusion that the commission has no authority to maintain or enforce the 95-cent rate, and the judgment expressly so adjudged, and further it enjoined the commission from attempting to maintain or enforce that rate. It is elementary that a judgment is *res adjudicata*, not only for what is expressly decided, but for what is by necessary implication decided in order to sustain it. If it be true, as contended in the justice's opinion, that under said section 72 the rate of 95 cents must stand until the commission consent to a change, the above-stated conclusion of the referee and provision of that judgment cannot stand, and therefore the contrary conclusion to that of the justice is necessarily implied to maintain that provision of the judgment. The conflict between that judgment and this one is self-evident, viz. that one declares that the commission cannot maintain or enforce the 95-cent rate, while this judgment declares in effect that it can, and at the suit of the commission enjoins appellant from charging more, and

thus enables the commission to do the very thing which that judgment forbids it to do.

My conclusion therefore is that the other judgment should have been accepted by the learned justice at Special Term herein as conclusive that the commission has and had then no right under section 72 to compel the appellant to maintain the 95-cent rate. It may be noted that, although the learned justice in his opinion held that the maximum limit of \$1 imposed by the act of 1906 is still in force, he in the judgment expressly authorized the appellant to apply at the foot of the judgment herein for leave to increase its charge above 95 cents. Of course, upon that theory, an increase of 5 cents only would be possible; but the application so permitted was not by the judgment so restricted.

The view I have thus taken of the binding force of the judgment in the other action makes it unnecessary to consider the decision of the Court of Appeals in *People ex rel. Municipal Gas Co. v. Public Service Commission* (2d District) 224 N. Y. 156, 120 N. E. 132, as to which the referee and the justice at Special Term herein are of such opposite opinions, the justice holding that the doctrine of that case that the commission has no power to fix a rate where the statutory rate is invalid as to a particular company as being confiscatory, is limited to a case where such invalidity has not been judicially declared—that is, adjudged—whereas the referee held that that doctrine was of general application.

[3, 4] Upon the argument it was further suggested that, as the 95-cent rate was actually in effect, appellant could not enforce any new rate established by it until 30 days after it had, as required by subdivision 12 of section 66 of that law, given notice to the commission of its change of rate and published the same. It appears that it did not give to the commission such notice until August 8, 1918. It would seem that this contention is well made, and that therefore appellant could not make its change of rate effective until September 8, 1918, and that the judgment appealed from might properly have enjoined the defendant to that extent. I think that the order of the commission of July 8, 1913, and appellant's written acceptance thereof, were in effect the filing required by said section 66.

[5] It is also here claimed by the respondent that this court should, from another record upon its files, take judicial notice of certain facts occurring subsequently to the judgment appealed from. Those facts are the following:

After the entry of judgment herein, and the taking of the appeal therefrom, the parties by their respective attorneys entered into a stipulation, dated August 28, 1918, to the effect that this appellant would apply to the respondent commission to fix a new rate, and that upon any appeal from or review asked of the new order so made by the commission appellant would not question the jurisdiction or power of the commission to make the same. Thereafter the appellant did apply to the commission to establish the rate of \$1.25, and the commission after due hearing made an order on December 13, 1918, fixing a new rate of \$1.10, and the appellant in writing accepted that order and agreed to obey it. Thereafter, on December 19, 1918, an order was upon consent made at the Kings Special Term, modifying the judgment herein so

as to permit that new rate. Then the city of New York applied to the court for leave to intervene and to vacate the latter order, upon the ground that the act of 1906 fixing the maximum rate of \$1 was still in force, and the appellant made a new application to the commission to establish a rate of \$1.30, and the appellant moved to vacate entirely the judgment herein. But the court on March 10, 1919, made an order denying the latter motion and vacating the said order modifying the judgment herein.

The opinion of the justice presiding indicates that he entertained the same opinion as Judge Hughes, that the act of 1906 was repealed by the act of 1916, but that he held that he had no right to vacate or modify the judgment herein because it was made at another Special Term, held by another justice. Upon appeal here on May 23, 1919, we affirmed that order. See Public Service Commission v. Brooklyn Borough Gas Co., 106 Misc. Rep. 549, 175 N. Y. Supp. 28, affirmed 188 App. Div. 935, 176 N. Y. Supp. 918. It is from the record upon that appeal that the respondent asks us now to take judicial notice of those subsequently occurring facts, and thereon to modify the judgment appealed from, so as to allow the \$1.10 rate, or, at least, if we prefer to do so, affirm, with leave to appellant to apply to the Special Term for such modification. It seems to me that the respondent is thus asking us to do the very thing which upon that appeal from that last order we refused to do, or to permit another Special Term to do the very thing which in that decision we upheld the justice for refusing to do at Special Term.

I conclude, therefore, that we cannot grant that request. Moreover, I think that we cannot so take cognizance of those subsequent facts. I know of no precedent for so doing. The cases cited by respondent's counsel all dealt with facts which pre-existed the judgment or order appealed from, and might properly have been considered by the court in making the same; whereas in this case those facts did not pre-exist the judgment. The only instance of taking cognizance of subsequent facts which I can recall is where upon a motion to dismiss an appeal such facts are presented to the court to show that the question involved has by virtue of such facts become merely academic, or that the appellant by those facts—for example, by taking the benefit of the judgment or order—has become estopped from prosecuting the appeal. Here neither such situation exists. If it were a new and open question here, I might consider carefully whether or not the said stipulation and the order made by the commission thereunder fixing the rate of \$1.10, and appellant's acceptance thereof, did not constitute such a situation; but I am bound to consider that this court in so determining the other appeal has decided to the contrary, because, if not, I can perceive no reason why it should not have reversed that order so made at Special Term, and itself granted the motion to vacate the judgment herein, or at least to modify it.

In conclusion, I venture to remark that this proceeding appears to me to have been an attempt to short-circuit—that is, to evade—Judge Hughes' decision, rather than to assail it by direct appeal. If we reverse the judgment appealed from, or modify it so as to limit its injunction to September 8, 1918, our determination cannot interfere with

the right of either party to insist upon the rate of \$1.10 since so established by the commission.

I advise, therefore, that the judgment appealed from be modified, so as to limit its injunction to September 8, 1918, and, as so modified, affirmed, without costs. All concur.

(189 App. Div. 87)

DELAP v. LEONARD et al.

(Supreme Court, Appellate Division, Second Department. October 3, 1919.)

1. REFORMATION OF INSTRUMENTS §=17(2)—MISTAKE OF SCRIVENER.

When there is no mistake about grantor's intention, but only in the writing, the mistake of the scrivener, no matter how it occurred, ought to be corrected.

2. REFORMATION OF INSTRUMENTS §=17(2)—DEED OF GIFT—MISTAKE.

Where grantor, conveying land to stepdaughter without consideration, instructed lawyer to provide for reversion to grantor upon stepdaughter's death before certain age, deed conveying, by mistake of lawyer, a life estate to stepdaughter, with remainder to her children, if any, and reversion to grantor upon her death without children, will be reformed, so as to convey estate grantor intended to convey.

Appeal from Special Term, Kings County.

Action by Elizabeth C. Delap against Estelle Delap Leonard and George R. Leonard, 3d. Judgment dismissing complaint on the merits, and plaintiff appeals. Judgment and findings reversed, with directions.

Argued before JENKS, P. J., and MILLS, RICH, KELLY, and JAYCOX, JJ.

C. W. Wilson, Jr., of Brooklyn, for appellant.

Michael Furst, of Brooklyn, guardian ad litem for George R. Leonard, 3d, infant respondent.

RICH, J. This action was brought to correct and reform a deed of real property in which it appears plaintiff sought to convey to her stepdaughter, the defendant Estelle Delap Leonard, the undivided one-half of the four parcels of real property mentioned in the complaint. The property was conveyed to plaintiff by her husband shortly before his death. He possessed no other property. Some time after her husband's death, with the purpose of correcting what she deemed to be an oversight on the part of her husband in failing to provide for his daughter, who was 9 years of age and in delicate health, she said to Mr. Donnelly, who was her coexecutor under her husband's will:

"I said that I thought that my husband's intention was to divide half the property between his daughter and myself, share and share alike, and I felt that my conscience told me that I ought to deed back half of the property to her in some way; that if she died before she was 21, on account of being in delicate health, it would come back to me, as the Delaps had plenty. I said I thought it was just and right, and it annoyed me after the will was filed and I found out about the will. I thought she ought to have half, and I thought I ought to get it back, if she died, because I never thought she would live to be 21."

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She said she never had a thought of Estelle getting married or having children. She requested him to employ an attorney to prepare the necessary conveyance. Accordingly an eminent lawyer was engaged, and the deed in suit was prepared in his office. It was executed by the plaintiff in the office of the lawyer on the 12th day of November, 1901, but instead of being drawn according to plaintiff's direction it purported to convey the use of an undivided one-half of the property during the term of her natural life—

"and in the event of her dying at any time leaving her surviving lawful issue, then to such issue of the said party hereto of the second part and their heirs forever in fee simple absolute. Upon the death of the said party hereto of the second part at any time without leaving lawful issue her surviving, the estate hereby conveyed shall then cease and determine, and the estate in the premises hereby conveyed to said party hereto of the second part for life shall revert to and vest in the said party hereto of the first part, her heirs and assigns forever, in all respects as if this conveyance had not been made."

It appears from the uncontradicted evidence that plaintiff was ill at the time the paper was executed, it was different from what she intended, and that when she executed the deed she supposed she was conveying the one undivided one-half to her stepdaughter, with the reservation that, if the stepdaughter should die before she attained her majority, the property should revert to the plaintiff. The plaintiff received no consideration for the deed. She sought to convey the property to her stepdaughter voluntarily as an act of justice. Owing to what was undoubtedly a mistake of the scrivener, her purpose was thwarted.

Estelle Columbia Delap was married, and the defendant George R. Leonard, 3d, is her son. The learned trial justice who presided was of the opinion that—

"It would be a dangerous use of the equitable powers of this court to change, after the lapse of many years, the provisions and effect of a grant of real property."

[1, 2] The plaintiff should not be penalized because of this mistake. When there is no mistake about plaintiff's intention, but only in the writing, the mistake of the scrivener, no matter how it occurred, ought to be corrected. *Pitcher v. Hennessey*, 48 N. Y. 415; *Born v. Schrenkeisen*, 110 N. Y. 55, 17 N. E. 339. And this is so, notwithstanding a long period of time has elapsed between the time of the execution of the deed and the discovery of the mistake. And there is reason for it in the instant case, in that this is not the question of reforming an agreement between two parties, but of a gift from plaintiff to her stepdaughter, and in such case a mistake in the estate granted is sufficient to justify a decree for reformation. *Schrieber v. Goldsmith*, 39 Misc. Rep. 381, 79 N. Y. Supp. 846; *Lister v. Hodgson*, 4 L. R. Eq. 34; *Crockett v. Crockett*, 73 Ga. 647; *Andrews v. Andrews*, 12 Ind. 348.

The judgment and findings should be reversed, new findings substituted, and a decree of reformation directed to be entered accordingly, without costs. All concur, except JENKS, P. J., not voting.

Application of LLOYD'S MEMORIAL CONGREGATIONAL CHURCH.

(Supreme Court, Special Term, Erie County. October 14, 1919.)

RELIGIOUS SOCIETIES §21—TRUSTEES OF CONGREGATIONAL AS DISTINGUISHED FROM INDEPENDENT CHURCH CANNOT CHANGE CHURCH ALLEGIANCE.

Persons constituting the majority of the trustees and congregation of a religious corporation organized as a Congregational church, according to Religious Corporations Law, §§ 160-171, which recognizes a distinction between a "Congregational" and an "Independent" church, have no power under sections 5 and 171 to change the church allegiance of the corporation to the Methodist Episcopal Church.

In the matter of the application of Lloyd's Memorial Congregational Church to change its name to Lloyd's Memorial Colored Methodist Episcopal Church. Application denied.

Parton Swift, of Buffalo, for petitioner.
William C. White, of Buffalo, opposed.

WHEELER, J. This is an application to change the corporate name of the petitioner from that of "Lloyd's Memorial Congregational Church" to that of "Lloyd's Memorial Colored Methodist Episcopal Church." This application is opposed by a minority of the trustees and congregation of the petitioner. The petition set forth that at a special meeting called by the trustees a resolution was passed by more than a two-thirds vote of those present for changing the name of the corporation as asked, and "for affiliation with the Colored Methodist Episcopal Church." It is thus made to appear the action taken is an effort to change the church allegiance of the petitioner from the general Congregational Church body to the Colored Methodist Episcopal Church, and, at the same time, so change its corporate name as to clearly indicate the attempted change of church affiliation. It is frankly stated by counsel for the petitioner that such is the purpose of this proceeding. The minority of the congregation and board of trustees challenge the right of the majority to make the change contemplated.

While this court has a right to authorize a change in a corporate name, nevertheless we are of the opinion that no such change should be authorized in this case, if it should be of the opinion that the petitioner or its trustees have no power or right to change its church affiliation, and devote its church property to public worship according to the uses and discipline of the Colored Methodist Episcopal Church at large.

It is alleged in the petition that the petitioner is an "Independent church," but the certificate of incorporation gives the corporate name as "Lloyd's Memorial Congregational Church." It is fair to assume that it was the purpose and intention of the incorporators to organize a church which should act in harmony and in affiliation with the general Congregational Church. Just how the general Congregational Church is organized is not disclosed by the papers before the court, but we know that the church holds its General Assemblies and conventions, while the management and control of its affairs are largely committed

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to the congregations of the individual churches. In any event the opposing affidavits show that church discipline and control of the Methodist Episcopal Church is radically different from that of Congregational bodies. In the Methodist denomination the church government and control is largely vested in the bishop of that church; whereas, in the Congregational churches the congregation exercises large, if not exclusive, control.

While the petition alleges the petitioner to be an "independent church," I very much doubt such a designation to be a true and accurate one. By referring to the statute known as the Religious Corporations Law (Consol. Laws, c. 51), we find various provisions for the incorporation and organization of churches of different denominations. Article 8 of this general statute prescribes the method of organizing Congregational and Independent churches. It provides for "notice of a meeting for the purpose of incorporating an unincorporated Congregational or Independent church shall be given as follows," etc. If the court reads this statute correctly, it recognizes a distinction between a "Congregational" and an "Independent" church; the one name being used to designate churches affiliated with the general church body known as the Congregational Church, and the other a church unit affiliated with no general church body. It will be observed that in the statute both the word "Congregational" and "Independent" is spelled with a capital letter, thus indicating these words were employed to designate a separate and distinct class of church bodies, while prescribing for both the same method and steps of corporate organization. This distinction may be of some importance, for it is conceded by counsel for the petitioner that, where a church corporation is not an Independent church, its trustees and governing board have no right to change the church allegiance from one denomination to another, or to divert its temporalities and property to other uses than in accordance with the discipline, rules, and usages of the corporation and of the ecclesiastical governing body.

We need but quote the language of section 5 of the Religious Corporations Law upon this subject. It provides:

"Sec. 5. *General Powers and Duties of Trustees of Religious Corporations.*—The trustees of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, and with the provisions of law relating thereto, for the support and maintenance of the corporation, or, providing the members of the corporation at a meeting thereof shall so authorize, of some religious, charitable, benevolent or educational object conducted by said corporation or in connection with it, or with the denomination, if any, with which it is connected; and they shall not use such property or revenues for any other purpose or divert the same from such uses. * * *

Prior to the enactment of the acts of 1875 (chapter 79) and 1876 (chapter 110), subsequently incorporated without material change into the Religious Corporations Law of the Consolidated Statutes, a majority of the members of any religious corporation had a right to control the corporation in all respects, and it was held that corpora-

tions formed under the third section of the act of 1813 (2 Rev. Laws 1813, p. 212), have no denominational character, nor could any such character be engrafted upon them, and that such corporations might change from one denomination to another. *Petty v. Tooker*, 21 N. Y. 267; *Gram v. Evangelical Lutheran Society*, 36 N. Y. 161; *Watkins v. Wilcox*, 66 N. Y. 654; *Westminster Presbyterian Church v. Trustees*, 142 App. Div. 866, 127 N. Y. Supp. 836.

In substance the decisions were to the effect that property acquired by a religious corporation organized under the act of 1813 was impressed with no particular trust to be used for the purposes of any particular sect or denomination, unless so expressly provided by the deed of conveyance or gift to such church. This latitude given to trustees of religious corporations led to abuses. Many religiously minded persons had made large contributions of money and property to church organizations to which they were attached, to have their gifts diverted from the original purposes intended when perchance the control of the board of trustees passed into the hands of those without sympathy with the religious views of the original donors. To remedy this condition the Legislature passed the acts of 1875 and 1876, and the law as enunciated by the courts in their prior decisions under the statute of 1813 was changed, so that now the trustees of church corporations are bound to administer the temporalities of their church—

"in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, * * * and they shall not use such property or revenues for any other purpose or divert the same from such uses." Section 5, Religious Corporations Law.

Since the passage of this statute the courts have been constrained to recognize the denominational character of religious corporations. *First Reformed Church v. Bowden*, 14 Abb. N. C. 356; *Isham v. Dunkirk First Presbyterian Church*, 63 How. Pr. 465. In the case of *Trustees of Presbytery v. Westminster Church*, 222 N. Y. 315, 118 N. E. 803, Judge Hiscock, of the Court of Appeals, in discussing the force and effect of section 5 of the Religious Corporations Law, said:

"There appears to be no doubt that under it a church which has become affiliated with and a constituent part of the church at large, and as such has acquired property, would be compelled while this relationship continued to submit to the government of such church at large. Thus plainly says the statute. The only question which would remain would be whether by rebellion or secession a constituent church can terminate the relationship and become free from such obligations and control, and we think that this question quite answers itself. It cannot."

It is unnecessary to cite or discuss decisions further as to the general proposition stated, as they are conceded by the counsel for the petitioner. He, however, contends that the petitioner is an Independent church, with no denominational or ecclesiastical affiliations, and that therefore the restraints imposed by section 5 of the Religious Corporations Law have no application to the case now under consideration. We think counsel is in error in claiming the petitioner to be an "Independent" church. It was incorporated as a "Congregational" church. At least the corporate name adopted by its incorporators

clearly discloses the intent and purpose that it should be a constituent unit of the Congregational denomination. The history of its organization related in the affidavits submitted clearly indicates the purpose to make it such, to be controlled and guided by the ecclesiastical polity and the religious belief of what is commonly known as the Congregational Church. In its certificate of incorporation the petitioner did not designate or class itself as an "Independent" church, but as a "Congregational" church, and for the purposes of this application we must deem it such.

It may be that the government and control of churches of this denomination is vested largely in members of the congregation of each individual church. It may be that the Congregational Church has no general ecclesiastical governing body to which the corporation is subject. Of just the extent and limit of general authority in that denomination the court is not advised. But the application of the statute to religious corporations is not dependent upon the existence of some "ecclesiastical governing body." The statute imposes the duty on church trustees to "administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject," clearly recognizing that in certain cases there may be no "ecclesiastical governing body." Nevertheless we do not understand that the mere nonexistence of some "ecclesiastical governing body" absolves the trustees of a church from administering its property according "with the discipline, rules and usages" of the denomination with which it is connected. The statute makes no exceptions, and had it been the intent of the Legislature to have exempted any class of churches from the operation of this section we are of the opinion it would have so said in plain and explicit language.

It may be unnecessary, but we think proper in this connection, to call attention to section 171 of the Religious Corporations Law authorizing—

"any incorporated Congregational Church, * * * by the concurrent vote of two-thirds of its qualified voters, * * * to direct the transfer and conveyance of any of its property, real or personal, * * * to any religious, charitable or missionary corporation connected with the Congregational denomination," etc.

This section not only recognizes the Congregational Church as a denominational church, as distinguished from an Independent church, but authorizes certain conveyances by churches belonging to that denomination, which churches of other denominations could not make by virtue of section 5 of the act. It defines, however, to just what organization such conveyances can be made, and by implication excludes all other conveyances.

We think that the petitioner comes clearly within the provisions of the statute, and to hold otherwise would be to defeat its plain purpose. Certainly the Congregational Church is generally regarded as a denominational organization as distinguished from independent churches. The petitioner must be regarded as "connected" with the Congregational Church within the meaning of the statute.

It may be that it would be better on the whole that the reorganization of the petitioner as contemplated should be perfected. But we are face to face with the prohibitions of the statute, which we think forbid this action. Convinced, as we are, that in coming into the Colored Methodist Episcopal Church this church organization and its property violates the Religious Corporations Law, we think that this court should not aid an illegal act by giving its sanction to a change of the corporate name as prayed.

This view of the matter obviates the necessity of inquiring into the regularity of the corporate meetings authorizing the proceedings which are challenged on this motion. The petitioner's application is denied, with \$10 costs.

So ordered.

(189 App. Div. 126)

In re BALDWIN.

In re CURTISS' WILL.

(Supreme Court, Appellate Division, Second Department. October 3, 1919.)

TRUSTS $\Leftrightarrow$ 272(3)—**RIGHTS OF BENEFICIARY IN STOCK DIVIDEND DETERMINED.**

Where trustee, holding corporate stock, received stock dividend, and as holder of stock so received purchased treasury stock under the subscription right given stockholders, life beneficiary, under holding of court that stock dividend was income, was entitled, in addition to the stock received as dividend, to treasury stock purchased by trustee as holder of dividend stock, upon payment to trustee of amount trustee paid therefor.

Appeal from Surrogate's Court, Westchester County.

In the matter of the intermediate settlement of the accounts of Anson Baldwin, as trustee of the trusts created by and under the last will and testament of Abijah Curtiss, deceased. From parts of a decree entered on the second intermediate accounting, Anson Baldwin and Frederick H. Curtiss appeal. Decree reversed in part. Trustee's account settled as amended and filed.

Part of the principal under the trust created by the will of Abijah Curtiss, of which Frederick H. Curtiss was to be paid the income, was originally 35 shares of the stock of the Rome Brass & Copper Company. Before the first accounting, and on September 1, 1910, that corporation issued a 300 per cent. stock dividend from surplus profits, so that these 35 shares thus brought out 105 shares. There was also offered a subscription right to take \$200,000 new treasury stock, giving to existing stockholders of record the right to take 1 new share for every 7 shares held.

The trustee first treated the 105 new shares as principal. He thus appeared on the stock ledger as trustee holding 140 shares. He was confident of the intrinsic value of the subscription right. So he also took the 20 shares offered on this 140 shares, paying therefor out of cash on hand and from borrowing. He testified that he "exercised the right in behalf of all parties," taking all the stock available on his record holding. When it was decided that this stock dividend was income (In re Baldwin, 74 Misc. Rep. 341, 133 N. Y. Supp. 1109; Id., 157 App. Div. 897, 142 N. Y. Supp. 1107; Id., 209 N. Y. 601, 103 N. E. 734), it established the title of the beneficiary. The trustee on March 31, 1914, therefore, passed to the beneficiary the 15 new shares obtained upon the subscription rights of his 105 new shares, and the beneficiary paid the trustee for

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their par value. The other 5 shares out of the 20 subscribed were added to the principal.

In these accounting proceedings these 15 shares have been regarded as principal. The accounting trustee has been charged with \$2,640, the full market value of such shares. An allowance of \$750 was made to the special guardian.

Argued before JENKS, P. J., and MILLS, RICH, PUTNAM, and BLACKMAR, JJ.

William W. Scrugham, of Yonkers, for appellants.

John Q. A. Johnson, of Yonkers (Frederick Hughes, of Yonkers, on the brief), for respondents Caroline C. Johnson and others and for special guardian of infant respondents.

PER CURIAM. It has been settled that the Rome Brass & Copper Company stock dividend, declared in 1910, was income, and as such passed to the life beneficiary, instead of becoming an accretion to the principal trust fund. 74 Misc. Rep. 341, 133 N. Y. Supp. 1109; 157 App. Div. 897, 142 N. Y. Supp. 1107; 209 N. Y. 601, 103 N. E. 734.

After such final decision in December, 1913, and the surrogate's decree entered thereon, directing the trustee to deliver such 105 shares to the life beneficiary, the trustee further transferred to such beneficiary the 15 shares of new treasury stock which he had subscribed for, taking reimbursement for the amount advanced. This was right, as the determination that the stock dividend was income carried also the appurtenant subscription right, as both were from accumulated profits. *United States Trust Co. v. Heye*, 224 N. Y. 242, 120 N. E. 645. The subscription right to the 15 shares here in dispute followed the ultimate title to the 105 shares for which the trustee subscribed on behalf of whoever should be finally entitled thereto.

In view of the situation of the infant parties to this accounting, the \$750 allowance to the special guardian is reduced to \$500.

Therefore so much of the decree of the Surrogate's Court of Westchester County is reversed as charges against the trustee the value of 15 shares of the Rome Brass & Copper Company transferred to Frederick H. Curtiss. The allowance to the special guardian is reduced from \$750 to \$500. The trustee's account, as amended and filed, is settled, with costs to the appellants, also to the respondents who have appeared, payable out of the estate.

BIGIO et al. v. STEINBRUGGE et al.

(Supreme Court, Appellate Term, First Department. October 17, 1919.)

SALES ¶411—**COUNTERCLAIM FOR FAILURE TO DELIVER MUST ALLEGE ABILITY TO PAY.**

A counterclaim, based on plaintiffs' failure to deliver goods bought by defendants, is insufficient to set out a cause of action, where it was not alleged that at appointed time of delivery defendants were able and willing to make the payment required.

Appeal from City Court of New York, Special Term.

Action by Jacques Bigio and another against Edward Steinbrugge, Jr., and others. From an order denying plaintiffs' motion to vacate an order for their examination before trial, plaintiffs appeal. Order reversed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Ferris, Dannenberg & Ansbacher, of New York City (Jacob Ansbacher, of New York City, of counsel), for appellants.

Anton Gronich, of New York City (Ira J. Schuster, of New York City, of counsel), for respondents.

BIJUR, J. The examination was ordered in support of defendant's counterclaim. Whatever view we may take of other alleged defects in the counterclaim, which is based on plaintiffs' failure to deliver goods purchased by defendant, it is manifest that it fails to set out a good cause of action, because of the absence of an allegation that at the appointed time of delivery defendant was ready and able to make the payments required. See *Stern v. McKee*, 70 App. Div. 142, 75 N. Y. Supp. 157; *Pope v. Terre Haute Mfg. Co.*, 107 N. Y. 61, 13 N. E. 592; *Reid v. America Co.*, 136 N. Y. Supp. 75.

Order reversed, with \$10 costs and disbursements, and motion to vacate examination granted. All concur.

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(109 Misc. Rep. 62)

IN re DURANT'S ESTATE.

(Surrogate's Court, New York County. October 9, 1919.)

1. WILLS §498—INTENT SHOWN TO LIMIT "ISSUE" TO CHILDREN ONLY.

The rule that the word "issue" will be construed to mean descendants generally yields to an intent manifested in some part of the will to limit the meaning to children only.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Issue.]

2. WILLS §533—LIMITATION OF REMAINDER OF TRUST FUND TO CHILDREN OF LIFE TENANT.

In view of other clauses of will, testator's intention in providing that a fifth of the residuary estate should be held in trust for a daughter for life, and on her death leaving "issue" to pay over to such issue the principal for equal division, *held* to have been to limit the distribution of the remainder to children of the life beneficiary and the issue of any of them dead on distribution, such issue to take parent's share.

In the matter of the estate of Charles W. Durant. On objections to the account of a trustee under a clause of the will. Decree directed in accordance with the opinion.

Geller, Rolston & Horan, of New York City, for trustee.

Harris & Towne, of New York City, for Ray D. Bowers.

Arthur Sutherland, of New York City, for Durant Bowers.

Henry De Forest Weekes, of New York City, special guardian of infants Estelle and Alice D. Weeks.

Thomas B. Gilchrist, of New York City, for Henry Dearborn, general guardian.

Laurence Millet, of New York City, for Margaret D. B. Dearborn.

FOWLER, S. The trustee under the ninth clause of the will of the deceased has filed its account, and objections thereto have been filed by one of the children of the life beneficiary. The objections put in issue the construction of the ninth clause of the will adopted by the trustee, and the correctness of this construction is therefore presented to the court for determination. That clause provides that one-fifth of the residuary estate of the deceased shall be held in trust and the income applied to the use of Estelle Durant Bowers, a daughter of the deceased, during her natural life, "and upon the death of my said daughter, leaving lawful issue her surviving then to pay over to such issue the principal of such share so devised in trust, to be equally divided between them."

Estelle Durant Bowers remarried and became known as Estelle Durant Weeks. She died on December 24, 1918, and was survived by five children. One of these children, Margaret D. B. Dearborn, had two children living at the date of death of the life beneficiary, and it is contended on their behalf that they are entitled to share in the remainder after the life estate of Estelle Durant Weeks equally with their mother and the other children of the life beneficiary.

[1] This contention would unquestionably be correct if the testator

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in the ninth clause of his will intended by the words "lawful issue" to refer to the descendants generally of his daughter Estelle, and that such descendants should take per capita. While it is the rule in this state that the word "issue" will be construed to mean descendants generally (*Schmidt v. Jewett*, 195 N. Y. 486, 88 N. E. 1110, 133 Am. St. Rep. 815), nevertheless this rule will yield to an intent manifested in some part of the will to limit the meaning of issue to children (*Matter of Union Trust Co.*, 170 App. Div. 176, 156 N. Y. Supp. 32; *Brown v. Tanz*, 176 App. Div. 795, 163 N. Y. Supp. 372).

There are in the will of the testator many manifestations of an intent to give his property to his children to the exclusion of his grandchildren. Thus, in paragraph third, the will provides that any income derived from his estate in excess of \$20,000 a year shall be divided among his children living at the end of such year. In paragraph eighth he provides that if either of his sons die before the life tenant, leaving no lawful issue him surviving, his share shall go to his surviving brothers and sisters in equal shares—none going to their children. In paragraph tenth he provides that in case his daughter should die leaving no issue her surviving, then the principal of the trust fund is to go to his sons, to be divided equally between them—no part going to their children. In paragraph fifteenth he provides that upon the death of his son Thomas, the trust fund held for his benefit shall be paid "to my other children living at the death of said Thomas, equally, to be divided among them"—not among them and their children.

There is therefore throughout the will of the testator a manifest intent to limit the distribution of his estate to his children living at the time of such distribution, and to exclude his grandchildren when the parent or parents of such grandchildren are living. There is also manifest an intention that such distribution shall be equal among his children or his grandchildren. A construction of the ninth clause of the will which would hold that the testator intended by the words "lawful issue" a per capita distribution among descendants would result in three-sevenths of the trust fund being paid to one child and her issue, while each of the other children would receive only one-seventh. There is nothing in the will to sustain the contention that such was the intention of the testator and nothing to support such an inequitable distribution of the trust fund.

[2]. I will therefore hold that the testator intended to limit the distribution of the remainder of the trust fund referred to in the ninth clause of his will to children of the life beneficiary and the issue of any of them who should be dead at the time of distribution, such issue to take its parent's share, and that the corpus of the trust fund should be divided equally among the children of Estelle Durant Weeks.

Settle decree accordingly.

KIPS BAY BREWING & MALTING CO. v. J. H. TOOKER PRINTING CO.

(Supreme Court, Appellate Term, First Department. October 17, 1919.)

COSTS \$275—PAYMENT AS CONDITION TO PLEADING OVER AFTER DEMURRER.

An order granting defendant's motion to withdraw its demurrer, and to plead over after judgment on the pleadings for plaintiff, should be conditioned upon the payment of taxable costs to date, but not upon additional costs.

Appeal from City Court of New York, Special Term.

Action by the Kips Bay Brewing & Malting Company against J. H. Tooker Printing Company. From so much of an order of the City Court of the city of New York as refused to vacate the judgment and imposed any more than taxable costs, together with costs of motion, upon defendant as a condition for withdrawing demurrer and filing answer, defendant appeals. Order modified, by reducing award of costs, and affirmed.

See, also, 174 N. Y. Supp. 686; 176 N. Y. Supp. 65.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Herman Kahn, of New York City, for appellant.

Paskus, Gordon & Hyman, of New York City (Arthur B. Hyman, of New York City, of counsel), for respondent.

PER CURIAM. In order to determine the amount of costs which should have been allowed to the plaintiff, it is necessary to recall the various motions that have been made herein.

Defendant demurred to the complaint, and plaintiff moved to strike out the demurrer as frivolous and for judgment on the pleadings. This motion was granted, with costs, and the defendant appealed. On appeal the judgment was vacated, and costs were awarded to the defendant; the court stating that the demurrer should have been brought on for hearing in the usual manner. Plaintiff paid the costs awarded and again moved for judgment on the pleadings. Judgment was granted a second time in the court below, and upon appeal the same was affirmed, but with an allowance for disbursements only, and with leave to the defendant to apply at Special Term for further relief or to take such proceedings as counsel may advise.

The papers presented indicate that the disbursements on this appeal amounted to \$10.57. Defendant thereupon moved in the lower court to vacate the judgment entered against it, and for leave to serve an answer to the complaint. The order made upon this motion refuses to vacate the judgment, and grants defendant leave to withdraw its demurrer and serve its answer upon payment of \$118.89 costs. This appeal by the defendant is from so much of said order as imposes any more than taxable costs to defendant with costs of motion, as a condition of pleadings, and also from the order in so far as it refuses to vacate the judgment.

The order granting defendant's motion to withdraw its demurrer and to plead over should have been conditioned upon payment of taxable costs to date, with \$10 motion costs. The record discloses that these costs would be \$28.97, the amount awarded in the second judgment, plus the disbursements awarded in the appeal therefrom, namely, \$10.57, making a total of \$39.54. To this total should be added the \$10 motion costs, making the complete sum of \$49.54.

As to the second phase of the appeal, the merits indicate that the judgment should stand as security to the plaintiff pending the trial of the action, and hence the order should not be disturbed in that respect.

Order modified, by reducing the award of costs to \$49.54, and, as modified, affirmed, without costs.

HYLAND v. FINK.

(Supreme Court, Appellate Term, First Department. October 17, 1919.)

BANKRUPTCY § 423(1)—EVIDENCE SHOWING FRAUDULENT OBTAINING OF PROPERTY BY BANKRUPT.

Evidence held to justify finding that defendant bankrupt, at time of obtaining loan from plaintiff to a third person, was beneficially interested, so that plaintiff's judgments against defendant, rendered in an action for obtaining property by false representations, under Bankruptcy Act, § 17 (U. S. Comp. St. § 9601), were unaffected by defendant's discharge, and improperly canceled at defendant's motion pursuant to Debtor and Creditor Law, § 150.

Appeal from City Court of New York, Special Term.

Action by Catherine Hyland against Valentine Fink. From orders granting motions by defendant to cancel two judgments for plaintiff, after defendant's discharge in bankruptcy, plaintiff appeals. Orders reversed, and motions denied.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

John J. Cunneen, of New York City, for appellant.

Samuel D. Lasky, of New York City, for respondent.

GUY, J. The motions for cancellation of the judgments in question were made pursuant to section 150 of the Debtor and Creditor Law (Consol. Laws, c. 12) on the ground that defendant had procured a discharge in bankruptcy. These motions were opposed for the reason that the judgments were rendered in an action for obtaining property from plaintiff by false representations. Section 17 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. § 9601]) provides as follows:

*"Debts Not Affected by a Discharge.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false * * * representations. * * *"*

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The action was instituted upon a complaint which alleged:

"I. That before the commencement of this action, and on or about the 10th of July, 1907, the defendant, for the purpose of inducing the plaintiff to loan two thousand (\$2,000) dollars to one Gustave E. Beyer, stated and represented to the plaintiff that said Beyer was worth one hundred thousand (\$100,000) dollars, and that defendant's money was tied up at the time, or otherwise he, the defendant, would personally make said loan, and that he, the defendant, wanted to oblige the said Beyer, and requested plaintiff to make such loan; and defendant further stated and represented to plaintiff that, if said Beyer did not repay the said loan, he, the defendant, would repay it."

Then followed the essential allegations of a fraud action, viz. falsity, scienter, deception, and injury. The answer consisted practically of a general denial.

Upon the trial it appeared that in July, 1907, defendant was co-executor with plaintiff of her husband's will, and knew that she had on deposit in a savings bank \$2,000 bequeathed her by her husband; that he requested plaintiff to loan said sum to Beyer, stating that he knew Beyer to be a rich man and worth \$100,000; that plaintiff said, "I would rather have nothing to do with it;" that defendant then said, "You will have no trouble getting your money back, because, if he doesn't give it to you, I will;" that plaintiff said, "On those conditions I will give you the money;" and defendant said, "I will see that you get it back all right;" that plaintiff relied on said statements, and loaned the money to Beyer, and received his note of hand accordingly; that the loan in question was used in paying overdue interest on one of Beyer's mortgages; that the only interest money received by plaintiff on the loan in question was from defendant, either in cash or by his personal check; and finally that Beyer's total worth was about \$53,000.

The trial record of this case clearly shows that the action was pleaded, tried, and submitted to the jury as a common-law action for deceit with full acquiescence and approval on the part of defendant, and the only question up for determination is whether under the circumstances detailed the judgments were properly discharged of record pursuant to provisions of the Bankruptcy Law cited. In *Matter of Dunfee*, 219 N. Y. 188, 190, 114 N. E. 52, the court said, in construing the provisions of subdivision 2 of section 17 of the Bankruptcy Law:

"The Bankruptcy Law does not require that the property shall be obtained by the bankrupt at the instant of making the false representations nor *that it shall pass directly to the bankrupt.*" (Italics mine.)

If it is shown that the bankrupt derives a benefit from the property obtained he comes within the provisions of the statute in question, which by its very terms places no limitations as to whom the property is obtained for.

In this case, as tending to prove defendant's beneficial interest in the loan, we have his promise to repay the loan if Beyer did not, the subsequent payments of interest by him personally, supplemented by the testimony of plaintiff's witness Fellman that prior to July, 1907, the time of the making of the loan, defendant told him that he was jointly interested in real estate with Beyer, and that he, the witness, knew of several real estate transactions between 1904 and 1908 in which the defendant and Beyer were jointly interested; also by

defendant's admission, on cross-examination, that the Third avenue property, to which Beyer had the legal title in 1907, and to pay the mortgage interest on which the money was admittedly borrowed from plaintiff, was about a year or more later conveyed by Beyer as part consideration in an exchange for property the title to which was then taken by Beyer and defendant jointly, and that defendant and Beyer never had any accounting as to said property.

In the light of this proof, the jury, which found defendant had been guilty of fraud in inducing plaintiff to make the loan, was fully justified in discrediting defendant's testimony that he never had any interest in real property with Beyer prior to 1908, and in finding, as matter of fact, that defendant was, at the time of obtaining the loan from plaintiff, beneficially interested in the securing of said loan.

It follows, therefore, that the orders appealed from should be reversed, with \$10 costs and disbursements, and motions denied, with \$10 costs. All concur.

(189 App. Div. 904)

LEWIS v. NEW YORK MUNICIPAL RY. CORPORATION et al.

(Supreme Court, Appellate Division, Second Department. October 3, 1919.)

1. CONTRACTS $\Leftrightarrow$ 28(3)—EVIDENCE INSUFFICIENT TO ESTABLISH CONTRACT TO BUILD ELEVATED RAILWAY AS ALLEGED.

In action, by one contracting to build elevated railroad structure, to recover on quantum meruit, after rescission because of breach by a defendant, the original contractor, evidence *held* insufficient to sustain plaintiff's burden to prove contract alleged in complaint, showing that his bid was predicated on the contract of the railroad with the original contractor, the drawings therein referred to, and the drawings showing conditions taken from data furnished by the various city departments, etc.

2. CONTRACTS $\Leftrightarrow$ 316(3)—PARTY SEEKING RESCISSION FOR BREACH LIMITED TO CAUSE RELIED ON IN PLEADING.

Plaintiff, suing to recover on quantum meruit after rescission, having expressly grounded his attempted rescission on the placing of the piers of the elevated railroad structure which he was to construct, and their foundation, in front of existing curbs, can be heard on no other ground for rescission.

3. CONTRACTS $\Leftrightarrow$ 312(1)—EVIDENCE INSUFFICIENT TO SHOW BREACH OF CONTRACT BY ORIGINAL CONTRACTOR WITH PLAINTIFF SUBCONTRACTOR.

Original contractor to build elevated railroad structure, who sublet the work to plaintiff, suing to recover on quantum meruit after rescission for an alleged breach, *held* not to have breached the contract in the particular alleged, by requiring the placing of piers and their foundations in front of existing curbs.

Appeal from Special Term, Queens County.

Action by Frederick N. Lewis against the New York Municipal Railway Corporation, the Connors Bros. Company, Incorporated, and another. From judgment for defendants Connors Bros. Company, and another, plaintiff appeals. Affirmed.

The following is the opinion of Kelby, J., at Special Term:

The action is to foreclose a lien. The defendant Connors Bros. Company on the 15th day of November, 1915, entered into a contract in writing with the New York Municipal Railway Corporation to construct concrete foundations

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and to erect thereon approximately $2\frac{2}{10}$ miles of a two-track elevated railroad structure known as section 2 of the Jamaica Line, commencing at a point on Jamaica avenue, near Walnut street, and running thence easterly along Jamaica avenue, in the borough of Queens, to Cliffside avenue, formerly Grant avenue. The work to be done under said contract was divided into five items. Item 1 was for the foundation excavation, and item 2 was for the construction of concrete foundations for piers or columns. On January 12, 1916, plaintiff, Frederick N. Lewis, entered into a contract in writing with the Conners Bros. Company, Incorporated, by the terms of which plaintiff undertook to perform items 1 and 2 of the said contract made by Conners Company with the railroad company for the agreed unit price of \$1.20 for each cubic yard of excavation and \$5.90 for each cubic yard of concrete masonry. Plaintiff entered upon the performance of the last-named contract and actually continued work down to and including May 29, 1916. On the 1st day of June, 1916, the plaintiff formally notified the Conners Bros. Construction Company that they elected to rescind the said contract. This was in conformance with a previous letter by the plaintiff to the said defendant, dated May 29, wherein he stated an intention to abrogate the contract. The express ground of rescission was that the work that he was being required to do was at variance with the contract, contract drawings, and certain other set of drawings, entitled "Supplemental Drawings," showing existing conditions above; the specific ground being that the contract and drawings above referred to showed the location of columns behind existing curbs, while the defendant and the railroad company were insisting upon the columns being erected in front of existing curbs, except in a few instances, where proposed curb lines have been shown in the contract drawings. The lien filed herein was bonded and discharged of record.

The plaintiff now sues on a quantum meruit after rescission, because of the alleged breach of the contract by Conners Bros. Company, Incorporated, and he has adduced evidence showing the reasonable value of the work performed to be \$7,526.70. The defendant Conners Bros. set up a counterclaim, alleging that the plaintiff breached his contract, and setting up damages of \$35,000. The sole question then is: Which party breached the contract?

The contract of the plaintiff with Conners Bros. provides that he will "furnish all materials and labor and tools * * * necessary * * * for the performance * * * all the excavation, masonry work, and incidentals, as set forth in items 1 and 2 in the contract" between the railway company and Conners Bros., and further provides it shall be done "according to the specifications and plans set forth and referred to in said contract, and which said plans and specifications, so far as they relate to said items 1 and 2, are hereby made part of this agreement," and again, "All necessary lines, locations and grades * * * will be furnished * * * by the engineer of the New York Municipal Railway Corporation, under whose direction and to whose satisfaction the work is to be performed."

The main contract between the railway company and Conners Bros. provides that "a description of the work to be done is set forth, and the requirements, provisions, and details and specifications are stated in the printed form of contract and in the drawings therein referred to;" and at page 3 of the same contract it is provided that the contractor "shall complete the works * * * in accordance with this contract and specifications and drawings herein mentioned: * * * Provided, however, that the said drawings may from time to time be altered or modified as hereinafter provided." There is a further provision on page 5, subdivision 7, which gives the company the right, during the progress of the work, to amplify the plans and to add explanatory specifications and drawings; and subdivision 8 on the same page: "The company further reserves the right to alter in any way in which it may deem necessary the drawings aforesaid in part or altogether at any time during the progress of the work, without constituting any ground for any claim by the contractor for payment or allowance for damages or extra service on any basis other than that provided for in the schedule of prices for items of the different classes of construction involved in such changes or alterations. All work thus occasioned is not susceptible of classification under the schedule of prices than as otherwise provided herein." At page 25, subdivision 2, is found

the following: "(2) The precise location, dimensions and other characteristics of the works are more fully stated in the specifications forming a part of this contract and on the detail drawings and plans hereinafter mentioned." And at page 27: "(1) The drawings referred to in this contract and specifications are divided into two general classes: Contract drawings C2901 to C2914, inclusive. The second class comprises drawings showing the details of elevated construction and are numbered as follows: Standard drawings, C886, C2538, A46, A523-1, A683, A684. In the contract drawings themselves, C2902 to C2910, both inclusive, are designated as alignment plans, and C2911 is designated as typical cross-section and details. The alignment plans above mentioned—that is, C2902 to C2910, both inclusive—are drawn to scale, and they show either "existing curb" or "proposed curb lines"; the curb line without any notation being existing curb line.

An inspection of these alignment plans shows that there were but few proposed changes in the curb line. The engineer of the railway, however, stated that he knew that there was going to be a substantial change in the curb line, but that he did not know whether the general contractor knew of this change of curb line by the city or not. It seems to me clear that the alignment plans were intended to and did show the existing curb along the work. C2911, denominated "a typical cross-section and details," contained two half sections showing the type of construction with columns on curbs, and another half section showing type of construction with columns in street, and a general note on said plan reads as follows: "Information to be supplied later as to which cols. are on curb and which are in street." The distance from the center of the street to the center of the column is indicated by the word "varies," and this latter is with relation to columns on curbs. The half section with columns in street, the distance from the center of the column to the center of the street is indicated as 13 feet, plus or minus. It appears from the evidence that the American Bridge Company was given the order for the steel on behalf of the contractor, and that the contractor authorized the railway company to deduct from his contract price the amount to be paid for said steel, and that on December 24, 1915, said company had received and commenced to fabricate the form of steel construction for piers on the curb. On September 29, 1915, the railway company furnished plans C5051 to C5071, inclusive, which are denominated "plans showing existing wiring conditions," and which were drawn to scale showing existing curb line, and in a few instances proposed curb, exactly as did the contract drawings. They also contained symbols of a dot within a small circle delineating proposed foundations. These foundations were behind the existing curb line, or behind the proposed curb line which had been set forth on the contract plans. This delineation of proposed foundations could not, of course, be a picture of "the existing conditions," but apparently located with a fair degree of accuracy that said foundations were behind existing curb.

On January 12, 1916, the date of the signing of the contract between Lewis and Connors Bros., the detailed work plan of the column foundations was completed, and these called for a new curb not shown on either the contract plans or the existing wire condition plans, and by these detailed work plans 126 of the 244 piers east of Queens boulevard were located in front of existing curb line, but actually behind a new curb line that had been established by the local authorities. The action of the local authorities narrowed the street by pushing out into the roadway the proposed curb in front of the existing curb. It is claimed by Lewis that before he entered into the written agreement between himself and Connors Bros. on January 12, 1916, he called upon Connors and stated in effect that the contract plans given him did not locate the columns with sufficient accuracy, and that he could not give Connors any price without knowing the position of the columns with respect to the curbs, and that Connors thereupon said that the columns were all behind the curbs, and that he was informed by Connors or by Mr. Lee, an employé of Connors, in the presence of Connors, that there could not be any doubt about the location of the columns, for the reason that the steel had been ordered for that form of construction which provided for the columns on the curbs, and that reference was then made to plan C2911; and plaintiff further contends that the plan showing existing wiring conditions was then produced by Mr. Lee in

the presence of Conners, and that there was specifically pointed out to him the proposed columns shown on said plan, and that Lee said those showed the location of columns. This is absolutely denied by both Conners and Lee; the defendant's contention being that the only papers given to Lewis were the contract and specifications, the contract drawings, and a drawing showing subsurface conditions. Lewis further says that relying on this statement as to all the piers, or practically all of them, being behind the existing curb and the showing of this wiring drawing, he prepared his figures and signed a contract and also an option which gave to Conners the right to accept his bid within the next 25 days.

On January 24, 1916, and before the exercise of the right of acceptance of the option by Conners, Lewis wrote to Conners Bros. in part as follows: "I have been giving much time during the past ten days looking into your work on Jamaica avenue, and I find that I have made you a lower price than I would have given, had I taken more time to consider it. However, I will stand by my proposal, if my understanding is correct in the following particulars based upon the information you gave me: (1) Contractor is to be paid for the width of 6 inches outside the line of excavation for each size of footing. (2) Water and gas mains will be allowed to go through footings without change; small service pipes, gas or water, house connections, etc., to be offset around the footings. (3) All footings to be behind the curb. (4) You to turn over to me your price on cement at \$1.66 a gross."

Three days later, January 27, 1916, defendant wrote to plaintiff a letter stating: "In accordance with our option, we have executed and signed the contract between you and ourselves for the work on section 2, Jamaica Line, and are inclosing the same herewith." This letter also stated in terms that it acknowledged "receipt of your favor of the 24th inst. and note the various suggestions made by you." The defendant then acquiesced to that part of plaintiff's letter concerning payment for excavation to be made on the basis of 6 inches outside the lines of excavation for each size of footing, and also undertook to turn over price for cement at \$1.66 gross per barrel. Defendant declined to acquiesce in the other two proposals contained in plaintiff's letter of January 24, 1916. This necessarily declined plaintiff's proposition that "all footings were to be behind the curb." Defendants stated that "we would not like to entertain any of the other suggestions contained in your letter, as it might raise the question of modifying the terms of the agreement, and it is better for both you and ourselves not to do so."

There is no question that this letter of defendant was received by plaintiff, for it inclosed the contract and option to plaintiff. The latter then discovered that defendant had not signed the contract, but only the option and on January 28, 1916, plaintiff brought the contract to defendant, and it was then properly executed. Nothing was then said about modifying the contract to conform to the terms of plaintiff's letter as to "all footings to be behind the curb." Plaintiff contends this letter was "interpolated" in the contract, and that he did not see it or read it until three or four weeks afterward. The contract consisted of seven typewritten pages on the letter head of the defendant; the option being on an additional page. I find nothing to support plaintiff's claim that defendant placed his letter with the contract, so as to cause it to be overlooked by plaintiff. The letter and contents were delivered in the ordinary course of business, as the parties customarily did. Subsequently, and on February 1, plaintiff received a letter from defendant, dated February 1, which in express terms state: "Will you kindly forward bond as mentioned in the contract, and referred to in letter of January 27, so that records may be complete on this matter." This last letter was sent by plaintiff to Mr. Porter, agent of the bonding company, with request that bond be furnished. Mr. Porter, when called as a witness to corroborate plaintiff's theory that the contract was predicated upon the "plans showing wiring conditions," stated that defendant's employé, Lee, stated to Lewis that these plans (plans showing wiring conditions) "are the electrical drawings, the columns are indicated, but you cannot take that for granted."

[1, 2] Under this state of facts the plaintiff has not sustained the burden of proving the contract alleged in the complaint, and I find the plaintiff's bid was

predicated on the contract of the railroad with defendant Connors Construction Company, and the drawings therein referred to and the "drawings showing existing conditions taken from data furnished from the various city departments, gas companies, and water supply companies." The express ground of rescission having been the placing of piers and their foundations in front of existing curbs, the plaintiff can be heard on no other ground for rescission. *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810. Nor does the evidence sustain a finding that the placing of piers in front of existing curb increased the cost of the work. The water main east of Queens boulevard was under the sidewalk area, and the piers having been moved out in the roadway, were moved away from the location of the water main. Nor is the evidence satisfactory as to increased costs on the surface.

[3] It must therefore be held that defendant did not breach the contract. It follows from the above that plaintiff has not performed the contract on his part, and is liable over to defendant for the breach on the counterclaim pleaded. The measure of damages is the difference between the contract price and the fair and reasonable cost to the defendant of completing the work. I find the reasonable cost to defendant up to January, 1918, was \$79,272.74, that there was paid to plaintiff in cash \$3,901.50, that the reasonable value of asphalt to be done is \$1,000, sidewalks to be done \$400, work with relation to changed curbs to be done \$1,875, making a total of \$86,449.24, less \$825 for expert opinion of engineers and \$100 salvage, making \$85,524.24 as total costs, and find that the cost at the contract rate fixed by plaintiff's contract \$55,049.31, leaving an excess of \$30,474.93, for which judgment is directed in favor of defendant against plaintiff, with costs.

Argued before JENKS, P. J., and MILLS, RICH, KELLY, and JAYCOX, JJ.

Edward M. & Paul Grout, of New York City, for appellant.

M. Carl Levine, of New York City, for appellees Connors Bros. Co., Inc., and Massachusetts Bonding & Insurance Co.

PER CURIAM. Judgment unanimously affirmed, with costs, upon the opinion of Mr. Justice Kelby at Special Term.

(189 App. Div. 96)

PEOPLE v. REDMOND.

(Supreme Court, Appellate Division, Second Department. October 8, 1919.)

1. PERJURY ⇐1—ELEMENTS OF CRIME.

To constitute the crime of perjury, under Penal Law, § 1620, not only must the testimony be false, but the witness must know it to be false, and must testify willfully and with a criminal intent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Perjury.]

2. PERJURY ⇐31—AFFIDAVIT TO RETRACT TESTIMONY PRESUMPTIVELY ESTABLISHED FALSTY.

Under Penal Law, § 1627, affidavit of defendant in prosecution for perjury retracting testimony given during trial presumptively established falsity of testimony, in so far as it was contradicted by the affidavit.

3. PERJURY ⇐31—AFFIDAVIT OF ACCUSED DENYING RECOLLECTION OF FACTS TESTIFIED TO; EFFECT.

Affidavit of defendant in prosecution for perjury that his testimony was based on statements made to him presumptively established that he testified to that which he did not of his personal knowledge know to be true.

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. PERJURY ¶12—If witness believed statements testified to, evidence not willfully false.

If witness who testified to facts told him by others believed what had been told him, his testimony, though false, was not willfully so, and therefore not perjury, under Penal Law, § 1620, notwithstanding section 1628.

5. PERJURY ¶12—Willful failure of witness to remember given fact may constitute crime.

A witness may be guilty of perjury in testifying that he does or does not remember a given fact, but that such testimony is willfully given is an element of the crime.

6. PERJURY ¶33(2)—Evidence insufficient to show testimony willfully false.

In prosecution for perjury, verdict of guilty held against weight of evidence, on the ground of insufficiency of evidence to show that the testimony given was willfully false.

Jaycox, J., dissenting.

Appeal from Kings County Court.

Edward Bishop Redmond was convicted of perjury, and he appealed from an order denying his motion for new trial and in arrest of judgment. Judgment reversed, and new trial ordered. On reargument of appeal. Judgment reversed, and new trial ordered.

Argued before JENKS, P. J., and MILLS, RICH, BLACKMAR, and JAYCOX, JJ.

A. F. Van Thun, Jr., of Brooklyn, for appellant.

Ralph E. Hemstreet, Asst. Dist. Atty., of Brooklyn (Harry E. Lewis, Dist. Atty., and Harry G. Anderson, Asst. Dist. Atty., both of Brooklyn, on the brief), for the People.

BLACKMAR, J. In the June term of 1917 the judgment of conviction herein was reversed by this court for an error in the charge, and a new trial ordered. 179 App. Div. 905, 165 N. Y. Supp. 1104. At the same term, on motion of the people, the order of reversal was resettled, to recite that the reversal was on law only, as the court had not reached an agreement on the facts. 179 App. Div. 127, 165 N. Y. Supp. 821. The people appealed to the Court of Appeals, and that court, in January, 1919, decided that an appeal to it would not lie unless it affirmatively appeared in the body of the order that the Appellate Division had exercised its power to review the facts and that, being satisfied with the judgment in that respect, the reversal was ordered for errors of law only. The appeal was dismissed, but without prejudice to a new application to the Appellate Division for the amendment and resettlement of the order, by stating in it its decision upon the weight of evidence. 225 N. Y. 206, 121 N. E. 785. Such application was thereupon made, and, as two of the justices who sat when the court passed on the case were no longer members of the court, a reargument of the whole case was ordered. It therefore became and is incumbent on us to consider both the facts and the law.

The defendant was indicted and convicted for perjury. In an action

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for partition pending in the Supreme Court, there was an issue of the legitimacy of Beatrice Barker, a defendant in that action. That issue in turn depended on whether her mother, now named Estelle Dorgeloh, was married to one Alphonsus Murtha, or Murtagh, at the time of her marriage to Charles Barker, the father of the said Beatrice. An issue of fact was framed for trial by jury as follows:

"Was the defendant Estelle Dorgeloh, and the mother of the defendant, Beatrice Arabelle Barker, then known as Estelle Whitney, married on or about May 1, 1897, to Alphonsus Murtha or Murtagh?"

The issue came on for trial before a court and jury. Complete proof was offered of a ceremonial marriage before a minister of the gospel on the date specified. The fact was not contested, as defendant Dorgeloh claimed that the ceremony did not effect a marriage. That contention was overruled by the presiding justice, who excluded evidence offered to show that the ceremony was not intended to effect a marriage, and directed the jury to bring in a verdict answering the question in the affirmative. This the jury did after protest, resulting from evident disinclination to render a verdict that tended to bastardize the innocent defendant Beatrice.

The defendant Redmond, called as a witness for defendant, testified that on the 1st of May, 1897, at his mother's house in Degraw street, Brooklyn, he met defendant Dorgeloh, then known as Estelle Whitney, and Alphonsus Murtha; that Estelle Whitney then and there said that she had been married to Murtha; that on the 30th of November, 1914, he accompanied the counsel for the defendant to Somerville, N. J.; that there he saw Murtha, who was the same man that he saw in his mother's house on the 1st day of May, 1897. Upon this testimony he was indicted and convicted for the crime of perjury.

In considering the weight of the evidence it is well to keep in mind certain established facts. On the 1st day of May, 1897, Estelle Whitney was 15 years of age and the defendant, Redmond, 11. She was then staying temporarily at the house of Redmond's mother, and it is in evidence, and not denied, that the intimacy of the girl and the little boy was so great that they slept together in the same bed. A ceremonial marriage was on that day performed between the girl, Estelle, and Murtha, and after the ceremony Estelle did return to the home of defendant's mother. It seems to me, therefore, that it is in the highest degree probable that she did speak of the marriage, at which an aunt of defendant was a witness, so that it was no secret. An analysis of the indictment, the evidence taken at the trial, and the charge of the court show that the issues litigated were whether perjury had been committed in three particulars—i. e., in testifying that the witness remembered seeing Murtha at his mother's home on May 1, 1897; that Estelle Whitney was with Murtha, and there stated that she had been married to him; and that 17 years afterwards defendant recognized Murtha as the same man he saw in 1897. The real question in the case is whether the evidence justified the jury in finding as facts all the elements of the crime in the testimony of defendant that Estelle Whitney said on May 1, 1897, in the home of defendant's mother, that she had been married to Murtha; for the testimony that Mur-

tha was present, or that defendant recognized him, at Somerville, N. J., is incidental matter not material to the issue.

[1] To constitute the crime of perjury, not only must the testimony be false, but the witness must know it to be false, and must testify willfully. Section 1620, Penal Law (Consol. Laws, c. 40). The evidence that the statement was not made is that of Estelle Dorgeloh only. The contest over the infant Beatrice's legitimacy was exceedingly bitter, and the mother, Estelle, appears to have been in a state of almost frantic excitement over it. One expression of hers on the witness stand indicates her state of mind—i. e.:

"Defend my child's honor? To the end of the earth. It is my duty."

She was incensed with every one on the other side of the civil action, among whom she counted the defendant and the counsel. The question whether she uttered the words on May 1, 1897, that she had been married to Murtha, was not definitely and clearly presented to the jury; and if it could have been dissociated from the emotional elements in the case, and left to the jury, I doubt if they would have found that she did not use them, upon her evidence alone, in view of the probability that she did, and of the contradictory testimony of the mother and aunt of the defendant and the defendant himself. The evidence that undoubtedly had the greatest weight in securing conviction is directed to the question whether the defendant, Redmond, who was 29 years of age at the time he gave the testimony for which he was convicted, and 11 years of age on May 1, 1897, really testified from memory or from suggestion. It seems to be assumed, and I think erroneously, that if his testimony was from suggestion, it was knowingly and willfully false. Estelle Dorgeloh and her counsel went to see Redmond, and Mrs. Dorgeloh, playing upon his sympathy for the infant Beatrice, whose legitimacy was in question, induced him to go to the counsel's office, where he was subjected to cross-examination, both by the witness Dorgeloh and counsel, and during its progress an affidavit was dictated to stenographers, which, after it was written out, Redmond signed, and which was produced against him at the trial.

[2] As the purpose of the interview was to obtain a retraction of his evidence, it may fairly be assumed that the affidavit, formulated by a hostile lawyer, states the substance of what he said, without mitigation in his favor. In so far as the affidavit contradicted the testimony, it presumptively established its falsity. Section 1627, Penal Law. The affidavit did not contradict the facts that the defendant testified to, but in artificial language disclaimed recollection, or, as the words are twice used, "independent recollection," of the occurrences regarding which he testified. He states that he was told these facts by Clifford Barker and his mother, but not that he did not believe them. The effect of the affidavit is that his testimony was based on statements made to him by his mother and Clifford Barker; in other words, that he testified as within his own knowledge to facts that he did not know to be true. Section 1626, Penal Law, provides:

"An unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false."

[3, 4] The affidavit presumptively established that the defendant testified to that which he did not of his personal knowledge know to be true. His statement of that which he did not know to be true was therefore, by the provisions of this section, made equivalent to a statement of that which he knew to be false. But that is not enough. By the wording of the definition of perjury (section 1620, Penal Law) the testimony must be willfully given; i. e., with a criminal intent. *People ex rel. Hegeman v. Corrigan*, 195 N. Y. 1, 87 N. E. 792. If the defendant believed what his mother and Clifford Barker told him, his testimony, although false, was not willfully so, and therefore not perjury. *People v. Dishler*, 38 Hun, 175. Our experience in the trial of cases teaches us that witnesses often honestly testify to facts that on cross-examination turn out to be not within their personal knowledge, but based on statements of others, or on conclusions that they drew from other facts. The effect of suggestion on an uneducated boy of 11 years is well known. He knows nothing of the rule of evidence excluding hearsay. If induced by suggestion to believe that a fact exists, he does not hesitate so to testify, and a statement that he did not recollect the fact, or had no independent recollection of it, without evidence that he did not believe it to exist, and therefore willfully testified, falls short of the legal requirements.

[5, 6] I think the probabilities are that the facts to which he testified did exist, and that when he testified he believed them to exist. It is true that a witness may be guilty of perjury in testifying that he does or does not remember a given fact (*People v. Doody*, 172 N. Y. 165, 64 N. E. 807); but that such testimony is willfully given is an element of the crime that must be established beyond a reasonable doubt. In this respect I think the verdict was against the weight of evidence.

It is unfortunate that just at the close of the trial purely hearsay evidence, competent, if at all, only for the purpose of impeaching a witness, was given and repeated, to the effect that some member of the Barker family had offered to use large sums of money for the purpose of securing evidence of the marriage of Estelle Whitney and Murtha. In view of the conclusive proof of the marriage by the testimony of the clergyman and a witness to it, and of the public records, the suggestion that any member of the Barker family was resorting to such methods to secure evidence of negligible value is incredible. However, the jury, which often does not appreciate the distinction between hearsay evidence, offered for the purpose of impeachment, and direct evidence on the issues, would in their minds connect this evidence with the testimony given by the defendant, on which he was convicted, and thus was created an unfavorable medium through which they viewed the evidence given on the trial of this action.

It is a question whether, in view of the evidence adduced on the trial, the affidavit, considering the way in which it was obtained, although it presumptively established the falsity of the testimony, was sufficient as a basis of conviction; but I prefer to place the decision that the verdict was against the weight of evidence on the ground of the insufficiency of the evidence to show that the testimony was willfully given.

The judgment of conviction should be reversed upon the facts as well as the law, the order of reversal settled accordingly, and a new trial ordered.

JENKS, P. J., and MILLS and RICH, JJ., concur.
JAYCOX, J., dissents.

(189 App. Div. 75)

In re UNITED STATES TRUST CO. OF NEW YORK.

In re COLGATE'S WILL.

(Supreme Court, Appellate Division, Second Department. October 3, 1918.)

1. TRUSTS $\S$ 217(4)—TRUSTEE, WHEN AUTHORIZED TO INVEST CORPUS OF ESTATE IN RAILROAD STOCK.

Where a will creating a trust, after authorizing the trustee to sell and invest the proceeds of securities as it shall in the exercise of a sound discretion deem for the best interest of the estate, expressly declared that the trustee should not be limited to the usual investments of trust estates, the trustee was authorized to invest in good railroad stocks a portion of the corpus of the trust which it received in money.

2. TRUSTS $\S$ 218(1)—TRUSTEE, WHEN NOT LIABLE FOR LOSS BY DEPRECIATION OF INVESTMENTS.

A testamentary trustee, which invested funds in one of the best railroad stocks, *held* not liable for depreciation, though it retained the stock for a considerable time in face of a declining market, and then disposed of it at much less than the price paid.

3. TRUSTS $\S$ 218(1)—TRUSTEE, LIABLE FOR DEPRECIATION OF INVESTMENTS, TO BE CREDITED WITH SUBSCRIPTION RIGHTS.

Where a trustee invested trust money in railroad stock, *held* that, where the stock depreciated and the investment resulted in loss, the trustee, in event of liability, was entitled to offset against such loss sums which it received for the sale of subscription rights appurtenant to the stock.

4. TRUSTS $\S$ 237—INSTRUMENT NOT A RELEASE OF TRUSTEE FOR DEPRECIATION OF TRUST FUND.

That adult remainder beneficiaries, after death of that beneficiary who was to receive the income from a trust for life, executed to and with the trustee an instrument assigning to it their interest in the trust fund upon a new and further trust specified, etc., *held* not a release of the trustee's liability for making an improper investment of trust funds; it appearing that the trustee's report at the time of the assignment concealed the loss resulting from the investment.

Appeal from Surrogate's Court, Westchester County.

In the matter of the judicial settlement of the account of proceedings of the United States Trust Company of New York, as trustee under the will of James B. Colgate, deceased. Cross-appeals from a decree of the Surrogate's Court by the remainder beneficiaries under the trust and the trustee. Decree modified, and, as modified, affirmed.

Argued before JENKS, P. J., and MILLS, RICH, KELLY, and JAYCOX, JJ.

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

William A. W. Stewart, of New York City (H. K. Davenport, of New York City, on the brief), for United States Trust Company of New York, appellant respondent.

Theodore H. Lord, of New York City (Charles W. Lucas, of New York City, and Irene Bennett Adams, of Mt. Kisco, on the brief), for Jessie C. Colgate and others, respondents appellants.

Theodore F. Humphrey, of New York City, general guardian of Jessie C. Colgate, an infant, respondent.

MILLS, J. These are cross-appeals, respectively, by the trustee of a trust created by a codicil to the will of the late James B. Colgate, and by the remaindermen beneficiaries under that trust, from a decree of the Surrogate's Court of Westchester County, filed December 31, 1918; the trustee appealing from that part of the decree which surcharged it with the sum of \$7,253.50 as a balance of loss upon its investment of funds in 200 shares of the common stock of the Chicago, Milwaukee & St. Paul Railroad Company, and the beneficiaries appealing from so much of that decree as allowed to the trustee a credit upon that loss of a certain sum received from the sale of subscription rights upon the stock, which credit reduced the loss to the amount above stated.

There is no dispute about the facts. They are as follows: The codicil probated February 24, 1904, left to the United States Trust Company a fund of \$200,000 in trust, to pay the income thereof to the testator's son, William H. Colgate, during his life, and upon his death to pay the fund to that son's children then living; each portion payable upon the recipient attaining the age of 25 years. On April 15, 1904, the trustee for that fund received from the executors certain securities of the appraised value of \$45,000, and also \$155,000 in cash. It soon invested the cash in certain securities, which included the 200 shares of common stock above stated; the same being purchased at the rate of \$144.25 a share, making an aggregate price of \$28,850. The trustee continued to hold that stock until, on September 24, 1917, it sold the same at \$58.25 a share, or for the aggregate sum of \$11,621, making a gross loss or depreciation of \$17,229 upon the investment. Meanwhile it had sold certain stock subscription rights which had been issued upon those shares for the aggregate sum of \$8,975.50, which, being deducted from the gross loss or depreciation, left a net loss or depreciation of \$7,253.50. The decree surcharged the trustee upon its final accounting, then pending, with that net loss. The portion of the codicil referring to that trust contained the following provisions as to the powers and duties of the trustee in respect to its investment:

"And it is further my will and I authorize and empower my said trustee the United States Trust Company of New York in lieu of money to receive from my executors any stocks, bonds, mortgages or other securities which may be held by me at the time of my decease in payment of said legacy at their market value to be ascertained by appraisement and hold the same upon the trust hereby created for the benefit of my said son William or to sell the same and invest the proceeds thereof in like securities or in such railroad bonds stocks and other securities as it shall in the exercise of a sound discretion

deem to be for the best interest of said trust estate it being my will that the said trustee shall not be limited to the usual investments of trust estates.

"It is my will that my said trustee shall not be held liable or responsible for any loss which may occur to said trust estate by reason of the retention of any of the securities which they may so receive from my executors or by reason of any investments made in accordance with these directions."

By stipulation of the parties the facts as to the said investment and the standing of the stock and its market variations during the period of its retention by the trustee as above stated were proven by the affidavit of Mr. Kingsley, vice president of the trustee. The material facts so proven are that, as is well known, that railroad company was at the time of the said purchase in 1904 regarded as one of the best in the country, paying good dividends, then at the rate of 7 per cent., but that during the war period its market value pretty steadily declined, although fluctuating considerably, and in 1917 ranged from 92 high to 35 low. It appears also, as is well known, that during the same period there was a large depreciation in the market values of stocks of other good railroad companies.

The learned surrogate filed a brief opinion, in which he held that the investment in railroad stocks was not allowed either by statute or by the codicil. It also appears that after three of the four beneficiaries arrived at full age, and after the death of their father, the life beneficiary, two of them, namely Gertrude M. Colgate and James B. Colgate, each executed to and with the said trustee an instrument assigning to it his or her interest in said trust fund upon a new and further trust therein specified, and that the third adult beneficiary, William Hoyt Colgate, after reaching full age, executed to the trustee a release upon receiving from it the securities which it had set aside as his share. The trustee before the Surrogate's Court claimed that those assignments and that release operated as to the three adult beneficiaries to waive and bar any claim by them to surcharge the account of the trustee, as has been done; but the learned surrogate in his opinion overruled that contention.

The main question presented by these appeals, therefore, is the question whether or not the said provision of the codicil authorized the particular investment in question. In his main decision the surrogate found that the purchase and retention of said stock was unauthorized, and was in violation of the duty of the trustee, although in passing upon the requests submitted he refused to find either way upon the question whether or not the codicil authorized such investment.

[1] Counsel for the beneficiaries contends that the above-quoted clause in the codicil must be construed as authorizing investment in other than securities usual for trust estate investments only as to the proceeds derived from sales of the securities held by the testator at his death, and therefore as not authorizing such investment of the cash (\$155,000), which was turned over by the executor to the trustee as the major part of the trust fund of \$200,000, and therefore as not authorizing this particular investment in the stock of the Chicago, Milwaukee & St. Paul Railroad Company, while counsel for the trustee contends that that clause in the codicil did authorize such investment

generally of the trust fund, both of the cash and of the proceeds from the sale of securities actually so turned over.

It is my judgment that the latter contention is correct. It seems to me that any doubt upon the subject is solved in that way by the general term used in the codicil, viz.:

"It being my will that the said trustee shall not be limited to the usual investments of trust estates."

It would be a very narrow construction to limit those general words to the special instances therein just before detailed, namely, the re-investment of the proceeds of sales of the securities actually turned over, which had belonged to the testator in his lifetime. No substantial reason for such distinction can be surmised, and certainly none appears in any way in the evidence. It is plain from the testimony of Mr. Kingsley that in 1904, when this investment was made by the trustee, the common stock of the Chicago, Milwaukee & St. Paul Railroad Company was in good repute as compared with other railroad stocks.

[2] It is also contended by counsel for the beneficiaries that it was negligence for the trustee to retain the stock so long—13 years—and the latter part of the period in the face of a declining market. It appears that the stock maintained its market value fairly until about the commencement of the war, that then it declined and continued to decline past the time when it was sold by the trustee on September 24, 1917, and that by the end of 1917 it had sold down to 35.

There is in the decision no attempt to find when the trustee in the exercise of due care should have sold the stock upon the declining market, if its original investment therein was authorized; therefore nothing appears in the decision from which we could fix the loss upon that basis. The finding of negligence therein is general, both in the purchase and the retention; nor do I perceive in the evidence sufficient basis for that determination, if we should hold that due care did require an earlier sale of the stock. It is quite likely that the exemption in the codicil from liability to loss upon investment made by the trustee in the exercise of the authority conferred, while granted in absolute terms, might not cover every conceivable such loss; still I think it is ample to protect the trustee from liability for retaining the stock as long as it did. The general conditions in this country were most extraordinary. The railroads were taken over by the federal government, and it was a matter of common thought for a time that their securities would appreciate in value under that system. I think it would be unreasonable to hold a trustee liable for retaining such securities under such conditions in the hope of a better market, when it was authorized by the terms of the trust to make such an investment originally. In short, it is my conclusion that no negligence on the part of the trustee was established, either in the original purchase or in the retention of the stock.

[3] As to the appeal by the beneficiaries, I think that if the trustee was properly held liable for the purchase and retention of the stock, and therefore chargeable with depreciation in its value and consequent loss, it was by the Surrogate's Court properly credited with what it

received upon the sale of the subscription rights appurtenant to the stock, or, in other words, held liable only for the net loss to the trust fund resulting from the entire transaction.

[4] As to the contention of counsel for the trustee that the said trust assignments and release by the three adult beneficiaries operated to bar their rights to have such surcharge made, if it otherwise existed, I agree with the conclusion of the learned surrogate that they did not so operate. The assignments were obviously intended merely to pass to the trustee upon a new trust whatever right the assignor had under the former one; that is, under the codicil. The release even refers to a possible balance upon the conclusion of the accounting proceedings, which were then pending. The evidence does not show that this particular investment was then called to the attention of either of the beneficiaries. It is to be noted that the trustee on August 15, 1917, wrote a letter to the attorney of James B. Colgate, one of the beneficiaries, stating the then investments of the trust funds, and among them the 200 shares common stock of the Chicago, Milwaukee & St. Paul Railroad, and valuing it at par, viz. \$20,000; whereas, the testimony of Mr. Kingsley showed that that year the market value ranged from 92 to 35, and on September 24, only a few days later, the trustee sold that stock at 58¼. Indeed, that letter is the only thing in the record which appears to savor of anything like misleading in the conduct of the trustee in its dealings with any of the beneficiaries.

I advise, therefore, that the decree appealed from be modified, so as not to surcharge the trustee with any amount on account of the purchase and sale of said stock, and that, as so modified, it be affirmed, with costs to the trustee payable out of the trust estate; that findings of fact 5, 6, and 8, and conclusions of law 1 and 2, in the decision, be reversed, and that finding of fact 10 be modified, by striking therefrom the words "except as to the purchase, retention, and sale of said 200 shares of common stock of the Chicago, Milwaukee & St. Paul Railway Company"; that we make the following conclusion of law, viz.:

"That the several objections to the said account should be and the same hereby are overruled and in no respect sustained; and that the said account is in all respects approved, settled, and allowed as filed."

Settle order before Mr. Justice Mills. All concur.

(109 Misc. Rep. 27)

KAYSER v. FITZGERALD et al.

(Supreme Court, Special Term, Otsego County. October 4, 1919.)

1. INJUNCTION §221—SUFFICIENCY OF NOTICE OF PROVISIONS OF INJUNCTION.

Where provisions of preliminary injunction order, as modified, and the injunction order as made permanent, were substantially the same, notice of the provisions of one was notice of the provisions of the other.

2. MASTER AND SERVANT §338—RIGHT OF EMPLOYER TO BE PROTECTED AGAINST STRIKERS.

The master's right to employ persons willing to enter employment cannot be interfered with by threats, intimidation, or coercion by persons participating in a strike, whether they act singly or as a result of an organization or conspiracy.

8. MASTER AND SERVANT §338—"INTIMIDATION" OF EMPLOYEES DEFINED.

To constitute "intimidation of employes" by persons participating in a strike, it is not necessary that there should be any direct threat or actual violence; but it is sufficient if the attitude assumed is intimidating.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Intimidation.]

4. INJUNCTION §223(2)—VIOLATION OF ORDER BY STRIKING EMPLOYEES.

On application to punish labor union officials and striking employes for disobedience of injunction by intimidation, threats, and an abuse of non-striking employes, *held*, that defendants were guilty of criminal contempt in deliberately disobeying order of court.

Action by Julius Kayser against James Fitzgerald, individually and as president, etc., and others. Injunction granted. On application to punish Robert F. Stump and others for disobedience of injunction order. Order granting application.

See, also, — App. Div. —, 178 N. Y. Supp. 897.

Hardy, Stancliffe & Whitaker, of New York City (Owen C. Becker, of Oneonta, and H. C. Stratton, of Oxford, of counsel), for plaintiff. O'Connor & O'Connor, of Hobart, for defendants.

A. L. KELLOGG, J. This is an application to punish Robert F. Stump, Otto Boelke, Harry T. Wilpers, and Hannah Chrisman for disobedience of an injunction order herein, made June 23, 1919, modified June 25, 1919, and made permanent during the pendency of the action July 24, 1919.

On July 29th last a show cause order was duly granted herein directing said persons to show cause at a Special Term of this court, to be held on August 5th, at Binghamton, and after hearing the attorneys for the respective parties, an order was made appointing Hon. William H. Johnson, a lawyer of profound learning and ability, as referee to hear and take the evidence of the parties to these proceedings, and such witnesses as they desired to produce, and to make his report to this court.

Upon the argument of this motion the counsel for the defendants stated that he desired to file opposing affidavits, and in the order of reference the defendants were granted the privilege of serving such opposing affidavits on Owen C. Becker, one of the attorneys for the plaintiff, on or before August 15th. No opposing affidavits were served, and in the opening of this hearing the defendants' attorneys an-

— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

nounced that they did not propose to file any affidavits, but would rely entirely upon the oral testimony.

The hearing before the referee was commenced on the 18th day of August, and, after successive adjournments, was completed on the 8th day of September. The referee made his report on the 1st day of October, and the court thereupon gave notice that it would hear arguments as to whether or not the report should be confirmed on October 4th, at Supreme Court chambers in Oneonta.

It is said by counsel for the defendants that the report is not sustained by the evidence. After a most careful perusal of the same, I am not able to so find. The referee was selected with care, and is as able, impartial, and fearless as could be named. He not only heard the evidence, but he saw the witnesses on the stand, and could judge of their appearance, and this is precisely one of those cases where that help is most needed to reach the truth. The findings of the referee also show care and thought. Were the evidence slighter than it is, I should still hesitate to set aside his conclusions.

The plaintiff is a manufacturing corporation, and one of its factories is located at Sidney. During the month of May last, a large percentage of the operatives of its factory at that place went out on a strike. There are three unions at Sidney—the dyers and finishers, the warpers and warp hands, and the glove makers. At all times since the beginning of the strike, the defendants Wilpers and Chrisman have been the presidents of the warpers' and glove-makers' unions, respectively. The defendant Stump has been, during the same period, president of the Warpers' and Warp Hands' Federated Union of America. The defendant Otto Boelke is a resident of Amsterdam, and an employé of plaintiff's factory at that place, and is a member of one of the local trade unions of that city composed of plaintiff's employés. The unions of Amsterdam, of which Boelke is a member, went out on strike at about the same time as the Sidney employés of the plaintiff.

The preliminary and permanent injunction orders were published in the Sidney Record, and copies of the order making the injunction permanent were mailed to the defendants, and to each of the strikers, on July 26th. Each of the defendants had actual notice of the original injunction order, this order as modified, and the order making the preliminary injunction permanent. They do not deny knowledge of the provisions of these orders, but confine their defense solely to a denial of the acts charged, or that in any event they had no intent to violate the same.

Wilpers was personally served with the original order, and requested the defendants' attorney to explain its provisions at a mass meeting of July 1st, and thereafter both the defendants Wilpers and Stump explained its provisions at subsequent union meetings.

Stump was the leader and superior officer of the striking unions. They looked to him for guidance and direction. He was well acquainted with every move made in this strike. He does not deny this, and the testimony all clearly indicates this fact. On the motion of July 1st, he made one of the answering affidavits. At the mass meeting on the same day, when the modified injunction order was explained by his

counsel, he was present and was one of the speakers. At a subsequent meeting he explained the injunction provisions to the strikers.

Boelke was present at the meeting of July 1st, and of subsequent meetings when the injunction order was explained. He had read the injunction tacked upon plaintiff's factory, and a copy was nailed up in union headquarters.

Hannah Chrisman testifies that she first learned about the injunction order along in June, about a week after it was served; knew about the motion of July 1st, and who was attorney for the unions. She attended meetings of the unions at which instructions were given. All four defendants admit knowledge from the first. Not one of them attempts to deny it. The reason the provisions of the injunction order were violated and disobeyed was not because any of the four defendants were without notice, but because they believed, as Stump said to Julius Hall, when he attempted to read its provisions to him, "It don't amount to anything."

This attitude of Stump, their superior officer and leader, was accepted by other leaders, and by all the strikers. Stump's disregard of this injunction order was further evidenced by his statements, when the show cause order in these proceedings was served upon him, that "they did not amount to anything; that he would frame this one and put it upon the wall." He also said to a large crowd, when served with said order, that "the injunction order did not amount to much of anything; that it was a matter for the lawyers to see to, and that it did not concern the strikers." The reason the injunction provisions were disregarded was the indifference and contempt for it on the part of the leaders, these defendants.

[1] The provisions of the preliminary injunction order, and as modified, and the injunction order as made permanent, were substantially the same. The notice of the provisions of any one was notice of the provisions of the other.

Shortly after the strike was instituted, a paid picket numbering about 35 members was organized at Sidney. Thereafter, on each working day, when plaintiff's employes were going to and from their work, strikers numbering from 30 to 125 marched up and down Clark street, the street leading to plaintiff's factory, and called plaintiff's employes "Yellow," "Scab," "Pimp," "Yellow Dog," "Yellow Rat," and other annoying names, thereby inciting and encouraging such conduct on the part of the strikers. None of the defendants have exercised proper restraint over or direction of said strikers in accordance with the duty incumbent upon them.

Robert F. Stump.

On or about the 13th day of July, Stump said to the strikers, "There they go, the yellows; get out and get after them," after which the strikers followed up plaintiff's employes and called them "Yellow," "Yellow Dog," and "Rats," as they were leaving the mill. Between the 16th and 29th days of July he told the strikers to "get on their job." Thereafter the strikers went to plaintiff's factory, and followed up its employes, and called them "Yellow," "Yellow Dog," and "Pimp."

July 17th he directed 3 or 4 strikers to "go after Earl Fleming" one

of plaintiff's employes, after which the defendants followed Fleming and called him names. On July 21st, when the president of the village of Sidney offered to read the injunction order to the strikers, and to him, Stump said, "It don't amount to anything," and on the same occasion Richard Dunn, one of the strike leaders, said to the strikers in his presence, "Pay no attention to it, do just the same as you have been doing." Stump did not remonstrate, but encouraged this attitude by his conduct and remarks.

Otto Boelke.

During the week of July 14th Boelke met King, plaintiff's superintendent, at its factory, and said to him, "Stick out your tongue; show your tongue;" and on other occasions, on the streets, repeatedly said to King, "Stick out your tongue; I want to see if it is yellow;" and at various other times, between the 10th and 29th days of July, marched with the strikers and called plaintiff's employes "Yellow," "Yellow Rats," "Yellow Dogs," "Yellow Skunks," and other names.

On July 15th, in the presence of Stump, he followed Paul Winkler, an employe of plaintiff, and assaulted Winkler by forcibly grabbing him by the arm and coat as he was going to work, and on this occasion called him "God damn son of a bitch," and said "he might as well be knocked in the head as go down there." On this occasion Stump directed Boelke to knock a cigar out of the mouth of one Pendlebury, an employe of the plaintiff.

On July 16th, when Winkler was going to work, he said, "There goes that God damn Dutch bastard; there goes that God damn Hun." About a week later Boelke said to Winkler, "If you go to Amsterdam something will happen to you." On July 20th, or about, Boelke and three companions followed plaintiff's superintendent about the streets for upwards of half an hour for the purpose of annoyance.

Harry T. Wilpers.

On June 30th he said to Kenneth Dibble and Howard Goodenough, employes of plaintiff, when they were on their way to the factory, that "if they went back to work" he would "kick" one part of their person (using a foul word). That all four of the defendants, almost daily during the period from the 1st to 29th day of July, marched up and down Clark street in Sidney, and, as plaintiff's employes went to and from their work, joined with the strikers in following said employes, both those walking and those riding in automobiles, and shouting after them, and calling "Yellow," and other annoying names. That all of the matters pertaining to the strike and its policies were discussed by the strikers in their triweekly meetings; and such conduct was apparently part of a scheme, and as a matter of fact constituted an organized and combined effort on their part, not only to prevent plaintiff's employes from working, but to prevent plaintiff from carrying on its business and to hinder and hamper the same.

[2] It is true, of course, that men have a right to strike, and that they have a right to co-operate together, and the organization and co-operation which men form is not against public policy, but is to be commended when their purposes are legitimate and lawful; but while they have that absolute right, other men who are willing to work have an equal

right to pursue their labors unmolested, and the plaintiff has just that same right to employ whomsoever it pleases, provided it can get men to enter such employment, and this right cannot be interfered with by threats, intimidation, or coercion by the defendants, whether they act singly or as a result of an organization or conspiracy.

In this case the evidence points unmistakably to the fact that the purpose of the defendants was not by peaceful persuasion to endeavor to prevent men from entering the employment of the plaintiff and working; but, on the other hand, it seems as though the defendants took the course they did, and by the means complained of, to compel the plaintiff to accede to their demands, or else destroy its business, and in doing that they exceeded their rights under the decisions of this state.

[3] In order to constitute intimidation, it is not necessary that there should be any direct threat, still less any actual act of violence. It is enough if the mere attitude assumed by the defendants is intimidating, and this may be shown by all of the circumstances of the case, by the methods of the defendants, and numbers their devices. *New York Central Iron Co. v. Brennan*, 105 N. Y. Supp. 869; *Foster v. Retail Clerks' Protective Ass'n*, 39 Misc. Rep. 48, 78 N. Y. Supp. 860; *People v. Wilzig*, 4 N. Y. Cr. R. 403; *People v. Kostka*, 4 N. Y. Cr. R. 429. In *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185, *Jenks, J.*, said:

"'Picketing' may simply mean the stationing of men for observation. If in the doing of this act, solely for such purpose, there be no molestation or physical annoyance, or let or hindrance of any person, then it cannot be said that such an act is per se unlawful; but 'picketing' may also mean the stationing of a man or men to coerce or to threaten, or to intimidate or to halt, or to turn aside against their will those who would go to and from the picketed place to do business or to work or to seek work therein, or in some other way to hamper, hinder or harass the free dispatch of business by the employer. In that case picketing may well be said to be unlawful. * * * I may add that I am not prepared to say that all picketing which goes no further than 'persuasion and entreaty' of those who are about to work or to seek work or to do business in the picketed place, is absolutely lawful. A wayfarer upon the public street should be free for peaceful travel. No man against my will has the legal right to occupy the public street to arrest my course, or to join me on my way, be he ever so polite or gentle in his insistence. There may be no intimidation, and yet an interruption of peaceful travel. There may be annoyance without danger."

What constitutes peaceful picketing may be answered by any fair-minded man, if this question is asked: "Would this be lawful if no strike existed?" Would it be lawful for one or more men to use offensive, abusive, insulting, or threatening language to another or others; for one to call another a "rat," a "scab," a "yellow dog," a "yellow rat," or a "Hun," or by any other name commonly accepted as offensive or degrading, or calculated to provoke the other to break the peace in resentment, or to so intimidate them that he or she would refuse to work?

Because such occurrences are liable to be the result of passions inflamed by such controversies, there is an insistent and undeniable demand that all persons having part in a strike, who are trying to exercise their rights under the law to maintain the strike, should be persistent in their efforts to keep the controversies within lawful bounds, and to guard that these inexcusable results do not follow. Otherwise,

in the estimate of the public generally, they will be held to some considerable measure of responsibility.

It was not given any one the privilege to enforce his views upon others—to compel others to listen. The right of others to listen or decline to listen is as sacred as that of free speech. It is clear that, if one does not desire speech of another, he may as surely have his privacy therefrom as the privacy of his home. It is undeniable that the so-called right of peaceful persuasion may be exercised only upon those who are willing to listen to the persuasive arguments.

It is a safe and proper generalization that any action having in it the element of intimidation, coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the law, is unlawful. Every act, of speech, of gesture, or of conduct, which any fair-minded man may reasonably judge to be intended to favor insult, threat, or annoyance to another, or to work assault or abuse on him, is unlawful.

Government fails in its duty, and liberty ceases to exist, when it lies within the power of one man, or group of men, to deny to any other man, or group of men, the right to seek and accept such employment as they desire.

These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful. These personal rights to which we have alluded are, in each instance, precisely those which the striker himself would insist upon were conditions reversed. They are also so plain, and the answers to the questions involving them so certain, that one called upon to enforce the law, if he has but ordinary intelligence, will plainly fail to do his duty when in his presence a fellow citizen suffers an invasion of his rights of this character. *Stephens v. Ohio Tel. Co.* (D. C.) 240 Fed. 759; *St. Germain v. Bakery & Confectionery Workers' Union*, 97 Wash. 282, 166 Pac. 665, L. R. A. 1917F, 824.

[4] I find, therefore, that the three men and women named deliberately disobeyed the order of the court. This makes it a case of criminal contempt. The only question left is as to the proper punishment to be inflicted upon them for what they have done. The facts being as they are in this case, every consideration of law and order requires such a sentence as will prevent these acts in the future.

An injunction is not sacred as coming from any man, but to disobey it is a serious thing, because it is disobeying the law, which, in this country, workmen themselves helped to make and should help to uphold.

An order may therefore be made:

(1) Directing that Robert F. Stump be imprisoned for the period of 30 days, and that he be fined the sum of \$250.

(2) That Otto Boelke be imprisoned for the period of 30 days, and that he be fined the sum of \$250.

(3) That Harry T. Wilpers be imprisoned for the period of 20 days, and be fined the sum of \$250.

(4) That Hannah Chrisman be fined the sum of \$250.

HARNICK v. SAPERSTEIN.

(Supreme Court, Appellate Term, First Department. October 17, 1919.)

ATTACHMENT §251, 278—VACATION OF WARRANT NOT CONDITIONAL ON FILING BOND OR MAKING DEPOSIT.

The granting of defendant's application to vacate warrant of attachment cannot be made conditional on his filing bond or making deposit to secure judgment which may be obtained against him, and under Code Civ. Proc. § 709, on vacation of the warrant and proper demand, he is entitled to the attached goods.

Appeal from City Court of New York, Special Term.

Action by Sam Harnick against Charles Saperstein. From part of an order setting aside a warrant of attachment, defendant appeals. Modified.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Robert Seelav, of New York City, for appellant.

Samuel Dickstein, of New York City, for respondent.

PER CURIAM. We know of no rule whereunder, upon the granting of an application by defendant to vacate a warrant of attachment, the relief applied for can be made conditional upon defendant filing a bond, or in lieu thereof depositing in court a sum sufficient to secure any judgment that may be obtained against him. That, however, was required in the case at bar, contrary to the provisions of the statute. Defendant was entitled on the vacating of the warrant in question, and on proper demand therefor, to the attached property in question. Section 709, Code C. P.

Order modified, by striking out condition imposed, and, as so modified, affirmed, with \$10 costs and disbursements to the appellant.

COOPER v. ROGGEN et al.

(Supreme Court, Appellate Term, First Department. October 17, 1919.)

1. DISCOVERY §63—QUESTION TO DEFENDANT ON EXAMINATION BEFORE TRIAL NOT WARRANTED BY ORDER.

An order for examination of defendant as to whether defendants were to pay plaintiff commissions on sales, renewal orders, and mail orders, and the aggregate of renewal and mail orders between certain dates, did not warrant a question calling for names, addresses, dates, and individual amounts of all customers who sent mail orders to defendant within a specified period.

2. DISCOVERY §63—RULING SUSTAINING OBJECTION TO QUESTION ON EXAMINATION BEFORE TRIAL PROPER.

Where the testimony of a defendant on examination before trial showed that he had received no letter from plaintiff agreeing an amount should be in full payment of his claim, and the order for defendants' examination before trial did not authorize the inquiry, plaintiff, a salesman suing defendants for commissions, cannot complain of the City Court's ruling sustaining defendants' objection to the question whether they had received the letter from plaintiff.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. DISCOVERY §=68—DEFENDANT MUST ANSWER QUESTION SPECIFIED IN ORDER FOR EXAMINATION BEFORE TRIAL.

A defendant, on his examination before trial, should have been required to answer whether plaintiff personally said to him that he (plaintiff) would pay defendant a certain amount, an inquiry specified in the order for defendants' examination before trial.

4. DISCOVERY §=68—QUESTION ON EXAMINATION BEFORE TRIAL RELEVANT UNDER THE ORDER.

In an action by a salesman to recover commissions, in view of the broad form of the order for the examination of defendants before trial, *held*, that they should be required to give the names, addresses, dates, and amounts of various orders received by them otherwise than through plaintiff salesman; there being nothing to indicate the information would be used for improper purposes, and the matter being relevant.

5. DISCOVERY §=41—COURT ON EXAMINATION BEFORE TRIAL, CANNOT PASS ON COMPETENCY OF EVIDENCE.

In examinations before trial, the court has no power to pass on the competency or admissibility of the evidence, and can consider only questions relating to the relevancy of the evidence and any privilege of the witness; latitude being desirable in examining an adverse party.

Appeal from City Court of New York, Special Term.

Action by Abraham S. Cooper against Louis A. Roggen and others. From an order sustaining an objection to questions on examination of defendants before trial, plaintiff appeals. Order modified and affirmed.

See, also, 107 Misc. Rep. 494, 174 N. Y. Supp. 687; 176 N. Y. Supp. 808.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Max Schleimer, of New York City, for appellant.

Adolph Cohen, of New York City, for respondents.

GUY, J. Plaintiff appeals from an order of the City Court denying his request to direct the defendant Harry Roggen, in an examination that defendant had at the instance of the plaintiff before trial, to answer certain questions specified in said order. The pleadings are not in the papers; but it seems the action is one by a salesman for the recovery of commissions, and that defendants pleaded an account stated and accord and satisfaction as a defense.

The defendant Harry Roggen testified on the examination that under certain conditions it was a part of plaintiff's duties to solicit orders of merchants for the defendants, and to sell goods manufactured by defendants at certain prices, for which services, under certain conditions, defendants agreed to pay plaintiff 7 per cent. commission; that under certain conditions defendants agreed to pay plaintiff 7 per cent. commission on all renewal orders of orders procured by plaintiff, and "on all mail orders sent by customers to the defendants which were solicited by the plaintiff"; also 7 per cent. "on all orders received by the defendants from customers of the state of Pennsylvania." He also testified to the amount of sales made by plaintiff, the aggregate orders received by defendants from customers of the state of Pennsylvania, the aggregate amount of orders received

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by mail by the defendants from customers of the state of Pennsylvania, the names and addresses of customers, and the dates and amounts of the sales made by plaintiff within the period covered by the complaint.

The order appealed from specifies seven questions to which the court sustained defendants' objection, and five of these called for the names, addresses, dates, and amounts of orders received by the defendants of customers generally, or customers in the state of Pennsylvania.

[1] The ruling of the court below on the first question in the order appealed from, calling for the names, addresses, dates, and individual amounts of all the customers who sent mail orders to the defendants in the period specified, was correct, for such inquiry is not warranted by the order for examination, which in that connection fixes the scope of the examination as follows:

(3) "Whether the defendants agreed to pay the plaintiff 7 per centum commissions on all sales made by me and also 7 per centum commissions on all renewal orders and mail orders received by the defendants from customers of the state of Pennsylvania"; (8) "the aggregate sales made of renewal orders received by the defendants from customers of the state of Pennsylvania between March 18, 1918, and May 17, 1918"; and (9) "the aggregate sales of mail orders received by the defendants from customers of the state of Pennsylvania between March 18, 1918, and May 17, 1918."

In no part of the record is it intimated that the plaintiff was entitled to receive a commission on orders given by all the customers of the defendants, and such inquiry would have no relevancy to the issues in the case.

[2] The appellant cannot complain of the court's ruling sustaining defendants' objection to the question whether they received a letter from the plaintiff by which he agreed that \$385 should be in full payment and satisfaction of his claim, because the testimony of the witness previously given showed that he had received no such letter, and the order for the examination did not authorize the inquiry.

[3] The witness, however, should have been required to answer whether the plaintiff personally said to him that plaintiff would pay the defendants \$136.39, for that inquiry is specified in the order, and we must therefore assume that the plaintiff is entitled to put the question.

[4] The remaining question is whether the defendants should be required to give the names, addresses, dates, and the amounts of the various orders received by defendants as testified to by the witness. Although defendants at the first session of the examination refused to give the names, addresses, dates, and amounts of the sales made by plaintiff, such refusal being sustained by the court, at a subsequent session they waived the ruling of the court and gave the information asked for; but they still refused to give the names, addresses, dates, and amounts of the other orders apparently in issue—the main grounds of objection being "that the information may be used for sinister purposes," and that the order for the examination did not call for such information. Other than the statement of the objection, there was nothing to indicate the probability that the information asked for

would be used for improper purposes, and in view of the broad form of the order for the examination it was not necessary that it should contain a direction that defendants should be examined as to the names, addresses, dates, and amounts.

[5] The rule applicable to examinations before trial is that the court has no power to pass upon the competency or admissibility of the evidence; that only questions relating to the relevancy of the evidence to the issues and with respect to whether the witness is privileged from answering should be considered; and that considerable latitude should be given in examining an adverse party, as it is in the nature of a cross-examination to elicit the truth and shorten the trial. *Guenther v. Ridgway Co.*, 159 App. Div. 74, 143 N. Y. Supp. 961.

It would seem, from the order for examination and the testimony given, that the names, addresses, and amounts of the various sales making up the total amount upon which the plaintiff based his commissions were relevant to the issues; for the purpose at least of verifying defendant's testimony as to the aggregate sales of the various classes of orders, the details asked for were desirable, if not necessary; and as there appeared no ground for the objection that plaintiff was actuated by a sinister purpose, the witness should have been required to answer these questions.

It follows that the order appealed from should be modified, by directing the defendant Harry Roggen to answer the following questions:

Give me the names, addresses, dates, and amounts of the renewal orders that the defendants received of customers of the state of Pennsylvania between March 18, 1918, and May 17, 1918, both dates inclusive.

Did the plaintiff personally say to you that he would pay the defendants \$136.30?

Give me the names, addresses, and the dates and amounts of orders the defendants received from customers in the state of Pennsylvania between March 18, 1918, and May 17, 1918, both dates inclusive, other than those received from the plaintiff.

Give me the names, addresses, dates, and the individual amounts of mail orders received by the defendants from customers in the state of Pennsylvania between March 18, 1918, and May 17, 1918, other than those that you have testified to as received from the plaintiff.

Give the names, addresses, dates, and amounts of renewal orders received by the defendants from customers in the state of Pennsylvania between March 18, 1918, and May 17, 1918, other than those testified to by you as received from the plaintiff.

As so modified, order affirmed, with \$10 costs and disbursements, and said defendant Harry Roggen is required to appear for examination in the court below on the _____ day of October, 1919, accordingly. All concur.

METROPOLITAN BANK OF NEW YORK v. BAKER, HAMILTON & PACIFIC CO.

(Supreme Court, Appellate Term, First Department. October 17, 1919.)

1. CORPORATIONS ¶668(5)—OFFICE EMPLOYÉ NOT "MANAGING AGENT" OF FOREIGN CORPORATION.

Office employé of defendant foreign corporation, keeping in touch with market conditions and informing company of his opinion in regard to future prices, also obtaining quotations and furnishing them to the company, which made all purchases and payments itself from its home office, *held* not the "managing agent" of the company within the state, so as to authorize service of summons on him under Code Civ. Proc. § 432, subd. 3.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Managing Agent.]

2. CORPORATIONS ¶668(4)—OFFICE EMPLOYÉ OF FOREIGN CORPORATION NOT "CASHIER."

Office employé of defendant foreign corporation *held* not a "cashier" of the company, to authorize service of summons on him, under Code Civ. Proc. § 432, subd. 3.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cashier.]

Appeal from City Court of New York, Special Term.

Action by the Metropolitan Bank of New York against the Baker, Hamilton & Pacific Company. From an order denying its motion to vacate service of a summons, defendant appeals. Order reversed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Tyler & Tyler, of New York City (Thomas H. Wight, of New York City, of counsel), for appellant.

I. Gainsburg, of New York City (H. Danziger, of New York City, of counsel), for respondent.

BIJUR, J. Defendant is a foreign corporation. Its only activities in this state are set forth in the affidavit of the party upon whom the summons was served, one Wendemuth. The service is sought to be sustained on the theory that Wendemuth is the "managing agent" of the corporation within the state. C. C. P. § 432, subd. 3.

It appears from Wendemuth's affidavit that the defendant sells no goods in New York, but does purchase goods here as hereinafter described. It has an office under its own name in this city and maintains a bank account sufficiently large to pay the rent of the office and the incidental expenses. Whether the bank account is in the name of the defendant or of Wendemuth is not made clear, but I shall assume that it stands in the name of defendant. Wendemuth keeps in touch with market conditions, and informs defendant from time to time of his opinion in regard to the probable rise or fall of commodities. He also frequently obtains quotations of prices of goods and furnishes them to defendant in San Francisco. If purchases are made, the orders come from the home office and are delivered by Wendemuth. All contracts are signed at the home office. Wendemuth has no dis-

⌘ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

cretion whatsoever in the premises. Even the bills for purchases are sent direct to San Francisco, and payments are made from there directly to the sellers. Wendemuth neither collects nor disburses any moneys except for the expenses of the office.

[1] I have serious doubt whether under these circumstances it may properly be said that the company is doing business within the state to such an extent as to subject it to service of process here, provided such service were made upon an appropriate representative of the company. That question, however, need not be decided, as I feel convinced that Wendemuth is not, within the language of the Code, "a managing agent" of the company. His only authority is as described above. He manifestly has no discretion, and does nothing which in the most liberal sense of that word could be construed as "management." Indeed, the only activities of the company in this state seem to me to be such as that "management" cannot be predicated of them. At best, if the company's activities here be regarded as doing business, Wendemuth's relation thereto is merely advisory, and his acts practically only clerical.

[2] The further contention of respondent that Wendemuth can be regarded as a cashier of the corporation appeals to me with even less force. Although respondent cites *Tauza v. Susquehanna, etc., Co.*, 220 N. Y. 259, 115 N. E. 915, as authority for his claim that the service is good, it requires merely a reading of the facts in that case to indicate how radically they differ in substance from those here presented.

Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. All concur.

HICKS v. DAVIS.

(Supreme Court, Appellate Term, First Department. October 17, 1919.)

APPEAL AND ERROR §—985—DENIAL OF DEFENDANT'S MOTION TO VACATE DEFAULT IN SERVING CASE ABUSE OF DISCRETION.

While the appellate court is loath to interfere in a matter involving the exercise of the trial court's discretion, yet where plaintiff, who recovered judgment, was in no wise prejudiced by the delay, *held*, that an order denying defendant's motion to vacate a default in serving case on appeal should be reversed; it appearing that defendant's attorney who had no clerk was engaged either in trial or appeal work on almost every week day during the month in which case on appeal was to be served.

Appeal from City Court of New York, Special Term.

Action by Bessie Hicks against Maurice E. Davis, in which there was a judgment for plaintiff. From an order denying defendant's motion to vacate default in serving case on appeal, defendant appeals. Order reversed, and motion granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Kohn & Nagler, of New York City, for respondent.

Jacob L. Holtzmann, of New York City, for appellant.

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PER CURIAM. Judgment was entered against the defendant in the court below May 12th last. Ten days thereafter he filed and served a notice of appeal from the judgment, giving a surety company bond to secure payment, and the time allowed him for serving his case on appeal expired June 12th. Plaintiff moved on June 27th for an order declaring the appeal abandoned by reason of defendant's failure to serve the case on appeal, and on July 2d the motion was granted. On the same day defendant served a notice of motion for an order to relieve him from his default, and for an order to vacate the order declaring the appeal abandoned, and from the order denying this last motion he appeals.

The moving papers state facts which indicate that the appeal has been taken in good faith. It appears from the affidavit of appellant's attorney that almost every week day during the month of June he was engaged in either trial or appeal work, and that he had no clerk. At the time the motion was made to declare the appeal abandoned the respondent had not been prejudiced by the delay, as the appeal could not in any event be heard before the first Monday in October. Although we are loath to interfere in a matter which involves the exercise of the discretion by the court below, we think it will best subserve the interests of justice to relieve the appellant from the consequences of his default.

Order reversed, with \$10 costs and disbursements to respondent, and motion granted, upon appellant stipulating to serve and file the printed case and points on appeal in time for argument at the November term; the appeal to be regarded as abandoned in the event of his default.

(109 Misc. Rep. 48)

RIDER v. PHILLIPS et al.

(Supreme Court, Special Term, Dutchess County. October 11, 1919.)

1. **TENANCY IN COMMON** §38(8)—**EVIDENCE THAT ON FORECLOSURE ONE COTENANT WAS REAL PURCHASER IN NAME OF THIRD PARTY.**

In a suit by an infant tenant in common against her cotenant and one who purchased the common property on foreclosure of a mortgage, evidence held to show that the cotenant was the real owner of the property, and that he consented to foreclosure of the mortgage for the purpose of cutting off the infant tenant's interest, buying it in through a third person.

2. **TENANCY IN COMMON** §19(5)—**ACQUISITION OF OUTSTANDING TITLE BY ONE COTENANT FOR BENEFIT OF ALL.**

One tenant in common cannot purchase an outstanding claim or title to the exclusion of his cotenant, and such purchase is presumed to be for the benefit of all; hence, where a tenant in common, for the purpose of cutting off the interest of an infant cotenant, allowed the premises to be sold on mortgage foreclosure, and bought the same in through a third person, such tenant in common will be compelled to hold the outstanding title for the benefit of the infant cotenant, who did not acquiesce, upon the infant's contribution of her share of all lawful expenditures.

Action by Pearl Rider, an infant under the age of 14 years, by Harry M. Rider, her guardian ad litem, against Lena Phillips and others, to impress a trust on real property. Judgment for plaintiff.

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Bick, Godnick & Freedman, of Brooklyn, for plaintiff.

Robert W. Doughty, of Beacon, for defendant Phillips.

Graham Witschief, of Newburgh, for defendant Edelman.

YOUNG, J. This action is brought to impress a trust on certain real estate in Beacon, N. Y., in favor of plaintiff, an infant 2 years of age. The premises were purchased by the defendants Peter Edelman and Harry M. Rider on May 1, 1913, from Stephen T. Bannister, subject to a first mortgage of \$3,000 and a purchase-money mortgage to Bannister for \$7,000 for 14 years, payable in yearly installments of \$500 each. The balance of the purchase price, \$2,000, was paid in cash, and the deed was taken in the name of Ida D. Rider, the wife of Harry M. Rider, and the mother of the infant plaintiff.

By an arrangement made between the defendants and Harry M. Rider, the latter collected the rents and paid them to Edelman, who applied them to the payment of the carrying charges and in reduction of the second mortgage, and in case of a deficiency he and Rider paid each one-half thereof. Ida D. Rider died September 4, 1917, intestate, leaving her husband, Harry M. Rider, and the infant plaintiff, who thereupon became seized of a one-half part of the premises, subject to her father's tenancy by the curtesy.

In March, 1918, Rider sold out his business and left Beacon, and thereafter Edelman collected the rents. Rider claims to have written a letter to Edelman prior to April 25, 1918, requesting a statement of the rents, but its receipt is denied by the latter. Thereafter Rider received from Edelman a letter, bearing that date, giving such a statement, and showing a deficiency of \$198.20 to be made up to meet the installment on the second mortgage due May 1st, and requesting payment by Rider of one-half thereof. The mortgage had then been reduced to \$5,000. Rider testifies that he replied, requesting Edelman to apply to this deficiency \$112.42, which he claims Edelman then owed him by reason of the prior discount of a note. Edelman, however, denied the receipt of any such letter, and also denies any indebtedness to Rider. Bannister, the mortgagee, pressed Edelman for the installment due on the mortgage; but Edelman requested him to wait until he could receive Rider's share of the deficiency. After waiting some time, however, Bannister finally commenced a foreclosure action in June. A guardian ad litem was appointed for the infant, and Rider appeared by attorney. Some attempt was made by Rider to save the property from the foreclosure, but nothing was accomplished, and judgment was finally entered, and the property sold thereunder at Poughkeepsie. It was bid in at the sale by Peter Edelman for \$1 more than the amount due, and his brother, Samuel Edelman, thereafter signed the terms of sale. He assigned his bid to the defendant Lena Phillips, who was a niece of Peter Edelman, and who testified that before the sale she had concluded to purchase at the foreclosure, at the suggestion of Peter Edelman that it would be a good investment. The property was conveyed to her by the referee, and Bannister took back a purchase-money mortgage for \$4,000, payable in semiannual installments of \$500 each. The check given to the referee for the 10

per cent. on the day of the sale was that of Minnie Phillips, a sister of the defendant Lena Phillips.

Lena Phillips is 22 years of age. She had never, prior to this purchase, owned any real estate. At the time of the foreclosure she had several savings bank accounts. She testified that she frequently received money from various members of her family, including Peter Edelman, for various purposes, and he testified that she often loaned him money, which he repaid, and that he also advanced moneys to her, and the various transactions are described. He did not produce his check book, showing the purpose of the checks drawn by him during the period in question. He testified that it had probably been thrown away.

The defendants contend that Lena Phillips purchased for herself in good faith, and not for Peter Edelman, that the latter owed no duty to plaintiff, his cotenant, except to refrain from any affirmative fraudulent act to produce the foreclosure of her interest, and that he was not under any obligation to advance money to protect the property beyond the income derived therefrom. Plaintiff, on the other hand, urges that Peter Edelman is still the real owner of the property, that the relations between Peter Edelman and plaintiff as tenants in common were fiduciary in character, that he was precluded from acquiring an outstanding title or interest in the property for his exclusive benefit, and that his purchase through Lena Phillips inured to plaintiff's benefit, as well as his own, and impressed the property in his hands with a trust in plaintiff's favor.

The contention by the defendant Edelman that after Ida Rider's death he lost interest in the property because it was unprofitable, that he only had \$1,000 invested therein, and that every year he was losing money, is not supported by the evidence. At the time of the foreclosure he had at least \$2,000 invested in the property. The \$500 annual installments paid on the principal of the second mortgage constituted an addition to the investment in the property, and cannot be treated as a mere carrying charge. The rents were always sufficient to pay such carrying charges and leave a surplus to be applied on the principal of the second mortgage of approximately \$350. Clearly, then, the property produced a small profit.

[1] It is true that Edelman disclaims any present interest in the property, and there is no direct evidence on the subject; but the circumstances surrounding the transactions and the course of dealing between the parties in my opinion leads to the conclusion that he is still the real owner. Nor is there any direct evidence that Peter Edelman's purpose in permitting this foreclosure was in order to cut off the infant plaintiff's interest. But I am unable to escape the conclusion that such was his intention. At the time of the default less than \$100 was necessary to pay the installment due, and yet it is urged that he was willing to sacrifice his own investment, rather than advance it.

While it is true that the evidence upon which I base this conclusion is somewhat meager, it must be borne in mind that plaintiff's evidence was drawn largely from reluctant and hostile witnesses. I therefore find that the defendant Lena Phillips is really holding title to the

premises for the defendant Edelman, and the case must be determined in the same manner as though he had purchased at the foreclosure and taken title in his own name.

[2] With this issue determined in plaintiff's favor, the situation at the time of the default and foreclosure of the second mortgage may be thus summarized: Edelman, with an investment of at least \$2,000 in the premises, and with a deficiency less than \$100 to meet the annual installment on the second mortgage, permitted and suffered a default, which resulted in a sale under foreclosure, at which he purchased for himself for \$1 more than the amount due, and now holds through Lena Phillips the entire title, with the intent which was thereby consummated to acquire the interest of his great-niece and cotenant, which had descended to her from her mother (his niece), and in which \$2,000 or more had been invested.

The rights and duties of cotenants in their relations to each other have been considered in numerous cases. Thus in *Van Horne v. Fonda*, 5 Johns. Ch. 388, it was held that, where two devisees are in possession of land under an imperfect title devised by their common ancestor, one of them cannot buy up an outstanding or an adverse title to dis seize or expel his cotenant, but such purchase will inure to their common benefit, subject to an equal contribution to the expense. The court in that case said:

"It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one cotenant buys up an outstanding incumbrance, or an adverse title, to dis seize and expel his cotenant. It cannot be tolerated, when applied to a common subject, in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with each other and to cause no harm to their joint interest."

In *Knolls v. Barnhart*, 71 N. Y. 474, it was held that where a widow paid a mortgage, took an assignment to herself, subsequently foreclosed, and bid in the premises, the interest of the heirs were not thereby cut off. The court said that it is a general rule that one tenant in common cannot purchase in an outstanding claim or title to the exclusion of his cotenant.

In *Peck v. Peck*, 110 N. Y. 64, 17 N. E. 383, it appeared that one of the tenants in common purchased a mortgage on the premises for less than its face and sought to charge his cotenants with contribution for the full amount. It did not appear that at the time he purchased there was any intention by the mortgagee to foreclose, nor any pressing necessity to take care of the mortgage. It was held that he could only require his cotenants to contribute their share of the amount he had paid, citing *Van Horne v. Fonda*, supra, 110 N. Y. 73, 17 N. E. 383.

In *Carpenter v. Carpenter*, 131 N. Y. 101, 29 N. E. 1013, 27 Am. St. Rep. 569, it appeared that executors, although having sufficient moneys in their hands to pay interest on the mortgages, defaulted and induced the holders to foreclose. Different portions of the property were bid in by certain of the children, and the interest of the plaintiffs, who were cotenants, was thereby divested. It was held that the titles acquired in the foreclosure were subject to a trust in plaintiffs' favor.

In *Allen v. Arkenburgh*, 2 App. Div. 452, 37 N. Y. Supp. 1032, affirmed 158 N. Y. 697, 53 N. E. 1122, it appeared that certain of the parties owned property in New Jersey as tenants in common, which was about to be sold in partition at a loss; that one of the tenants promised that, if the others would not bid, he would buy it in, pay the charges, and divide the surplus equally among the tenants in common. He bought it in, took title, and thereafter died, and the property was sold under a power of sale contained in his will. It was held, among other things, that the presumption is ordinarily that a tenant in common who purchases an outstanding interest does so for the benefit of all proprietors.

In *Collins v. Collins*, 13 N. Y. Supp. 28,¹ affirmed 131 N. Y. 648, 30 N. E. 863, it was held that, where a joint owner of property purchased at a foreclosure sale under a mortgage which had been assigned to a student in his office, the title acquired by him was subject to a trust in favor of his cotenant.

In *Streeter v. Shultz*, 45 Hun, 406, affirmed 127 N. Y. 652, 27 N. E. 857, it appeared that plaintiff conveyed to Charles Shultz one-half of certain premises, subject to a mortgage of \$7,500. Thereafter the mortgage was foreclosed, the premises being sold to one Christie, who bid in behalf of and assigned his bid to Shultz, who took a deed of the premises. There was no agreement that Shultz was to buy for himself and plaintiff, and the price paid was the full value. It also appeared that plaintiff thereafter sold all his personal property to Shultz, and that Shultz had obtained a grant of land under water from the state, and built docks and buildings at a very large expense. Plaintiff appears to have acquiesced in the purchase by Shultz at the foreclosure, and never made any objection thereto until, many years later, he commenced an action to redeem his undivided one-half from the foreclosure. The court held, first, that the fact that Shultz was a tenant in common with plaintiff, with no duties toward him other than such as necessarily arose from the cotenancy, did not prevent him from purchasing the premises for his own benefit, and that the subsequent acts of the plaintiff and his long acquiescence in the purchase by Shultz would defeat his claim, even if originally good.

In *Dolan v. Cummings*, 116 App. Div. 787, 102 N. Y. Supp. 91, affirmed 193 N. Y. 638, 86 N. E. 1123, it was held that a relation of confidence and trust exists between brothers and sisters, who are tenants in common of lands, and if one tenant conceals the fact that

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 59 Hun, 620.

he has had a specific offer for the real estate, and induces his cotenants to sell their interests to himself at a lower value, they are entitled to rescind the sale on discovering the offer. In that case the question of the relation of tenants in common was discussed by Gaynor, J., in a concurring opinion as follows:

"The question whether the mere relation of tenancy in common creates a fiduciary relation among the tenants in respect of the common property seems to be unsettled. In the cases of *Van Horne v. Fonda*, 5 Johns. Ch. 388, *Dickinson v. Codwise*, 1 Sandf. Ch. 214, and *Wells v. Chapman*, 4 Sandf. Ch. 333, there were other elements besides the mere relation. The opinion of the lower court in the case of *Graham v. Luddington*, 19 Hun, 251, note, was in the affirmative, while the opinion of the three judges on appeal in the case of *Streeter v. Shultz*, 45 Hun, 406, was in the negative. In the case of *Peck v. Peck*, 110 N. Y. 64 [17 N. E. 383], there were also other elements. In the case of *Abbey v. Wheeler*, 85 Hun, 226 [32 N. Y. Supp. 1069], it was held that a suit for an accounting would not lie by a tenant in common against his cotenant, on the ground that there was no fiduciary relation between tenants in common, and therefore nothing to give equity jurisdiction of such a suit. And so our cases in this state run. There is a diversity of opinion elsewhere. Mr. Bispham, however, in his scientific and altogether able treatise on the Principles of Equity, enumerates the relation of tenants in common among those out of which arises ipso facto a fiduciary relation (7th Ed. § 93); and the case of *Duff v. Wilson*, 72 Pa. 442, warrants his text. The present case not only brings the question up squarely, but shows that it ought to be decided in the affirmative."

In the above cases, although differing in their facts from the case at bar, one clear and dominant principle is laid down, which in my opinion is equally applicable to the situation here. One tenant in common cannot purchase an outstanding claim or title to the exclusion of his cotenant, and such a purchase is presumed to be for the benefit of all.

I do not think the case of *Streeter v. Shultz* is at war with this principle. In that case the plaintiff was of full age and acquiesced in the purchase, openly made for full valuation by his cotenant, with full knowledge and without raising any objection until many years later, after defendant had expended large sums of money in improvements on the property.

Edelman's purchase, therefore, is presumed to have been, not for himself alone, but for plaintiff, his cotenant, as well, and unless that presumption has been rebutted by the evidence, it is conclusive of this case. In my opinion this presumption has not been overcome, and I therefore find that the real estate in question is impressed with a trust in favor of plaintiff to the extent of her half interest as a tenant in common, and that she is entitled to a conveyance of such interest by the defendant Phillips, and to an accounting of the rents and profits, subject, however, to contribution by her of her share of all lawful expenditures made by the defendants upon the property.

Decision and judgment may be agreed upon or settled upon notice.

(108 Misc. Rep. 187)

WILLIAMS v. GALLATIN, Commissioner of Parks, et al.

(Supreme Court, Special Term, New York County. July, 1919.)

MUNICIPAL CORPORATIONS § 721(4)—**LEASE OF BUILDING IN CENTRAL PARK FOR MUSEUM PURPOSES VALID.**

The city of New York, under Greater New York Charter, §§ 613, 621, 622, and section 244a, as added by Laws 1914, c. 466, embodying a provision of Laws 1859, c. 349, and acts amendatory thereto, under which Central Park was acquired and authorizing maintenance of museums therein notwithstanding sections 612, 627, may lawfully lease arsenal building in Central Park to a corporation chartered by Laws 1911, c. 152, § 2, to promote methods of safety and sanitation and for museum purposes.

Taxpayer's action for injunction by William H. Williams against Francis D. Gallatin, as Commissioner of Parks of the City of New York, for the boroughs of Manhattan and Richmond, and the City of New York and Safety Institute of America. Complaint dismissed.

William B. Roulstone, of New York City, for plaintiff.

William J. Moran, of New York City, for defendant Safety Institute of America.

William P. Burr, Corporation Counsel, of New York City, for defendants Gallatin and City of New York.

LUCE, J. The plaintiff, a taxpayer, seeks to enjoin the defendant New York city park commissioner from executing a lease of the Arsenal Building in Central Park to the other defendant, Safety Institute of America, for a term of ten years, upon the ground that the use of the premises by the tenant for the purposes expressed in the lease is contrary to the Greater New York Charter in that it is foreign to park purposes. The complaint alleges that Central Park is a public park, owned by the city of New York; that the Arsenal Building is located in Central Park, and is a part thereof, and is intended for use solely as public park property; that the defendant Francis D. Gallatin, as commissioner of parks, is the chief executive in charge of the administration, management, and control of Central Park and of the Arsenal Building; that under the provisions of section 612 of the Greater New York Charter (Laws 1901, c. 466) said Francis D. Gallatin, as commissioner of parks, is charged with the duty of maintaining the beauty and utility of Central Park, and is further charged with the duty of instituting and executing all measures for the improvement thereof, for ornamental purposes and for the beneficial uses of the people of the city of New York, and that he is further charged with the duty, among others, of preventing any use of Central Park which does not aid the beneficial use thereof by the people of the city of New York, and does not contribute to its use and enjoyment by said people; that under section 627 of the Greater New York Charter it is unlawful for the defendants to grant, use, or occupy for the purposes of a public fair or exhibition any portion of Central Park; that the defendants entered into a certain agreement in writing, a copy

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of which is attached to the complaint; that the defendants planned to proceed with the performance and execution of the terms of this lease, and with the use and alteration of the said Arsenal Building; that the use of Central Park or the Arsenal Building for any of the purposes referred to is illegal, and violates the sections of the Greater New York Charter referred to, and will not aid in, but will impede and materially hinder, the beneficial use of the said Central Park by the public and the people of the city of New York, and will not contribute to, but will detract from, the use and enjoyment of the said Central Park by the public and people of the city of New York, and will not enhance, but will diminish, the opportunities of the people and public of the city of New York to use and enjoy the said Central Park as a place of resort, amusement, recreation and exercise; that it was illegal for the defendants to enter into said lease, and that the defendant Gallatin, as commissioner of parks, exceeded his power in executing said lease; and that the erection, construction, alteration and occupancy of the Arsenal Building will substantially damage and injure the property of the city of New York, and will damage and injure the said Central Park in its use and enjoyment by the taxpayers, citizens and public of the city of New York. The lease recites it is made "in order to promote and increase the public enjoyment, use and convenience of the public park known as Central Park." The lease further provides "that the said building, after it shall have been altered and repaired as herein provided for, shall be kept open and accessible to the public hereafter free of all charge throughout the year, five days in each week, one of which shall be Sunday afternoon, and also for two evenings in each week, within such hours and subject to such rules and regulations as may be determined by the trustees of said institute; and also that on the two days in each week during which said building may remain closed to the general public it shall be open and accessible to students, schools, and societies organized for the purpose of promoting means and methods of safety and sanitation within such hours and subject to such rules and regulations as may be determined by the trustees of said institute." The defendant Safety Institute of America was formerly known as the American Museum of Safety, but on November 22, 1918, by order of this court, the said name American Museum of Safety was changed so that said corporation defendant is now named the Safety Institute of America. The American Museum of Safety, now the Safety Institute of America, was incorporated by chapter 152 of the Laws of 1911, which, by section 2 thereof, defines its objects as:

"Sec. 2. The objects of the corporation hereby created are to study and promote means and methods of safety and sanitation and the application thereof to any and all public or private occupations whatsoever, and of advancing knowledge of kindred subjects; and to that end to establish and maintain a museum, library and laboratories, and their branches wherein all matters, methods and means for improving the general condition of the people as to their safety and health may be studied, tested, and promoted, with a view to lessening the number of casualties and avoiding the causes of physical suffering and of premature death, and to disseminate the results of such study, researches and test by lectures, exhibitions and other publications."

Chapter 466, Laws of 1914 (Greater New York Charter, § 244a), authorizes the board of estimate and apportionment of the city of New York to appropriate annually—

"Such sum as it may deem proper, not exceeding fifty thousand dollars, for the keeping, preservation, and exhibition of safety devices and means and methods of safety and sanitation in the building or any part thereof in the city of New York now or hereafter occupied by the American Museum of Safety."

The lease prohibits any commercial transactions or gainful pursuits upon the demised premises. No rent is reserved in the lease, but the tenant is obligated to expend not less than \$50,000 in alterations, repairs and improvements upon the demised premises according to plans subject to the park commissioner's approval. The tenant's covenants comply with the requirements of section 244a of the charter, the lease providing:

"The said building * * * shall be kept open and accessible to the public hereafter free of all charge throughout the year, five days in each week, one of which shall be Sunday afternoon, and also for two evenings in each week, within such hours and subject to such rules and regulations as may be determined by the trustees of said museum; and also that on the two days in each week during which said museum may remain closed to the general public it shall be open and accessible to students, schools, and societies organized for the purpose of promoting means and methods of safety and sanitation within such hours and subject to such rules and regulations as may be determined by the trustees of said museum."

The public functions performed by the tenant are sufficiently established by its objects, stated in chapter 152, Laws of 1911, the authority to the city of New York to appropriate money for the corporate purposes, and the covenants in the lease requiring the premises to be accessible to the public. The argument of the plaintiff is based on his assumption that any use of the lands included in Central Park for purposes other than playgrounds or resting places, is illegal; in other words, that a park should consist solely of trees and grass. It is well established that park lands may be put to many uses without violation of law. The laws under which Central Park was acquired and amendatory acts thereto provided for the establishment and maintenance within the limits of the park of museums, zoological or other gardens, collections of natural history, observatories or works of art. Laws of 1859, c. 349, and acts amendatory thereto. This provision has been carried into the Greater New York Charter. Greater New York Charter, §§ 613, 621, 622.

The decisions of the courts of this state have recognized that the establishment of a restaurant in a public park is a proper use of the park property. *Gushee v. City of New York*, 42 App. Div. 37, 58 N. Y. Supp. 967; *Gredinger v. Higgins*, 139 App. Div. 606, 124 N. Y. Supp. 22. It has also been recognized that the use of park property for horticultural gardens and for instruction and recreation of the public is a proper use. *International Garden Club, Inc., v. Hennessy*, 104 Misc. Rep. 141, 172 N. Y. Supp. 8. The acts and decisions above referred to fully establish that educational features as well as provision for the health and comfort of the public are proper attributes

of a public park. The city of New York has authority, under the charter, to establish the museum proposed to be maintained by the defendant Safety Institute of America, and to utilize the Arsenal Building for that purpose, and this authority exists, whether the title to Central Park is held by the city in its capacity, as an agency of the state, or as a private owner. What the city can do itself it can do through the legally constituted corporation created by the Legislature for that purpose. *Gushee v. City*, supra. The complaint does not allege that the Arsenal is to be used for any purpose other than that expressed in the lease. Such a use is within the statutory provisions creating Central Park, and therefore the plaintiff's cause of action fails. The motion for judgment on the pleadings dismissing the complaint because it fails to state a cause of action is granted and the complaint dismissed.

Judgment accordingly.

(108 Misc. Rep. 168)

FREVERT MACHINERY CO. v. HOLLANDER MACHINERY CO. et al.

(Supreme Court, Special Term, New York County. July, 1919.)

1. TRADE-MARKS AND TRADE-NAMES ¶58—IMITATION OF TRADE-MARKS AND LABELS RESTRAINED.

Where design of plaintiff's trade-mark on new and secondhand machinery was identical with defendants' trade-mark, on secondhand machinery adopted over ten years later, and court is satisfied that the devices used are identical and that the character of type, words used, and arrangements of words are almost identical in both trade-marks, plaintiff is entitled to restrain defendants, its competitors, from using any imitation of its trade-mark and label.

2. TRADE-MARKS AND TRADE-NAMES ¶57—SIMILARITY NO LESS OBJECTIONABLE BECAUSE NOT EXACT COPY.

Though there are differences in names, etc., the similarity between plaintiff's earlier trade-mark and defendants' trade-mark is no less objectionable because its separate features, when examined in detail, are not found to be copies of corresponding features of plaintiff's trade-mark.

3. TRADE-MARKS AND TRADE-NAMES ¶57—TEST OF INFRINGEMENT WHETHER ORDINARY PURCHASER WOULD BE DECEIVED.

It is not necessary, to constitute infringement, that every element of a trade-mark be appropriated, or that trade-mark be completely copied; the test being whether, taking into account the resemblances and differences, the former are so marked that the ordinary purchaser is likely to be deceived thereby.

4. TRADE-MARKS AND TRADE-NAMES ¶57—PROOF THAT ANY ONE HAD BEEN DECEIVED UNNECESSARY.

It is no defense to a motion to enjoin use of any imitation of plaintiff's trade-mark and label, etc., that there is no proof that any one had been deceived by the similarity in the two trade-marks; liability to deception being sufficient ground for injunction.

Motion by the Frevert Machinery Company against the Hollander Machinery Company and others for an injunction. Motion granted.

Jay Noble Emley, of New York City, for the motion.

David P. Siegel, of New York City, opposed.

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LUCE, J. [1] This is a motion "for an order restraining the defendants, their servants and agents, from placing or causing to be placed upon their tools and machinery any imitation of the plaintiff's trade-mark and label," etc. Plaintiff and defendant are both in the same line of business, with the exception that plaintiff deals in both new and secondhand machinery, whereas defendant deals solely in secondhand machinery. It appears that plaintiff's trade-mark was adopted in 1907, and that the trade-mark of defendant was adopted by it about 6 months ago. The papers before the court show that the plaintiff and its predecessor in interest have extensively advertised the said trade-mark through catalogues and otherwise through the mails for a great number of years, and its trade-mark is generally known to the machinery trade. It also appears that the plaintiff has had manufactured for it and sold under its own name and trade-mark hand power traveling cranes and polishing machines, and that all machines and tools sold by it have borne this trade-mark. By the affidavit of one Cotton, a customer of plaintiff's, it appears:

"My sole guidance in buying machinery, either new or secondhand, is by reason of the Frevert Machinery Company trade-mark, and I am not primarily concerned with the name or make of the machinery. In fact, I have bought machines irrespective of the maker, simply because the trade-mark of the Frevert Machinery Company appeared on the machinery and tools."

In the affidavit of one Robidoux, another customer of plaintiff, it is said:

"Whenever I need machinery I am guided almost entirely by the recommendations of the Frevert Machinery Company with reference to my needs, and never buy anything on the strength of the name of the maker alone. If the Frevert Machinery Company's trade-mark is upon a machine, I am satisfied to buy same from the plaintiff herein, either new or secondhand."

Plaintiff alleges, and the proof shows, that it does sell its tools or machines because its trade-mark is affixed thereto, and that many of its customers rely entirely upon the plaintiff's recommendations on tools and machines, and plaintiff attaches its trade-mark to the machines and tools sold by it. Catalogues are submitted showing machines that plaintiff sells under its trade-marks. Plaintiff submits proof that its sales manager was deceived into believing that defendant's trade-mark was that of the plaintiff. Defendant admits that its attention was called to the similarity in design of the two trade-marks, and that—

"It agreed to destroy the name plates on hand, provided plaintiff paid it the value thereof, to wit, \$30, and to discontinue using same, for, rather than become involved in a lawsuit the defendant was willing to discontinue the particular design, since same meant nothing in a business way."

Defendant's president admits in his affidavit that the design of the defendant's trade-mark is identical with that of the plaintiff. A comparison of the two trade-marks in question shows that the devices used are identical, and the character of type, words used, and their arrangement are almost identical.

[2] True, there are differences in names, etc.; but the similarity between the two trade-marks is none the less objectionable, because

its separate features, when examined in detail, are not found to be copies of the corresponding features in plaintiff's trade-mark. See *Luyties Bros. v. Zimmermann & Co.*, 149 App. Div. 542, 133 N. Y. Supp. 997; *Kalish, Inc., v. Harper*, 184 App. Div. 684, 172 N. Y. Supp. 470.

[3] It is not necessary, to constitute infringement, that every element of a trade-mark be appropriated, nor that the trade-mark be completely copied. A proper test is whether, taking into account the resemblances and differences, the former are so marked that the ordinary purchaser is likely to be deceived thereby. In the case at bar it is admitted that the design of plaintiff's trade-mark has been copied by defendant, or at least that the designs are identical, and a comparison of the two trade-marks convinces the court that the character of the lines and the arrangement of the words are identical. Plaintiff's trade-mark is a fanciful and arbitrary one, and the use of an almost identical trade-mark by a competitor in trade for similar tools and machinery is a very obvious invasion of plaintiff's rights. It is no defense to say that the plaintiff has no trade-mark in the words "lathes, shapers, millers, planers, tools." Plaintiff does not claim to have a trade-mark in these words. Plaintiff's trade-mark is in the design, and the words are merely incidental. Defendant may use the same words, provided it does not make use of the same design.

[4] Defendant makes much of the point that no one has been shown to have been deceived by the similarity in the two trade-marks. Plaintiff shows that its sales manager was so deceived. However, it is no defense to a motion for an injunction that no such proof was submitted. As was said in *T. A. Vulcan v. Myers*, 139 N. Y. 364, 367, 34 N. E. 904, 905:

"No evidence was given or offered to show that any person had actually been deceived by the imitation of the plaintiff's trade-mark; and we think that none was necessary for the maintenance of the action. It is the liability to deception which the remedy may be invoked to prevent."

In *Kalish v. Harper*, supra, the court said:

"The motion for an injunction was denied upon the ground that there was no proof of deception. No such proof is necessary. Although the complaint alleges that the simulation of plaintiff's trade-mark tended to and did result in deception, the right to an injunction sufficiently appears when it is shown that there has been an unlawful invasion of plaintiff's property right in its trade-mark."

It is the liability to deception and consequent injury which justifies the issuance of an injunction. See *German-American Button Co. v. Heymsfeld, Inc.*, 170 App. Div. 416, 421, 156 N. Y. Supp. 223. Motion is granted, with \$10 costs.

Motion granted, with \$10 costs.

(108 Misc. Rep. 177)

MACKENZIE et al. v. SEABOARD NAT. BANK et al. *

(Supreme Court, Special Term, New York County. July, 1919.)

DISCOVERY §—47—VACATION OF ORDER FOR EXAMINATION BEFORE TRIAL.

Where one defendant to an action for damages for conversion of stock had previously been sentenced on his conviction of larceny thereof, and the only special circumstances rendering his examination before trial necessary were those relating to his release on parole, the order for examination would be vacated, where his deposition was sought to be taken on separate trial of issues raised by answer of other defendants, in view of Prison Law, § 214, and Code Civ. Proc. §§ 882, 2008.

Action by Charlotte L. Mackenzie and Romeyn Berry, as trustee under a certain trust, against the Seaboard National Bank, Arthur F. Luke, Henry W. Banks, Jr., and John L. Weeks, partners composing the firm of Luke, Banks & Weeks, Richard J. Hartman and another. On motion by defendants Luke, Banks, and Weeks for vacation of an order for the examination of defendant Hartman before trial. Granted.

See, also, 184 App. Div. 3, 171 N. Y. Supp. 1002.

Morris, Plante & Saxe, of New York City (Charles E. Mahony, of New York City, of counsel), for plaintiffs.

White & Case, of New York City, for defendants Luke, Banks, and Weeks.

LUCE, J. The defendants Luke, Banks, and Weeks apply for the vacation of plaintiffs' order for the examination of Richard J. Hartman, a defendant, before trial. The action is to recover \$297,912.64 damages for the conversion of 1,104 shares of Singer Manufacturing Company stock. The judgment for plaintiffs on a previous trial was reversed. 184 App. Div. 3, 171 N. Y. Supp. 1002.

An order entered February 10, 1917, provided for a separate trial of the issues raised by the answers of the defendants Seaboard National Bank, and Luke, Banks, and Weeks. On May 24, 1919, the action against the Seaboard National Bank was discontinued; thus the separate trial will be only the issues raised by the answer of the defendants Luke, Banks, and Weeks, and it is upon that trial that the deposition of Hartman is sought to be taken. In February, 1915, Hartman was convicted of the crime of the larceny of the 1,104 shares of stock of the Singer Manufacturing Company, and was sentenced to state's prison for a maximum term of 9 years and 7 months, and for a minimum term of 5 years. In March, 1919, Hartman was admitted to parole, and is at No. 470 West Delavan street, Buffalo. The order required the warden of the Great Meadows prison to produce Hartman for examination at that prison. The order is challenged by Luke, Banks, and Weeks. (a) Hartman is not a party defendant upon the trial of the issues raised by their answers; (b) no facts are shown to warrant Hartman's examination as a third party before trial.

The objection that Hartman is not a party to the litigation of the issues raised by the answer of Luke, Banks, and Weeks is amply sustained

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*Order affirmed 189 App. Div. 931, 178 N. Y. Supp. 902.

by the authorities. *Sharp v. Hutchinson*, 48 N. Y. Super. Ct. 101; *Seeley v. Clark*, 78 N. Y. 220. The plaintiffs maintain that Hartman is still a convict, subject to prison discipline, still serving the sentence of the court, and that these facts, constituting his present status, are the special circumstances which render it proper that he should be examined as a third party before trial. The defendants contend that, even if still a prisoner serving a sentence, Hartman may be produced at the trial upon a writ of habeas corpus ad testificandum, as provided by section 2008 of the Code of Civil Procedure, and if not under confinement he is subject to subpoena. The able and diligent counsel have cited no authorities upon this question directly in point. The cases of *People ex rel. Clark v. Warden*, 39 Misc. Rep. 113, 78 N. Y. Supp. 907, holding Parole Law constitutional, and *Matter of Gargan v. Sculley*, 82 Misc. Rep. 667, 144 N. Y. Supp. 205 (a maximum sentence for life, minimum 20 years, was, under Domestic Relations Law [Consol. Laws, c. 14] a life sentence) furnish but little aid. Section 214 of the Prison Law (Consol. Laws, c. 43) provides that a prisoner, while on parole, remains—

"in the legal custody and under the control of the agent and warden of the state prison from which he is so paroled, until the expiration of the maximum term specified in his sentence, * * * or until his absolute discharge as hereinafter provided."

The Attorney General (Report 1910, p. 886) held a prisoner on parole in the actual custody of the agent or warden of a state prison should not be surrendered to the authorities of the United States or other state for a crime committed in another state. By the terms of the statute Hartman is in the legal custody and under the control of the agent and warden of the Great Meadows prison, and it is therefore assumed he is not subject to a subpoena. By the same reasoning, he can be produced upon the trial by habeas corpus ad testificandum. If the witness' disposition were produced at the trial, before it could be read there must be proof that he is unable to attend by reason of his insanity, sickness, or other infirmity, or that he is in a prison or jail, or he is absent from the state. Code Civ. Proc. § 882. The jail or prison there mentioned must be one without the jurisdiction of the state, since if in a state penal institution his attendance can be compelled as provided in section 2008 of the Code. The only special circumstances which render his examination before trial necessary are those relating to his release on parole. These circumstances are not sufficient, since upon the trial it could not be shown that his attendance cannot be secured. The motion is granted, with \$10 costs, and the order of June 10, 1919, for the examination of Richard J. Hartman, is vacated.

Motion granted, with \$10 costs.

(109 Misc. Rep. 38)

NIAGARA GORGE R. CO. v. GAISER.

(Supreme Court, Special Term, Niagara County. October, 1919.)

1. CARRIERS § 7—RIGHT OF PUBLIC SERVICE COMMISSION TO ISSUE CERTIFICATES FOR OPERATION OF BUS LINES.

Laws 1919, c. 307, amending Transportation Corporations Law, § 26, restored to a considerable extent the jurisdiction of the Public Service Commission granted by Transportation Corporations Law, § 25, as enacted in 1913, of which the commission had been deprived by Laws 1915, c. 667, and gave every village and town the option to bring itself within the provisions of section 26, as amended, requiring from the commission local consents and certificates of public convenience and necessity for the operation of bus lines.

2. CARRIERS § 7—OPERATOR OF BUS LINE COMPETING WITH STREET RAILROAD IN VILLAGE A COMMON CARRIER.

Operator of bus line, partly in village and competing with street railway, held to have become a common carrier under Laws 1919, c. 307, amending Transportation Corporations Law, § 26, so that he was under Public Service Commissions Law, § 53, requiring that he obtain certificate of public convenience and necessity before exercising a franchise granted by the village.

3. STATUTES § 161(2)—STATUTE WILL NOT BE CONSTRUED TO MAKE IT MEANINGLESS.

A statute will not be construed, so as to render it meaningless and ineffective for any purpose.

Action by the Niagara Gorge Railroad Company against Edson U. Gaiser. Judgment on the pleadings for plaintiff, directing issuance of permanent injunction.

George C. Riley, of Buffalo, for plaintiff.

Tuttle, Rice & Stockwell, of Niagara Falls (Alfred W. Gray, of Niagara Falls, of counsel), for defendant.

MARCUS, J. This action was commenced July 26, 1919, to restrict the operation by the defendant of a bus line through the village of Lewiston, Niagara county, as a part of a route paralleling plaintiff's railroad from 125 Main street, in the city of Niagara Falls, to the village of Lewiston.

An order to show cause for a temporary injunction enjoining the operation of a bus line through the village of Lewiston was granted by Mr. Justice Taylor (ex parte), and was subsequently modified by him, so as to restrict the operations of the defendant to the dock of the Canadian Steamship Company, but to permit the bus line to run straight through the village on its route, terminating at Youngstown. The order to show cause why the injunction should not be continued pendente lite was argued before Mr. Justice Laing, and resulted in a continuance of the modified temporary injunction until final judgment in this action.

It was conceded by counsel on the argument that the complaint correctly alleges all of the essential facts relevant to the situation, and to constitute a cause of action based on the failure of the defendant to apply for and obtain a certificate of convenience and necessity from the Public Service Commission, but it is contended that no legal

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requirement exists for such a certificate obtained by the defendant. For the purposes of the argument, the following facts stand admitted:

(1) That plaintiff is a common carrier operating 7 miles of double track railroad by electric motor power, extending from the city of Niagara Falls into the village of Lewiston.

(2) That plaintiff has obtained the consent of the authorities for such operation, as required by law.

(3) That plaintiff operates under a lease an electric railroad extending from within the village of Lewiston to and through the village of Youngstown, and terminating at Ft. Niagara.

(4) That the defendant operates a bus line, the route of which is for the most part parallel with plaintiff's railroad and its leased lines.

(5) That defendant is a common carrier and competes with the plaintiff in the carriage of passengers between said points.

(6) That defendant on the 6th of June, 1918, applied for and obtained from the Public Service Commission, Second District, a certificate of public convenience and necessity as to a portion of his route from 125 Main street, Niagara Falls, to the northerly boundary line of said city, and has since operated thereunder.

(7) That the board of trustees of the village of Lewiston, in June, 1919, adopted a resolution providing that the provisions of section 26 of the Transportation Corporations Law (Consol. Laws, c. 63), as amended by chapter 307 of the Laws of 1919 (effective May 3, 1919), should thereafter apply to such village.

(8) That thereafter defendant petitioned the local authorities of said village for their consent to the operation of his bus line, and on July 24, 1919, said consent was granted upon terms, requirements, and conditions therein set forth, and over a route specifically described.

(9) That defendant has failed and neglected to apply for or obtain a certificate of public convenience and necessity for the operation of said bus line over said route.

(10) That such bus line operations result in damage and injury to the plaintiff, for which the plaintiff has no adequate remedy at law.

[1] Section 25 of the Transportation Corporations Law reads as follows:

"Any person * * * who * * * owns or operates a * * * bus line * * * or route or vehicles described in the next succeeding section of this act wholly or partly upon and along any street * * * in any city shall be deemed to be included within the meaning of the term 'common carrier' as used in the Public Service Commissions Law, and shall be required to obtain a certificate of convenience and necessity for the operation of the route or vehicles proposed to be operated. * * *"

It will be at once noted that section 25 clearly and unequivocally defines as common carriers within the terms of the Public Service Commissions Law (Consol. Laws, c. 48), and requires a certificate of public convenience and necessity for the operation of such bus route or vehicles, described in section 26, as are operated "wholly or partly upon and along any street * * * in any city." The defendant is such a person as section 25 describes, for he operates a part of his route along the streets of the city of Niagara Falls. The operation

of a route partly in a city constitutes him a common carrier, and since the amendment of 1919, requires that he obtain a certificate "for the operation of the route or vehicles proposed to be operated."

Section 24 of the Transportation Corporations Law was added to article 4 of said law by chapter 219 of the Laws of 1909, and it provided that any person owning or operating a stage route in a city of 1,000,000 inhabitants should be deemed a "common carrier," as the term is used in the Public Service Commissions Law. Section 25 was added by chapter 495 of the Laws of 1913, and its provisions completely answer the suggestion of defendant's learned counsel that the amendment of May 3, 1919, contained any joker clause, and it seems to me conclusive evidence of the legislative contention to require motor bus lines operating in villages or towns to obtain the certificate of public convenience and necessity of the Public Service Commission.

The enactment of 1913 was entitled "Additional Persons and Corporations Subject to the Public Service Commissions Law," and included therein those operating along highways known as a state route, and those constructed wholly and partly at the expense of the state, and along highways in any part of a city having a population of 750,000 or under; also that, where such a route had been constructed partly at the expense of a railroad, the Public Service Commission might require the applicant for its certificate to contribute a sum equal to five per cent. of the sum paid by the railroad or street railway corporation for construction, as a condition for further operating such a bus line.

The section was again amended by chapter 667 of the Laws of 1915 to its present form, and made to provide that any person operating a state route in any city should be deemed a common carrier within the meaning of the term as used in the Public Service Commissions Law, and shall be required to obtain the certificate of the commission. With that amendment of 1915, section 26, entitled "Consent Required," was added to article 4, and has continued in that form until May 3, 1919, when its provisions applicable only to a city were extended by chapter 307 to include towns and villages which might adopt resolutions providing that the provisions of the section should apply thereto; and the significant fact is to be noted that in the amendment of 1919 the words "shall be operated wholly or partly upon or along any street or highway in such town or village, nor receive a certificate of public convenience and necessity," are exactly identical with the words in the first amendment of section 28, applying to cities, and the procedure for obtaining authority to operate therein.

The effect of the amendment of 1919 was to restore, to a considerable extent, the jurisdiction of the Public Service Commission granted in the provisions of section 25 as it was enacted in 1913, of which the commission had been deprived by chapter 667 of the Laws of 1915. As the section read prior to 1915, the certificate of the commission was necessary for bus lines operated over state routes or state highways outside of the city, and the legislative intent to return this jurisdiction is evident upon a reading of the 1919 amendment.

The amendment of 1915 had subjected the suburban railways of the

state to much competition, resulting in what is generally known by communities to be practical bankruptcy, and almost universal applications for increases in fares; and undoubtedly in recognition of this situation, and of the inequity of permitting competing bus lines to use, without license fee or public service regulation, the highways and streets, for which in many instances the railroad companies had been required, by the terms of their franchise, and under the general Railroad Law, to pave, the law was restored in its general features to that of 1913, and the option was given every village and town to bring itself within the provisions of the amended section requiring local consents and certificates of public convenience and necessity from the Public Service Commission. This review of the legislation disposes of the suggestions of counsel for defendant that anything sinister exists in the amendment of 1919.

It is also pertinent to suggest that in addition to the positive and direct requirement contained in section 25, "that any person * * * who * * * operates a * * * bus line * * * or route * * * described in the next succeeding section of this act wholly or partly upon and along any street * * * in any city * * *" must obtain the commission's certificate, the provisions of section 26, applicable alone to cities contains, in the same language, the requirement later made applicable to towns and villages, that no bus line shall be operated "nor receive a certificate of public convenience and necessity," until the owner had obtained the consent of the local authorities.

If the Legislature did not, by these words, intend to confer jurisdiction upon the Public Service Commission as to the portions of bus lines and routes in towns and villages, then the language of the Legislature above quoted must be held to be without any meaning whatever. It was clearly the legislative intention to restore the jurisdiction of the Public Service Commission over bus lines, not only in the places described in section 25, prior to the amendment of 1915, but to extend to the towns and villages of the entire state the local right and option to supervise, regulate, and prescribe the terms on which motor bus lines might be operated over their highways, afford the protection which such regulation and control would provide, and incidentally protect the investments of those who were operating existing interurban railway lines from such form of competition as is shown to be adopted by the defendant in this suit. The Legislature has clearly recognized the necessity of vesting in the Public Service Commission authority to pass upon the question as to the convenience of and necessity for such competing lines, and the power to supervise and control their operation. Unless defendant has come under the jurisdiction of the Public Service Commission, he may so operate that his competition will make plaintiff's operation impossible, because of the financial loss resulting, and thereby the service guaranteed to the public through the supervision of the plaintiff by the Public Service Commission may be destroyed.

[2] I am also of the opinion that defendant became a common carrier under the provisions of the 1919 amendment, and as such, under section 53 of the Public Service Commissions Law, was required to

obtain a certificate of public convenience and necessity before exercising its franchise granted by the village of Lewiston. Section 26, prior to the 1919 amendment, described bus lines carrying passengers "in competition with another common carrier which is required by law to obtain the consent of the local authorities of said city to operate over the streets thereof." The 1919 amendment provided that any town or village may adopt a resolution "providing that the provisions of this section shall apply to such town or village."

The amendment thus added to the bus line operated in cities, and which by section 25 were made common carriers, who must obtain certificates of public convenience and necessity, such bus lines as compete with other common carriers required by law to obtain the consent of local authorities of towns and villages. This made such bus lines, including the defendant, common carriers, and as such were brought within the provision of section 53 of the Public Service Commissions Law, which would require the certificate of convenience and necessity, regardless of the requirements of section 25 of the Transportation Corporations Law, to the same effect. The Public Service Commissions Law, in section 53, provides:

"Nor * * * shall any such * * * common carrier exercise any franchise or right under any provision of the railroad law, or of any other law * * * without first obtaining the permission and approval of the proper commission."

Defendant's counsel admitted upon the argument that the 1919 amendment made defendant a common carrier, a perfectly obvious conclusion. As such he was required by the provision of both the Public Service Commissions Law and section 25 of the Transportation Corporations Law to obtain a certificate of public convenience and necessity. As a matter of fact, the provision of section 25 of the Transportation Corporations Law, stating that such a common carrier "shall be required to obtain a certificate of convenience and necessity for the operation of the route or vehicles proposed to be operated, and shall be subject to all the provisions of said law applicable to common carriers," is entirely superfluous, as when, by the preceding matter in said section 25, a bus line was made a common carrier within the meaning of that term as used in the Public Service Commissions Law, then as a natural result the Public Service Commission acquired jurisdiction, and the requirement of section 53 of the Commissions Law became operative.

Such very evidently was the understanding of the draftsman of section 26 of the Transportation Corporations Law, which, as variously amended, always provided that the bus line should not operate "nor receive a certificate of public convenience and necessity" until the local authorities had granted their consent. The amendment of 1919 is as effective in adding bus lines operating over routes through towns and villages to the bus lines operating within the city as if the first sentence of section 26 had been amended by adding thereto, after the word "city," the words "towns or villages." The bus lines operating in towns or villages became common carriers within the meaning of the term used in the Public Service Commissions Law, because such bus

lines are such lines as are mentioned in section 25 as "described in the next succeeding section of this act."

[3] The words of the amendment, "nor receive a certificate of public convenience and necessity," show clearly the legislative intention that such a certificate should be obtained by the defendant. If that were not the legislative intent, the words are meaningless and ineffective for any purpose, and such a construction of the statute urged by the defendant violates all recognized rules for the interpretation of statutory enactment.

The defendant's demurrer is overruled, and judgment on the pleadings ordered, directing that a permanent injunction issue as pleaded for in the complaint, with the costs of the action.

(108 Misc. Rep. 172)

PARTOLA MFG. CO. V. CONGRESS WAREHOUSE & FORWARDING CORPORATION.*

(Supreme Court, Special Term, New York County. July, 1919.)

1. LANDLORD AND TENANT §134(2)—MERGER OF LESSEE ESTATE IN FEE SIMPLE OF TENANT.

Where defendant, owning several properties, including an uncovered yard, inclosed by a brick wall, and a platform and scales in a brick building, having a door opening on inclosed space, leased all the properties to plaintiff, with a covenant that defendant would not use premises, except for storage of merchandise, etc., or obstruct the lights, or make any alterations without plaintiff's consent, and plaintiff leased the yard to defendant for same term for storing of trucks, etc., omitting the restrictive covenants in defendant's lease to it, there was no intention to prevent a merger of the lesser estate granted to defendant in its larger title of fee simple absolute.

2. LANDLORD AND TENANT §134(6)—INJUNCTION RESTRAINING USE OF PREMISES DENIED.

Where there was no intention to prevent a merger of a lesser estate leased by plaintiff to defendant in defendant's larger title of fee simple absolute, an injunction pendente lite restraining defendant from continuing to construct a roof over uncovered yard leased to it, and from constructing a brick wall along side wall of an office building, formerly leased by defendant to plaintiff, will be denied, because defendant's acceptance of the lease merged all that it contained in defendant's fee, and there was no violation of any of plaintiff's rights.

Action by the Partola Manufacturing Company against the Congress Warehouse & Forwarding Corporation. On motion for injunction. Motion denied.

Hovell, McChesney & Clarkson, of Brooklyn (Sidney A. Clarkson, of Brooklyn, of counsel), for the motion.

Wing & Wing, of New York City (Arthur K. Wing, of New York City), opposed.

LUCE, J. This motion seeks to restrain the defendant, during the pendency of the action for a permanent injunction, from continuing the building operation on premises Nos. 179-181 West Houston street,

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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*Order affirmed — App. Div. —, 179 N. Y. Supp. 941.

and from doing any act in connection with said premises, excepting the storing of defendant's trucks therein, or any other act without plaintiff's written consent. The defendant is the owner in fee of Nos. 179, 181, 183, and 189 West Houston street, and Nos. 1, 3, and 5 Congress street, Manhattan borough. By lease dated August 29, 1918, the defendant leased to the plaintiff Nos. 1, 3, and 5 Congress street and Nos. 179, 181, and 189 West Houston street for a term of 5 years and 7 months, beginning October 1, 1918, and ending May 1, 1924. Nos. 179, 181 West Houston street was an uncovered yard, inclosed by an 8-foot brick wall, having exits on West Houston street and Congress street, protected by sliding doors entirely inclosing the openings. There was also on the plot a platform scale adapted for weighing trucks, the beam of which was in a brick one-story building formerly used by the defendant as an office, and situated upon No. 1 Congress street. This brick building has three large windows, three smaller windows, and one door opening upon this brick inclosed space. The smaller windows admit light into water-closets. There is some doubt if, on October 1, 1918, the defendant delivered possession of Nos. 179 and 181 West Houston street to the plaintiff.

On January 15, 1919, the plaintiff leased, by a written instrument, to the defendant Nos. 179, 181 West Houston street for a term ending May 1, 1924; that being the termination of defendant's lease to plaintiff of the whole premises. The defendant has commenced the construction of a roof over these premises, and as a part of the work is engaged in constructing a brick wall, parallel to and distant about 6 inches from the side wall of the office building, containing the windows and door heretofore described. The scale has been removed, the scale pit filled, and preparations made for a 550-gallon gasoline tank below the surface. The plaintiff seeks this injunction because of irreparable damage suffered by destroying the light of the side windows and the ventilation of the water-closets, and the breach of the covenant in the lease of plaintiff to defendant, which restricts the premises demised "for storing of trucks and any other purpose to which the landlord [plaintiff] may agree." The lease of plaintiff to defendant omits the following clause, contained in the defendant's lease to the plaintiff:

"Third. That the tenant will not use, or permit to be used, any part of the demised premises for any business or purpose other than the storage and sale of noncombustible chemicals, or any other merchandise or articles not more hazardous or injurious to the building, or assign this lease or use the roof of said building, obstruct the lights or skylights thereof, injure or disfigure the said building in any way, or make any alterations therein, or allow the same to be done, without first obtaining the written consent of the landlord, or permit to be displayed upon any part of said premises the sign of any real estate broker."

[1, 2] The removal of the scale is also counted upon to sustain the injunction; but as the scale was upon the premises demised to defendant by the lease of January 15, 1919, the removal cannot injure the plaintiff, since the defendant had no right to use it. The destruction of the plaintiff's light is answered by the defendant's allegation that the office building has ample windows opening upon Congress

street for the front room of the office, and a skylight for the rear room, and the uselessness of the door is apparent, since it leads only to the premises demised to defendant. The defendant is constructing this roof in connection with a building it is erecting upon No. 183 West Houston street.

Much stress is placed by the defendant upon the omission from the lease of January 15, 1919, above quoted, and he argues that the omission signifies the plaintiff acquiesced, if it did not consent, to the defendant's building operation. Had there been a simple surrender of the premises demised to the defendant, there would be no doubt but that the defendant then would hold the premises freed from any covenants, and at liberty to use its premises as if no lease had been made by it to the plaintiff. Unless there be in this lease of plaintiff such clause or clauses as may prevent a merger, the acceptance of the leasehold by the defendant merged all it obtained from plaintiff in the larger title of fee simple absolute.

The plaintiff at best has only a leasehold interest in the premises demised to it by the defendant in the August instrument. With the exception of the restriction limiting the use of the premises demised to the defendant "for storing of trucks and any other purpose to which the landlord may agree," and the omission of the third clause, already quoted, the two leases contain identical clauses, particularly the term of each lease being coterminous. The situation of the parties, the leasehold interest of the plaintiff in the premises, the coterminous expiration of the leases, the deduction of the rent reserved in the January 15th lease from the rental fixed in the August lease, and the payment of the difference by plaintiff to defendant, all indicate there was no intention of the parties to prevent a merger of the lesser estate, granted to defendant in its larger title of fee simple absolute. If merged, then the defendant holds its title freed from any limitation imposed by the lease of January 15th. There is such merger, and therefore the defendant has not violated any of plaintiff's rights.

The importance of this decision to the parties is apparent, since no appeal can be heard till October, and ere then the building causing this litigation will be completed and occupied, and because of this importance the moving papers have been carefully studied. Motion is denied, with \$10 costs.

Motion denied, with \$10 costs.

(189 App. Div. 56)

In re SHERMAN.

In re SCRIBNER'S WILL.

(Supreme Court, Appellate Division, Fourth Department. October 1, 1919.)

1. TRUSTS $\Leftrightarrow$ 218(1)—DUTY OF TRUSTEE AS TO DOUBTFUL SECURITIES.

Where securities, when they came to a trustee, were of doubtful and uncertain value, he owed only the duty of exercising a reasonable judgment and good faith in administration and collection of the same.

2. TRUSTS $\Leftrightarrow$ 218(1)—WHERE SECURITIES RECEIVED BY TRUSTEE WERE OF DOUBTFUL VALUE, EVIDENCE OF VALUE NECESSARY TO CHARGE TRUSTEE.

Where securities received by trustee were of doubtful value, proof of their value at some time during the administration of the trust must be given, when it is sought to charge the trustee with a loss claimed to have resulted from his bad faith or mismanagement of the estate.

Appeal from Surrogate's Court, Albany County.

In the matter of the application of Mary E. Sherman for an accounting and removal of Willard Lester as trustee under the last will and testament of Benjamin C. Scribner, deceased. From a decree of the Surrogate's Court, surcharging the accounts of the trustee, etc., the trustee appeals. Reversed, and new trial granted.

See, also, 180 App. Div. 196, 167 N. Y. Supp. 682.

Argued before KRUSE, P. J., and FOOTE, LAMBERT, DE ANGELIS, and HUBBS, JJ.

Edgar T. Brackett, of Saratoga Springs, for appellant.

B. K. Walbridge, of Saratoga Springs, for respondents.

LAMBERT, J. This proceeding is instituted by a life annuitant for a final accounting by and removal of a substituted trustee under the will of Benjamin Scribner, deceased. The will was probated in 1880. Letters of administration with the will annexed were issued to one Taber B. Reynolds, who soon thereafter, by judgment of the Supreme Court, was appointed trustee under the will. Reynolds served as trustee until January, 1896. Before the trust was fully administered, he brought an action in the Supreme Court for a final accounting and discharge as trustee. The action proceeded to judgment in January, 1896, adjusting his accounts and permitting his resignation. The judgment determined the trust estate to then consist of securities, \$49,840.50; cash, \$6,130.41—totaling \$55,970.91, and made certain allowances which brought the estate down to \$55,078.04.

The appellant, Lester, was then appointed substitute trustee, and the trust estate, as so constituted, passed to him. He, as trustee, has not heretofore made any accounting of his trust duties. In compliance with the order to show cause, issued in this proceeding, he filed an account of his administration of the trust. The same was surcharged, and the issues thus made were tried before the surrogate of Albany county, resulting in the decree surcharging his account about \$49,000. That result proceeded upon two theories: First, that by accepting the trust estate as fixed by the judgment of 1896, without investigation as to the then value of the securities, the trustee was negligent, and

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

must be held liable for the face value of the investments turned over to him, plus uncollected interest; second, that in the subsequent handling of the estate the trustee was guilty of negligence, bad faith, and malfeasance. The decree specifically directed and adjudged that the title to the principal securities reported by the trustee as assets of the trust estate, and for which he sought credit, should be vested in him personally, segregated and impounded for the benefit of the trust estate, and that he be charged with the face value thereof, plus uncollected interest. In this provision of the decree were included securities representing investments made by his predecessor, as well as investments made by him in the course of administration of the trust estate. The appellant was also charged by the decree with losses in administration, depreciation in values of property, and denied commissions and attorney's fees, and was personally charged with costs of the proceeding.

The bulk of the trust estate upon the accounting was represented by securities turned over to the trustee under the judgment of 1896. The principal one consisted of a \$20,000 mortgage, reduced by payments to \$15,000, on a summer hotel property known in the record as the "Wayside Inn Hotel." The findings of the surrogate described it as a large wood structure, used for summer hotel business, located at a place called Luzerne, Warren county, and "that an important part of the value of said property consisted in the good will of the hotel business." The owner of the equity of redemption, who was the mortgagor and maker of the bond accompanying the mortgage, was a widow, well advanced in years and insolvent. She had operated the hotel for several years. At the close of business in November, 1897, because of losses in operation and need of money to pay debts and make repairs, she threatened to abandon the property. In this situation, for the purpose of inducing his trust debtor to continue in the operation of the hotel, the appellant made an additional trust loan of \$5,000, taking as security a second mortgage upon the hotel property and a first mortgage lien upon properties owned by the mortgagor, adjacent to and serviceable in the conduct of the property as a hotel business. This arrangement was carried out. At the end of the succeeding year, a substantial loss resulting from the operation of the hotel determined Mrs. Butler, the trust debtor, to surrender the real estate covered by the mortgages mentioned to the trustee.

In this crisis, the trustee arranged with his brother, who was the owner of the personal property equipment of the hotel, to operate it for the next five successive years on a percentage basis of profits to the trustee. This arrangement resulted in a financial loss. Thereafter, and in the year 1903, to the time of the accounting, this hotel property was leased under varying conditions, with a loss in operation to the operator. During this period no interest was paid upon the trust mortgages, which at the time of the trial had reached the alarming sum of around \$17,000. This, in a general way, presents the history of the Wayside Inn mortgage indebtedness and the treatment it received by the trustee, and as embodied in findings made with much amplification by the surrogate. There was made the additional find-

ing of fact that the loan of \$5,000 upon the hotel property, and the trustee's consent given to the operation of the hotel business, entailing yearly loss of interest upon the trust securities, was made in bad faith and for the purpose of enhancing the personal and moneyed interest of the Lester family. Upon this premise of facts, considered in their relation to specific findings of neglect, bad faith, and malfeasance, the surrogate determined that the trustee should be charged with the face value of the mortgages, plus the uncollected interest thereon, and provided for the substitution of cash for the securities as assets of the estate.

The trustee took an appeal from the decree entered to the Appellate Division of the Third Department. Matter of Sherman, 180 App. Div. 196, 167 N. Y. Supp. 682. The decision of the Appellate Division is evidenced in an opinion. It was there decided that the determination of the surrogate that the appellant trustee should be charged with negligence in accepting the securities under the judgment of 1896 was erroneous; this because he had no part in their creation and owed no duty in respect thereto, except to administer the same in good faith and with such care as the attending circumstances would commend to a prudent person. It was further suggested in the decision rendered that, inasmuch as the value of these securities was uncertain, and depended upon the operation of the hotel business to preserve the "good will," the principal element of value of the securities, the trustee was justified in making an honest effort to operate, or have operated, the said hotel business for at least some period of time. The court did not go to the extent of deciding that the operation of this hotel from 1898 to the time of filing the account was legally justifiable in view of the attending yearly loss. That was left as an open question of fact, to be determined upon a new trial, which was ordered. It was, however, distinctly decided that in no event should the trustee be charged with the face value of the securities, except upon adequate proof that such was their value at the time they were charged to him.

[1, 2] The rule of liability follows as a necessary sequence because, as stated in the opinion of the Appellate Division, at the time these securities came to the trustee they were of doubtful and uncertain value, and he owed only the duty thereto of exercising reasonable judgment and good faith in the administration and collection of the same. If a loss was sustained to the estate, such as might make the trustee chargeable with their value at some time during his administration of the trust, then proof should have been given respecting the value, for the purpose of fixing the loss resulting. In this connection the court suggested that there was neither such a finding nor evidence upon which to base it in the record, and for that and other reasons a new trial of the proceeding was ordered. It has been had. No additional evidence was given. By stipulation, the record made on the first trial was read in evidence. The surrogate has again made findings and decree, reaching substantially the same financial result. He eliminated the finding of negligence in the acceptance of the securities under the judgment of 1896, but has again found specifically, bad faith and mal-

feasance by the trustee in handling the trust estate. He has again fallen into the error, made on the former trial, of charging the trustee appellant with the face value of the securities at the time or soon after he received them, in the absence of any proof of their value.

The Appellate Division, on the former appeal, pointed out in its opinion that there was neither a finding nor evidence justifying a finding of the value of the Wayside Inn Hotel property, and that such was indispensable to show the loss sustained by the estate through the mismanagement and want of care upon the part of the trustee. This is the rule that the court suggested should be applied to the legal redress granted by the surrogate. It questioned the premises adopted by the surrogate, to which was applied the drastic remedy of compelling the trustee to substitute cash for the trust securities. It appeared then, as now, that the surrogate charged the face value of these securities to the trustee, on the first default in the collection of interest. This surely cannot be sustained as a just rule of liability, even in a trust accounting, except upon justified findings of a conspiracy or design to wreck the estate. There is nothing in the record that has been called to our attention, or that we can find, that justifies such a conclusion of fact. At the due date of the first uncollected interest, the record shows the trustee was struggling with the question of how to keep the hotel in operation to preserve its market value. As suggested by the opinion of the court, it was his duty to exercise his best judgment in the management of the property for the benefit of the estate, and if he did so, and acted in good faith, he will be protected against loss to the estate. Whether or not he was justified in continuing his effort to operate this hotel, in the face of successive yearly losses of interest upon the investment, is a question that has not yet been passed upon, as stated above.

The observations made with reference to the Wayside Inn security have more or less application to the remaining securities coming to the possession and care of the trustee from his predecessor. For this reason it is not deemed essential that they be more specifically considered at this time.

The decree should be reversed, and a new trial ordered, with costs to the appellant to abide the final award of costs. Findings of fact numbered 9 and 40 are disapproved and reversed, and the court further holds and decides that, as to the securities which came into the hands of the trustee under the judgment appointing him trustee, there is no satisfactory evidence to show their value and the amount with which the trustee is legally chargeable. All concur.

(108 Misc. Rep. 156)

MOUNT v. MOUNT et al.

(Supreme Court, Special Term, New York County. July, 1919.)

1. PERPETUITIES § 6(2)—ENTIRE RESIDUARY ESTATE MAY BE LEFT IN TRUST TO ONE BENEFICIARY.

An entire residuary estate may be held in trust for the use of one beneficiary for life, and on his or her death may then be divided into shares, each of which will be held in trust for a second separate life, or a part thereof.

2. PERPETUITIES § 6(6)—DEVISE TO TENANTS IN COMMON IN TRUST FUND NOT RESTRICTION OF ALIENATION.

Where the interests of the beneficiaries in a trust fund are separate and distinct, they take as tenants in common, and the power of alienation of each share is suspended only for the number of lives during which the share or subshare is limited.

3. PERPETUITIES § 6(6)—TRUST PROPERTY IN UNDIVIDED FUND, WHERE BENEFICIARIES' INTERESTS ARE SEPARATE, NOT RESTRICTION OF ALIENATION.

Although trust property may be held by the trustee for convenience of investment in one undivided fund, if the beneficiaries' interests are separated into distinct shares, and held by them as tenants in common, each share is to be deemed a separate entity, and is entitled to its separate term for two lives.

4. PERPETUITIES § 6(2)—WILLS § 866—SUSPENSION OF POWER OF ALIENATION FOR THREE LIVES VOID.

Where testatrix devised the net rents of real property in trust for the benefit of her grandniece for life, with remainder to her issue, and, if none, to become a part of the residuary estate, and where that operated to suspend the power of alienation of the property for two further lives, making three lives in all, the gift over was void, and the corpus of the property vested in decedent's heirs as of the time of her death.

Action by Elizabeth Mount against Richard H. Mount, Frances De G. Mount, sued herein as Jane Mount, and Richard F. Mount impleaded with others, for the construction of the will of Charlotte A. Mount, deceased, and for a partition and an accounting. Will construed, and judgment for partition in part, and for an accounting, except in so far as any of the issues may have been disposed of by legal proceedings or act of parties.

Hamilton & Freeman, of New York City, for plaintiff.

Charles J. Leslie, of New York City, guardian ad litem, for Richard F. Mount and another.

Frank L. Crocker, of New York City, for Wilber H. Kirkham.

Cadwalader, Wickersham & Taft, of New York City, for St. Mary's Free Hospital.

D. B. Simpson, of New York City, for E. G. Hotchkiss, as executor, etc.

Bauerdorf & Taylor, of New York City, for Alice Desvernine and others.

GUY, J. This is an action for the construction of the will of Charlotte A. Mount, who died March 27, 1904, leaving real estate appraised at \$646,300 and personalty appraised at \$187,781.63; also for a partition and an accounting. Decedent was unmarried. Her heirs at law

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and next of kin were a sister, three nieces, and a nephew; also one grandniece, one grandnephew, and one great-grandnephew.

Decedent bequeathed legacies aggregating about \$29,425, and devised land outside of the city appraised at \$15,400. By the seventh clause of her will she devised the net rents of No. 239 West Fourteenth street in trust for the benefit of her grandniece, Charlotte M. Rowley (late Mrs. Maccaffil) for life, with remainder to the life tenant's issue; if none, then to become a part of her residuary estate. Mrs. Maccaffil died without issue. The ninth clause of the will provided:

"Ninth. I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, of what nature or kind soever, and wheresoever situated, to my executors, who shall qualify as such under the thirteenth clause of this my will, as trustees, upon the following trusts: To lease and manage the real estate, to invest and reinvest the personal estate to collect and receive the rents, interest and income of such real and personal estate, and to pay over to my sister, Susan, the entire net amount of such rents, interest and income during the term of her natural life. Immediately after the death of my said sister my said executors or the survivor of them, as such trustees, shall divide the said residuary estate (real and personal) into as many shares of equal value as will make one for each of the children then living of my nephew, Richard H. Mount, and one for the lawful issue collectively of each of the children of my said nephew (if any) who may then have died leaving such issue, and shall set apart one of such shares to each child then living, and one to such issue collectively of each deceased child, which shares shall be designated as the property of such parties respectively, and my executors shall keep separate accounts of such respective shares. My said executors, as such trustees, shall pay over to the children of my said nephew, if then of the age of twenty-five years, otherwise on their arriving at that age, the net income of the shares so set apart to them respectively during the period of their respective lives, and after their deaths respectively they shall distribute and pay over such shares to the issue of such children respectively in equal portions per stirpes. My said executors and trustees shall pay over to and distribute among the issue of any deceased child or children of my said nephew who shall at the death of my said sister, Susan, be of the age of twenty-five years, otherwise as soon as they respectively attain that age, their respective portions of the share so set apart to such issue collectively."

The equitable life tenant of the income, Susan A. Mount, died on May 21, 1917. In 1906 the Court of Appeals, through Chief Judge Cullen, wrote its unanimous opinion relating to the construction of this will. This opinion, while not *res adjudicata*, is so clear and explicit a construction of the written instrument (*Wronkow v. Oakley*, 133 N. Y. 511, 31 N. E. 521, 16 L. R. A. 209, 28 Am. St. Rep. 661; *Matter of Baer*, 147 N. Y. 355, 41 N. E. 702) that this court believes the Court of Appeals will follow it. Its material part is as follows (*Matter of Mount*, 185 N. Y. 168-170, 77 N. E. 999, 1001):

"We are now brought to a consideration of the existing circumstances in the present case, and to some extent to the construction and validity of the will (although in these latter respects our determination cannot be conclusive on the parties), in order that we may determine whether the discretion of the courts below was justifiably exercised, in withholding a determination of the questions the appellants sought to have adjudicated. The testator's sister is now 76 years old. The testator's nephew, Richard H. Mount, is over 50 years old. He had at the execution of the will two children, who still survive, Edward, now aged 30, and Harold, aged 23. His wife, the mother of these two children, is still living. The elder son is married, and pending this appeal

has had a child born. The younger is unmarried. Bearing in mind the age of his wife and that of the children, the strong probability is that Richard Mount will have no other children by his present wife. She may die; he may marry again and have children. But for such an event to have any bearing on the present controversy the child must be born before the present equitable life tenant, a lady 76 years old, dies. Therefore the chances are decidedly against such an occurrence. If it does not happen, and the two sons of the nephew now living survive their grandaunt, there will be only a single question to determine; that is, whether the direction in the will to divide the corpus into shares for all the children of the testatrix's nephew, which would include children who might be born after her death, renders the provision, so far as it applies to children living at her death, illegal and void. If this provision is valid as to those children, no other question can arise under the will, because the remainders given on the death of those children are clearly good.

"We are inclined to the view that this question is a comparatively simple one. It is true that in determining the validity of a trust and whether testamentary dispositions contravene the statute forbidding the suspension of the absolute ownership of personal property for more than two lives in being, we must consider, not what has actually happened since the death of the testator, but what might have happened. 'It is not sufficient that the estate attempted to be created may, by the happening of subsequent events, be terminated within the prescribed period, if such events might so happen that such estates might extend beyond such period. In other words, to render such future estates valid, they must be so limited that in every possible contingency they will absolutely terminate at such period, or such estates will be held void.' *Schettler v. Smith*, 41 N. Y. 328. The trust for the testator's sister suspends absolute ownership for her life. If the trust was to continue in *solido* for the benefit of all the nephew's children who might survive their grandaunt, it would be void, not only because it might depend on lives not in being at the death of the testatrix, but also because its continuance might last over a greater number of lives than that prescribed by the statute. But on the death of the sister the corpus is to be divided into several shares according to the number of children the nephew may then have, including the issue of any deceased child. The trust as to each share terminates with the life of the beneficiary. Therefore, as to the share of a child of the testatrix's nephew living at her death the suspension is for two lives authorized by statute, to wit; the testatrix's sister and the equitable life tenant of the particular share.

"It matters not that the whole corpus is not released at the termination of any two specified lives. An entire estate may be held in trust for one beneficiary for life, and on his death may then be divided into shares, each of which may be held in trust for a second separate life. *Moore v. Hegeman*, 72 N. Y. 376; *Wells v. Wells*, 88 N. Y. 323; *Vanderpoel v. Loew*, 112 N. Y. 167 [19 N. E. 481]. It is not at all necessary that the testator create a single trust in a single piece of property. He may create separate trusts in undivided interests. The validity of each of such trusts is dependent solely on its terms, not on the fate or validity of the others. If, therefore, the nephew should have children born after the testatrix's death and surviving her sister, their existence would serve to cut down the shares to be held in trust for the children living at the testatrix's decease. But we do not see how the invalidity of the testamentary disposition in favor of such after-born children can affect the legality of the trust in favor of the existing children. All the probabilities are that this question will be presented for determination on the death of the testatrix's sister, but in the view which we take of it the appellants, at least, have no just cause of complaint that the judgment below left it open.

"Other questions, such as in case of the death of Richard H. Mount before that of Susan Mount, leaving issue then surviving, the validity of the direction that their share shall be paid to such issue only as they respectively arrive at the age of 25 years may never arise. So also the provision for accumulation of income beyond the minority of the beneficiaries (a provision not quoted) may never become a practical question. A marked instance of the futility of hoping to decide in advance every question that may occur in the construction of a long and complicated will is shown by the fact that, despite the

elaborate discussion in the well-known case of *Manice v. Manice*, 43 N. Y. 303, over 35 years ago, we have but recently had before us another litigation arising out of the construction of the will that was then before the court."

[1-3] The Court of Appeals' view that an entire residuary estate may be held in trust for the use of one beneficiary for life, and on her death it may then be divided into shares, each of which may be held in trust for a second separate life or part thereof, has become a rule of property. Where the beneficiaries' interest in a trust fund is separate and distinct, they take as tenants in common, and the power of alienation of each share or subshare is only suspended the number of lives during which the share or subshare be limited. *Schey v. Schey*, 194 N. Y. 368, 373-375, 87 N. E. 817; *Vanderpoel v. Loew*, 112 N. Y. 167, 177, 180-186, 19 N. E. 481; *Smith v. Edwards*, 88 N. Y. 92, 103; *Moore v. Hegeman*, 72 N. Y. 376, 382-384; *Stevenson v. Lesley*, 70 N. Y. 512, 515, 516. Although the trust property may be held by the trustee for convenience of investment in one undivided fund or general mass, if the beneficiaries' interests are separated as here into distinct shares, and held by them as tenants in common, each share is looked upon as a separate entity, and is entitled to its separate term for two lives. *Leach v. Godwin*, 198 N. Y. 35, 41, 91 N. E. 288; *Schermerhorn v. Cotting*, 131 N. Y. 48, 61, 29 N. E. 980.

[4] Upon the death of Mrs. Maccaffil, without lawful issue, the separate trust for her life in the net rents of No. 239 West Fourteenth street was devised to fall into the residuary trust. But as this operated to suspend the power of alienation of No. 239 West Fourteenth street for two further lives (making three lives in all), the gift over is void, and the corpus of No. 239 West Fourteenth street vested in decedent's heirs as of the time of decedent's death. *Clark v. Cammann*, 160 N. Y. 316, 328, 329, 54 N. E. 709. If the rents of No. 239 West Fourteenth street, after Mrs. Maccaffil's death, were not divided among all decedent's heirs as such, they should be accounted for before the referee to be appointed in partition, unless the heirs are barred for good and sufficient legal reasons. If any income was accumulated for any beneficiaries' use after attainment of majority, such income should be duly accounted for before the referee in partition, unless such accounting is barred for good and sufficient legal reasons. There is nothing in the will to prevent the life beneficiary of income, who is also an heir of decedent, from taking a distributive share of the income and corpus of No. 239 West Fourteenth street, as to which decedent had died intestate. *Doane v. Mercantile Trust Co.*, 160 N. Y. 495, 499, 500, 55 N. E. 296; *Matter of Tompkins*, 154 N. Y. 634, 644, 49 N. E. 135. The property still held in trust cannot be partitioned until the death of either one or both of the children of Richard H. Mount, for whom it is held in trust in equal shares. Both of them are over 25.

There should be judgment for the partition of No. 239 West Fourteenth street; also for an accounting of the matters set forth in this opinion, except in so far as any of the issues hereinbefore set forth

may have been disposed of by legal proceedings or act of parties. All questions of costs are reserved until the coming in of the referee's report.

Ordered accordingly.

(108 Misc. Rep. 180)

**BRONX GAS & ELECTRIC CO. v. PUBLIC SERVICE COMMISSION,
FIRST DIST., et al.**

(Supreme Court, Special Term, New York County. July, 1919.)

1. PLEADING ~~§~~193(8)—DEMURRER WILL NOT LIE TO RELIEF DEMANDED, IF CAUSE OF ACTION SHOWN.

A demurrer will not lie purely to the nature of the relief demanded, if from the facts alleged any cause of action may be predicated thereon.

2. PLEADING ~~§~~350(3)—DECISION ON THE MERITS PROPOSED BY MOTION FOR JUDGMENT ON THE PLEADINGS.

In action by gas company to enjoin Public Service Commission and other public officials from enforcing Laws 1906, c. 125, fixing maximum price of gas in plaintiff's territory, and to prevent interference with its collection of a higher rate fixed by it as a reasonable rate, seeking to declare statutory rate confiscatory, owing to increased cost of production, etc., and to fix a reasonable rate, wherein commission demurred to first cause of action and answered the second, a decision on the merits was proposed by plaintiff's motion for judgment on the pleadings.

3. GAS ~~§~~14(1)—JUDICIAL POWER DOES NOT EXTEND TO FIXING RATES.

The judicial power does not extend to the fixation of a rate for gas.

4. GAS ~~§~~14(1)—STATUTE RESTRICTION ON POWER OF PUBLIC SERVICE COMMISSION TO FIX RATES.

The Public Service Commission has no authority to fix any rate for gas in excess of the price of \$1 per 1,000 cubic feet fixed by Laws 1906, c. 125, because, although the statute may be unconstitutional as a matter of fact, in so far as it fixes too low a rate for the earning of profits by company, it is nevertheless valid as a restriction on Public Service Commission's power to fix any other rate.

5. GAS ~~§~~14(1)—COMPLAINT ASKING PUBLIC SERVICE COMMISSION TO DECLARE STATUTORY RATE CONFISCATORY AND ENJOIN ENFORCEMENT STATES NO CAUSE OF ACTION.

In action against Public Service Commission, First District, and other public officials, to restrain their enforcement of Laws 1906, c. 125, fixing maximum rate for gas in plaintiff's territory, and to prevent interference with a higher rate fixed by it as a reasonable rate, seeking relief by having statutory rate declared confiscatory because of increased cost of production, and to have court fix a reasonable rate, where commission demurred to first cause of action and answered second, the facts alleged in first cause of action did not empower court to grant an injunction.

Suit for injunction by the Bronx Gas & Electric Company against the Public Service Commission of the State of New York, First District, and others. Motion by plaintiff to overrule a demurrer and for judgment on the pleadings denied.

Order reversed — App. Div. —, 180 N. Y. Supp. 38. See, also, 108 Misc. Rep. 204, 178 N. Y. Supp. 218.

Atwater & Cruikshank, of New York City, for plaintiff.

Terence Farley, of New York City (Godfrey Goldmark, of New York City, of counsel), for defendant Nixon and the Public Service Commission.

McAVOY, J. The corporate plaintiff seeks an injunction against the Public Service Commission and other public officers to restrain them from enforcing the provisions of chapter 125 of the Laws of 1906, fixing the maximum price of gas at \$1 per 1,000 cubic feet in the territories served by the plaintiff company, and to prevent any interference upon the part of public officials charged with the duty in the premises with the collection of a higher rate which the plaintiff company fixes as a reasonable rate, to wit, \$1.50. Plaintiff has separated its grounds for relief into two distinct causes of action, the one to declare the rate of \$1 as a confiscatory rate because it is impossible, due to the charges for necessary ingredients used in the manufacture of gas, to realize any profit upon such manufacture, or, indeed, to pay for the cost thereof, and as an incident to this injunctive relief it is asked, in the other cause of action, that the court should go further and fix a reasonable rate, the enforcement whereof would be protected. It is, of course, obvious that the existing rate statutes must be adjudged to be invalid and inoperative before there would be a right to the additional injunctive relief which is sought, and there is no contention but that the plaintiff is entitled to bring an equity action to have such statutes declared unconstitutional and void, if it is shown that the rates prescribed are not sufficient to supply the cost of manufacture of gas and realize a reasonable profit. The validity of the act (Laws 1906, c. 125) is the point to be determined under the allegations of plaintiff's second cause of action.

The first cause of action is based upon the theory that the cost of production of plaintiff's gas has increased so much by reason of the general advance in the price of labor and supplies that it has been costing plaintiff much more than \$1 to produce and deliver gas, so that, instead of paying dividends on its stock, plaintiff has been losing \$200 a day on its gas department; that therefore the rate statutes have become unconstitutional and nugatory, and because of this the plaintiff has undertaken to increase its gas rate to \$1.50 per 1,000, and has filed, pursuant to the Public Service Commissions Law (Consol. Laws, c. 48) and the commission's regulations, a 30-day notice or schedule with the Public Service Commission, stating that on and after April 11, 1919, its rate would be increased to the sum of \$1.50. Plaintiff asserts that the defendants have threatened to prevent this increase by prosecutions, suits, demands for penalties, etc., and the remedy is asked, under the first cause of action, to enjoin defendants from interfering with plaintiff in the enforcement of its new rate, and repeats as an incident the demand of the second cause of action that the rate statutes be declared unconstitutional. Although there is but one prayer for relief attached to the amended complaint, there are no facts alleged in such amended complaint which would entitle the plaintiff to the relief of restraint of the public officials from enforcing the \$1.50 rate, unless it were for the matter set forth in the first cause of action. The Public Service Commission answers the second cause of action and demurs to the first cause of action.

[1, 2] The real objection seems to be on the part of the defendant raised by its demurrer to the first cause of action to the relief demanded

therein, and to the facts alleged in such cause as judicial ground for affording that relief. It is true as a rule of law that a demurrer will not lie purely to the nature of the relief demanded if from the facts alleged any cause of action may be predicated thereon, but since the intent of the pleader, evidenced by his obvious demand embodied in the prayer for relief, goes in its essential nature to the question whether the facts set forth in the first cause of action are sufficient to empower this court to grant an injunction against interference with plaintiff's new gas rate of \$1.50 per 1,000 cubic feet, a decision on the merits of the controversy is really proposed by this motion for judgment by plaintiff on the pleadings. I pass, therefore, a point which may be conceded, that the first cause of action might be construed as merely a repetition of the second cause of action, and therefore would allow of a judgment declaring the acts complained of as unconstitutional, and will consider whether any cause is laid, of which this court may take cognizance, to enjoin the public officials, defendants herein, from interference with the \$1.50 rate because of danger of multiplicity of suits, burdensome litigations, imminence of bankruptcy, the public policy of enabling plaintiff to continue its public service for the benefit of the community, and kindred equitable grounds.

[3] Of course, the principal difficulty of holding that the power of the court exists lies in the rule of law that the judicial power does not extend to the fixation of a rate, and by whatever term this relief is denominated, it would ultimately result in the determination of a court that the specific rate the interference with which is sought to be enjoined was a reasonable rate. The situation that arises from this alleged lack of power is this: The plaintiff would, after an expensive and protracted litigation, if it be able to show that the restrictive statutes are unconstitutional, have accomplished a declaration that the statutes complained of compelled the furnishing of and the delivery of gas at the former rate—an exercise of power which is confiscatory in its result. Thereafter, and in an entirely new proceeding, it will be required to show what is a reasonable price which it may charge for the furnishing of gas to consumers.

[4] The Public Service Commission would have no authority to fix any rate for gas in excess of the price fixed by statute, because, although the statute may be unconstitutional as a matter of fact, in so far as it fixes too low a rate for the earning of profits by the company, it is nevertheless valid as a restriction on the Public Service Commission's power to fix any other rate. *Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, 121 N. E. 772. Even if and when the restrictive statutes are adjudged as confiscatory, the power of the Public Service Commission will not thereby, in view of this ruling, be increased. The argument is made, in view of this condition, that the fixing of a rate in this case would be merely a secondary or incidental result to the granting of proper equitable relief, and that where such a state of facts arises, due to the failure of the Legislature to exercise its primary functions of rate regulation, the equitable power may be invoked, that the court should act to prevent a gross injustice, and because of the failure of the rate-making authority to act. It seems to

me that these are arguments of expediency and policy which must be addressed to the Legislature, and cannot, because of the awkwardness or difficulty of the situation, be made a base from which authority not conferred may be assumed in necessity to arise.

[5] When the court determines what is a reasonable charge as an incident to a determination that the rate statutes are confiscatory, such a charge cannot be enforced as a fixed charge for services for any purpose other than to determine the particular controversy between the parties before the court and those whom they represent. Attempting to enforce the rate which the court determined to be a reasonable one, as a prescribed future charge, would in an indirect way usurp the legislative prerogative of prescribing by rule the compensation for a future public service. If a law be adjudged invalid, the court may not, in the same decree declaring its invalidity, attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It is bound to stop with simply passing its judgment upon the validity of the act. It is quite apparent to me that the considerations which inhibit a tribunal from fixing a rate to be charged in the future are equally potent to prevent its effecting the same end through the enjoining power, forbidding interference with the rate which it finds to have been sufficient under previous conditions and prices. The situation, if the existing rate statutes are declared confiscatory, will be identical with the establishment of a new utility, created after the decree declaring the acts confiscatory has been filed. The company must decide for itself, in the first instance, what rate shall be charged, the legislative rate having been annulled by judicial decree; the commission having no power to fix a rate due to the inhibition of its statutory power, which does not fall with the declaration of the invalidity of the rate. Such a rate named by the utility company will control until it is found by the court to be unreasonable.

There lie but two things in the path of the right of this company to exercise its common-law privilege to charge any rate which, by agreement with its consumers, it can secure. The first is the legislative prescription of the \$1 rate; the second is such restrictions as are imposed by statute to the fixation of a new rate in the absence of the authority by the Public Service Commission to establish such new rate. If the first be removed by decree of the court, and the necessary preliminary conditions to the charge of the new rate be complied with under the Public Service Commissions Law, the company is left free to take the initiative. There can be no illegality if the courts have held invalid the act of the Legislature, and the company has complied with the necessitous terms for establishing the new rate, until the Legislature establishes another rate by appropriate enactment or gives its delegate, the Public Service Commission, authority to do so. Therefore the motion by the plaintiff to overrule the demurrer and for judgment on the pleadings is denied, with costs.

Motion denied, with costs.

GROLNICK v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court, Appellate Term, First Department. October 17, 1919.)

1. PLEADING §323(3)—MOTION FOR BILL OF PARTICULARS ON REFUSAL TO OBEY A FORMER ORDER GRANTED.

Where the present ground for the application for a bill of particulars is failure of the party to furnish the bill previously directed by the order of the court, a showing of such disobedience in itself entitles applicant to relief; an affidavit verified by the attorney being sufficient.

2. COURTS §99(2)—COURT ORDERS NOT APPEALED FROM NOT TO BE SET ASIDE.

On motion for further bill of particulars, court cannot base refusal on sufficiency of pleading, which would virtually set aside previous order, unappealed from, requiring a bill of certain particulars.

Appeal from City Court of New York, Special Term.

Action by William S. Grolnick against the Mutual Life Insurance Company of New York. From an order of the City Court of the City of New York, denying its motion for a further bill of particulars, defendant appeals. Order reversed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Frederick L. Allen, of New York City (Murray Downs, of New York City, of counsel), for appellant.

John Bogart, of New York City (Nathan Berk, of New York City, of counsel), for respondent.

BIJUR, J. The plaintiff was directed by a previous order, from which no appeal has been taken, to furnish a bill of certain particulars named. This he has failed to do. The learned judge below denied appellant's application for a further bill, first, on the ground that its application was bad from a "procedural point of view," evidently referring to the fact that the affidavit upon which the motion was made was verified by the attorney, and not by the client.

[1] We need not consider the possible futility of an affidavit by the client in an original application for a bill of particulars, where the basis of the application is to be found in the pleadings exclusively. It certainly is of no importance in a case like the present, where the ground for the application is the failure of the party to furnish the bill previously directed; i. e., to obey the order of the court. Upon the presentation of that bare fact, the applicant is entitled to relief.

[2] The further reason given by the court below for denying the present motion, namely, "that it seems as if the original bill was entirely sufficient for all the needs of this litigation," is not involved in the present application. The order granted, from which no appeal was taken, must be presumed to have been proper, and should therefore be complied with.

Order reversed, with \$10 costs and disbursements, motion granted; bill to be served within 10 days after service of a copy of the order entered hereon, with notice of entry thereof. All concur.

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AMES v. AMES.

(Supreme Court, Special Term, Onondaga County. October 29, 1919.)

1. DIVORCE §53—DEFENSE OF ADULTERY OF PLAINTIFF IN ACTION FOR SEPARATION.

Under Code Civ. Proc. § 1770, a defendant in an action for separation may set up as defense and counterclaim acts of adultery committed by the plaintiff prior to commencement of the action.

2. DIVORCE §104—PLAINTIFF CANNOT ALLEGE ACTS OF ADULTERY SUBSEQUENT TO SUIT.

In an action for absolute divorce, the plaintiff will not be permitted to serve a supplemental complaint setting up acts of adultery alleged to have been committed by defendant since joinder of issue.

3. DIVORCE §104—IN ACTION FOR SEPARATION, CRUEL TREATMENT AFTER ACTION BROUGHT MAY BE ALLEGED.

In an action by a wife for separation from her husband on the ground of cruel and inhuman treatment, she may serve a supplemental complaint alleging acts of cruel and inhuman treatment which occurred subsequent to the commencement of the action, in aid of the cause of action stated in the original complaint.

4. DIVORCE §101, 104—DEFENDANT MAY PLEAD ADULTERY BY PLAINTIFF AFTER ACTION BROUGHT.

In an action for divorce for adultery, the court has power to permit defendant to plead as a counterclaim, as well as a defense, by supplemental answer, acts of adultery committed by plaintiff since the action was begun.

5. DIVORCE §104—IN ACTION FOR SEPARATION, DEFENDANT MAY ALLEGE ADULTERY BY PLAINTIFF BEFORE AND AFTER ACTION BROUGHT.

As a defendant cannot discontinue, and sue over, a husband, in an action by his wife for separation for cruel and inhuman treatment, is entitled to leave to serve a supplemental answer setting up acts of adultery committed by the wife prior to and subsequent to the commencement of the action.

Action for separation by Florence L. Ames against Millard R. Ames. On motion by defendant for leave to make and serve supplemental answer setting up acts of adultery committed by plaintiff prior and subsequent to commencement of the action. Motion granted.

Richard J. Shanahan, of Syracuse, for plaintiff.

Costello, Burden, Cooney & Walters, of Syracuse (Oliver D. Burden, of Syracuse, of counsel), for defendant.

ROSS, J. [1] The right in an action for separation of a defendant to set up as a defense and counterclaim acts of adultery committed prior to the commencement of the action has existed since 1881. Code of Civil Procedure, § 1770; Van Benthuyssen v. Van Benthuyssen, 2 N. Y. Supp. 238; Wise v. Wise, 159 App. Div. 575, 576, 144 N. Y. Supp. 649.

[2-5] The right to interpose matters arising after suit is brought is not so clear. In an action for an absolute divorce, the plaintiff will not be permitted to serve a supplementary complaint, setting up acts of adultery alleged to have been committed by the defendant since the joinder of issue. Campbell v. Campbell, 69 App. Div. 435, 74 N. Y. Supp. 979; Halsted v. Halsted, 5 Misc. Rep. 416, 26 N. Y. Supp. 758,

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affirmed 7 Misc. Rep. 23, 27 N. Y. Supp. 408; *Neiberg v. Neiberg*, 8 Misc. Rep. 97, 28 N. Y. Supp. 1005.

In an action by a wife to obtain a separation from her husband on the ground of cruel and inhuman treatment, she will be allowed to serve a supplemental complaint alleging acts of cruel and inhuman treatment which occurred subsequent to the commencement of the action; this in aid of the cause of action stated in the original complaint. *Smith v. Smith*, 99 App. Div. 283, 90 N. Y. Supp. 927.

So much for the rights of a plaintiff in an action, either for a divorce or separation. With reference to the rights of a defendant, the court has power to permit a defendant in an action of divorce for adultery to plead as a counterclaim, as well as a defense, by supplemental answer, acts of adultery committed by the plaintiff since the action was begun. *Blanc v. Blanc*, 67 Hun, 384, 22 N. Y. Supp. 264. In the case last cited, *Follett, J.*, says:

"Public policy, the interests of society and of the litigants, alike demand that the rights of the parties should be determined in a single action, unless by so doing some statute or rule of procedure settled by reported cases is violated."

No case has been cited in which the defendant in an action for separation sought to plead as a counterclaim by supplemental answer acts of adultery committed by the plaintiff since the action was begun but it seems to me that the ground of decision in the case of *Blanc v. Blanc* is equally applicable to a case of this character. If the defendant can establish the facts which he desires to plead by supplemental answer, it would be a ground in a proper case for the dissolution of the contract of marriage, and it would seem to be unnecessary and inconsistent with the general theory of the administration of law to compel the defendant in this action, whatever may be its result, to bring another action, based upon the claimed acts of adultery committed subsequent to the joinder of issue herein, which he desires to set up by supplemental answer, which, if proved, would render nugatory the judgment in the action now pending.

The distinction between the case of a plaintiff and a defendant, each of whom seeks to set up facts accruing after the commencement of the action was stated by Judge McAdam in the following language:

"A plaintiff may discontinue and sue over again, while a defendant cannot."

See *Halsted v. Halsted*, 5 Misc. Rep. 417, 26 N. Y. Supp. 759.

Motion granted. If the attorneys do not agree as to form of order, to be settled upon two days' notice.

(109 Misc. Rep. 132)

STAR OPERA CO., Inc. v. HYLAN et al.

(Supreme Court, Special Term, New York County. October 27, 1919.)

1. INJUNCTION ¶77(1)—RESTRAINING CITY FROM PROHIBITING PRODUCTION OF GERMAN OPERA DENIED.

The Supreme Court will not enjoin the mayor of New York City and other officials from prohibiting, until the treaty of peace with Germany is ratified, the performance of opera in the German language in the city; the performances actually given by complainant company having provoked riotous conduct by bystanders, requiring the efforts of a large body of police to control.

2. THEATERS AND SHOWS ¶8—POWER TO REVOKE LICENSE FOR PRIVILEGE TO GIVE OPERATIC PERFORMANCE IN THE COURTS.

Under Greater New York Charter, § 1472, and section 1473, as amended by Laws 1914, c. 475, the giving of an operatic performance in the city of New York is a privilege which can be exercised only by those who have procured license to do so from the commissioner of licenses; the power to revoke such licenses being placed by section 1476 in the courts of record of the city.

Action by the Star Opera Company, Incorporated, against John F. Hylan and others. On motion by plaintiff to continue an injunction pendente lite. Motion denied, and temporary restraining order vacated.

Max D. Steuer, of New York City, for the motion.

William P. Burr, Corp. Counsel, of New York City (George P. Nicholson and John Lehman, both of New York City, of counsel), opposed.

Martin W. Littleton, of New York City, for American Legion, opposed.

GIEGERICH, J. This is a motion made by the plaintiff to continue an injunction pendente lite, which injunction was granted ex parte. The facts, so far as necessary to state them, are as follows:

The plaintiff is a New York corporation, organized in August, 1919, for the purpose, among others, of giving theatrical, operatic, and other musical performances, and has contracted to give a series of operas in German during the season of 1919-1920. Prior to the first performance a petition of the American Legion to stop the performance of German opera was presented to the mayor of the city, who gave a hearing of three hours' duration to those who favored and those who opposed the proposed performances. The giving of the proposed performances in German is opposed by the various local organizations of the American Legion. The public hostility to the proposed project has been rendered more bitter by the fact that it has been widely advertised that the general director and producing manager of the company is a German citizen, who has been charged with having stated that he has no intention of becoming an American citizen, and stays here only because of the money he can make. He has also been charged with being the author of a song sung by himself celebrating the sinking of the Lusitania. Whether all or any of these charges are

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true, I do not have to attempt to determine. The important fact is that they are made and widely believed, and the effect upon the people, not yet recovered from the passions of the war, is substantially the same as though every charge had been proven.

On October 20, the evening of the first performance, a riotous crowd of 6,000 or 7,000 people filled the streets surrounding the opera house and resisting large bodies of the police when efforts were made to disperse them. On October 21 no performance was given. On October 22 the riotous demonstrations were still more pronounced, and the collisions with the police were still more serious. Three policemen were seriously injured; one of them having his leg fractured, another one having his hand smashed, and another one having his hip seriously injured. In addition to these injuries about 50 policemen were struck with various kinds of missiles which the crowd were throwing. The extent of the injuries which the police may have inflicted upon the riotous crowd is not shown, although the affidavits of well-known citizens state that the police showed great self-restraint and handled the situation well.

[1] After a careful consideration of the facts appearing in the papers and of the arguments of counsel, I have reached the conclusion that the motion to continue the injunction should be denied. At the outset I may say that I recognize that the production of German opera is an act innocent in itself. It does not follow, however, that an act, innocent under ordinary circumstances, may always be done, regardless of time, place or conditions. For instance, shooting pigeons on one's own grounds may be a lawful act; but if, as a result, crowds collect outside the grounds to shoot the escaping birds and become an annoyance, the lawful act becomes a nuisance. *Rex v. Moore*, 3 Barn. & Ad. (23 Eng. C. L.) 184. So, too, although the mere act of conducting a moving picture show on Sunday may be lawful, if done in a thickly populated neighborhood, near a large church, and on a main thoroughfare, along which people pass to and from worship, it may become unlawful and be enjoined. *Hamlin v. Bender*, 92 Misc. Rep. 16, 155 N. Y. Supp. 963. On the same principle, although it may be lawful in itself to carry a red flag on the street, it has been held that it may not be done when such a state of public sentiment prevails and under such circumstances as to constitute disorderly conduct. *People v. Burman*, 154 Mich. 150, 117 N. W. 589.

It is easy to imagine other cases where acts, harmless under normal conditions, may be dangerous in time of public excitement. For example, when the inhabitants of a city are inflamed by race riots, it may be permissible, or even necessary, for the police authorities to prohibit white men from passing into sections of the city inhabited by colored men, and vice versa; and this, however harmless or even commendable may be the purpose of the one thus seeking to pass into a prohibited area. It is no answer to such cases to say that it is the duty of the police to protect innocent people in the exercise of their lawful rights. That is a counsel of perfection. It loses sight of their practical difficulties. So many unreasonable people might choose to exercise unimportant lawful rights as to require the entire police force

to protect them and leave the great mass of the community exposed to disorder and lawlessness. In the present case, on the second night of the performance, more than 300 policemen were employed to cope with the disorders. In all such cases, it is conditions, not theories, that the police authorities have to deal with, and the courts should be cautious in overruling the judgment of those charged with the duty of maintaining order.

In support of the motion the plaintiff cites the decision I made in *Star Co. v. Brush*, 103 Misc. Rep. 631, 170 N. Y. Supp. 987. The cases are widely different in many respects. That was not a case of the exercise by the local authorities of their judgment on a local condition. There the local authorities of a suburban town sought to suppress the circulation of a great metropolitan newspaper, because they did not approve its views. Moreover, that case dealt with a constitutional right of supreme importance to the entire people—nothing less than the freedom of the press. This case does not deal with a constitutional right, or, in fact, any right at all.

[2] The giving of an operatic performance in this city is a privilege which can be exercised only by those who have procured a license to do so from the commissioner of licenses. Greater New York Charter (Laws 1897, c. 378) § 1472, and section 1473, as amended by Laws 1914, c. 475. The power to revoke such licenses is placed by the same statute in the courts of record of the city. *Id.* § 1476. There is no question presented, however, as to revocation of the license, because no revocation has been attempted. All that the mayor and the other police authorities have forbidden is the giving of the particular kind of opera in question. In passing, it may be worth while to point out that there is a manifest difference between giving German opera as a commercial enterprise, with its widely advertised appeal to the public for support, and enjoying German opera privately. The latter is nowise involved in this case. Considering, on the one hand, the unimportant nature of the privilege in question and the transitoriness of the deprivation (the mayor's prohibition, by its terms, is to remain in effect only until the treaty of peace is ratified), and, on the other hand, considering the serious consequences of permitting the plaintiff to continue this privilege, in the particular form it has chosen, the serious personal injuries, the drain upon the police force of men needed throughout the city for the performance of their regular duties, the inconvenience and danger imposed upon the community by having important thoroughfares blocked with crowds of angry men—when these things are considered and weighed against each other, it seems to me there should be little doubt as to the wisdom of the mayor's decision.

I have reached the conclusion I have reached in this case with the more satisfaction because of another important and far-reaching reason. It is highly desirable that the passions of the war subside as rapidly as may be. This process cannot be hastened, however, but will be retarded, by ill-advised and premature attempts like the one under consideration. Great numbers of the community, and especially men who have been in the service, have construed this attempt as a defiance and a challenge. I do not mean to say that such an effect was

intended by those who have produced the opera. This is evidently not true, however, of all those who attend. One affiant relates two instances which fell under his observation on a single evening, showing ill feeling between the crowds of objectors and those who attended the performances. One man on his way to the opera house in a limousine put his head out of the car and made grimaces and hissed at the crowd, and a woman on her way in a taxicab thrust out her tongue in derision. Ordinarily, these incidents would be too trivial to mention, but now they are significant as indications of a hostile state of mind. I should be sorry to believe that the people who are undertaking and those who are supporting by their attendance this effort to revive German opera in this city are not desirous of allaying the animosities heretofore unfortunately existing between groups of our inhabitants and the animosities necessarily existing between our people and the people of Germany, with whom we have so recently been actively at war, and with whom we are not yet formally at peace. It should be remembered that the wounds of the war have not yet healed, nor lost their tenderness, and any step taken toward the restoration of things to normal conditions should be taken in the light of that fact, and, if it is found upon trial that public sentiment is not yet prepared for the step, it should not be persisted in. Reconciliation cannot be forced; it can only be brought about by time and by wise efforts toward that end.

Motion denied, with \$10 costs, and the temporary restraining order vacated. Order signed.

(108 Misc. Rep. 198)

PACIFIC COAST BORAX CO. v. SHIPPERS' NAVIGATION CO., Inc., et al.

(Supreme Court, Special Term, New York County. July, 1919.)

1. CARRIERS $\S$ 177(1)—INITIAL CONNECTING CARRIER LIABLE FOR DAMAGE TO GOODS THROUGH NEGLIGENCE.

In absence of a provision making remedy under Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) to the Interstate Commerce Act exclusive, and in view of proviso that it shall not deprive any holder of an initial carrier's receipt or bill of lading from any remedy or right of action under existing law, the initial carrier, connecting carrier, or terminal carrier may all be held liable to shipper for damage caused by their negligence.

2. CARRIERS $\S$ 184—COMPLAINT SUFFICIENT TO SHOW LIABILITY OF INITIAL CARRIER FOR DAMAGE TO GOODS.

A complaint alleging that an initial carrier delivered freight intrusted to it to a connecting carrier, not in the good condition in which it had been received, showed that damage was sustained on line of the initial carrier, and stated a cause of action against it under the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa).

3. CARRIERS $\S$ 184—COMPLAINT NOT STATING SEPARATE CAUSE OF ACTION AGAINST CONNECTING CARRIER.

Complaint alleging that damage to freight was caused while in the possession of the initial carrier, and not setting forth what part of the damage, if any, was sustained on each of the two lines, did not state a separate cause of action against the connecting carrier, in view of the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa).

$\Rightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action by the Pacific Coast Borax Company against the Shippers' Navigation Company, Incorporated, and another. Motion for judgment on the pleadings. Order directed in accordance with opinion.

Frank H. Hall, of New York City, for plaintiff.

Hirsch, Sherman & Limburg, of New York City (Herbert R. Limburg and Mortimer H. Hess, both of New York City, of counsel), for defendant Great Lakes Transit Corporation.

McAVOY, J. [1] The question for decision here is whether a shipper must sue the carrier first receiving property for interstate transportation, as he is permitted to do under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]), which provides in substance that a common carrier receiving property for transportation in interstate commerce shall be liable to the lawful holder of its bill of lading for any loss, damage, or injury to such property caused by it or by any common carrier to which such property may pass, or whether his right to suit against a connecting carrier, to which the initial carrier has delivered the goods, survives. The object of the Carmack Amendment is quite apparent. It was designed to aid the shipper in finding a liable corporation, where there were several carriers involved in the contract of carriage, and do away with the necessity of the shipper endeavoring to find upon which connecting line the culpable negligence occurred. The rule of law which required proof affirmatively that the damage occurred while the property was in the possession of the connecting carrier was intended to be obviated by this amendment, making the initial carrier responsible for all damage, no matter upon whose lines the negligence occurred. The liability of a connecting carrier for property lost or damaged while in its custody does not appear to have been changed from that imposed upon it under its common-law duty by the Carmack Amendment. In fact, the provision of the amendment itself is that the section shall not deprive any holder of an initial carrier's receipt or bill of lading from any remedy or right of action which he has under the existing law. U. S. Comp. St. 1913, §§ 8563-8592. In the absence of a provision making the remedy under the Carmack Amendment exclusive, and in the presence of a proviso reserving the right of action existing under any law, it cannot be held that no cause can lie against a connecting carrier, where property has been shipped through an initial carrier, who has given his receipt or bill of lading for the same, covering his liability over all lines. I think initial carrier, connecting carrier, or terminal carriers may all be held liable for damage to property caused by their negligence.

[2, 3] The other point raised is that no cause of action is, on the face of the complaint, alleged against the defendant Great Lakes Transit Corporation, in that the complaint fails to allege what portion of the damage was sustained while the goods were in the possession of the connecting carrier. Although the Carmack Amendment may permit an action against the connecting carrier, it is asserted that it would be essential to show that whatever damages has been sustained

occurred while the goods were in the possession of such connecting carrier, and that such complaint must allege, too, that the connecting carrier received the goods claimed to be damaged in good condition from the initial carrier. It is alleged in paragraph 6 of the complaint that the defendant Shippers' Navigation Company, Incorporated, delivered the freight intrusted to it to the defendant Great Lakes Transit Corporation, not in the good condition in which it had been received. It would appear that, if this allegation be true, as it must be deemed to be, such damage as had occurred to the goods must have been caused while in the possession of defendant Shippers' Navigation Company. Of course, it may be true that a portion of the alleged damage occurred while the goods were in the possession of the initial carrier, and further damage was sustained while the goods were in the possession of the connecting carrier; but it seems clear that this does not allege a complete common-law action against either, unless it is set forth what portion of the damage was sustained on each of the two lines, so that to uphold a cause of action against the connecting carrier facts should be shown which indicate some liability for causing such damage while the goods were in its possession, else no claim against it can be sustained. The difficulty arises from pursuing the remedy against the initial carrier and the connecting carrier, where both are alleged to be liable for causing damage to the goods, without alleging facts from which it can be inferred as to what damage was caused by each, if any, of the two common carriers. This difficulty would be entirely obviated if the reasonable remedy provided in the Carmack Amendment were availed of, under which a suit against the initial carrier would entitle the plaintiff to recover his full damage, without respect to the particular connecting carrier's lines upon which the actual damage was suffered. I hold that there is a good cause of action alleged against the initial carrier under the Carmack Amendment, and that such amendment does not prevent a suit against the connecting carrier, but that there are not facts sufficient to constitute a cause of action set forth upon which to predicate a separate cause against the connecting carrier, as the complaint is laid.

Ordered accordingly.

(189 App. Div. 148)

PEOPLE v. FISHER et al.

(Supreme Court, Appellate Division, Fourth Department. October 1, 1919.)

1. EMINENT DOMAIN §8, 167(4)—STATUTES GIVING RIGHT OF CONDEMNATION STRICTLY CONSTRUED.

Statutes giving the right of eminent domain will be strictly construed, and proceedings thereunder must be in strict conformity with the statute, and every jurisdictional provision thereof complied with.

2. EMINENT DOMAIN §169—CONSENT OF GOVERNOR PREREQUISITE TO ACQUISITION OF FORESTS BY PURCHASING BOARD.

Governor's statements, to members of forest purchasing board during informal conversations, that certain land should be acquired at once, held insufficient consent to acquisition of the land under Laws 1908, c. 130, § 47, requiring Governor's "consent," where no record was made of the conversations, and no entry made in any book or record showing Govern-

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or's consent to acquisition of such land; parol consent being insufficient to comply with the statute, though statute does not expressly require written consent.

3. EMINENT DOMAIN §=169—PROVISION FOR GOVERNOR'S CONSENT TO PURCHASE OF FORESTS MANDATORY.

Laws 1908, c. 130, § 44, requiring Governor's consent to acquisition of land by forest purchasing board, is mandatory.

4. EMINENT DOMAIN §=169—JURISDICTIONAL STEPS IN ACQUISITION OF FORESTS BY FOREST PURCHASING BOARD.

Under Laws 1908, c. 130, § 47, providing for filing of certificate describing lands appropriated by state for purpose of making them a part of Adirondack or Catskill Parks, and service of notice of filing of such certificate upon owner, all jurisdictional steps necessary to acquisition of land by forest purchasing board must have been taken before the filing and service of such notice.

De Angelis, J., dissenting.

Appeal from Special Term, Herkimer County.

Action by the People of the State of New York against Clarence L. Fisher and another. Plaintiff based its claim of title to the land involved upon a proceeding taken by the Forest Purchasing Board. Trial court found the proceedings of such board to be in accordance with the statutes, that the plaintiff acquired a good title, and gave judgment for plaintiff. Defendants appeal. Reversed, and complaint dismissed.

See, also, 98 Misc. Rep. 131, 164 N. Y. Supp. 125.

Argued before KRUSE, P. J., and FOOTE, LAMBERT, DE ANGELIS, and HUBBS, JJ.

Purcell, Cullen & Purcell, of Watertown (Elon R. Brown and Henry Purcell, both of Watertown, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (A. F. Jenks, Deputy Atty. Gen., of counsel), for the People.

HUBBS, J. By chapter 283 of the Laws of 1885 the Legislature of the state created the forest preserve. That act established the policy of the state to conserve the wild forest lands and protect the headwaters of the chief rivers of the state. The law was amended from time to time for the purpose of carrying out such policy.

By chapter 220 of the Laws of 1897 the forest preserve board was given the power of eminent domain. That law also defined the powers and duties of the board. Prior to its passage the board had had power to acquire land solely by purchase. By chapter 94 of the Laws of 1901 the powers of the forest preserve board were transferred to a new board to be composed of the forest, fish and game commissioner and two members of the canal board to be designated by the Governor. The powers of the new board were the same as those of the forest preserve board as defined in said act of 1897 (chapter 220), except that the act of 1901 (chapter 94) provided that—

"Lands shall not be purchased or acquired * * * except with the consent of the Governor."

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Prior to the taking effect of the last-mentioned act the consent of the Governor had not been necessary in the acquisition of lands by the board. By chapter 130 of the Laws of 1908 a forest purchasing board, consisting of three members, the forest, fish and game commissioner and two land commissioners to be designated by the Governor, was created, with the same power to acquire land that was formerly possessed by the forest preserve board. Section 44 of said act provided that—

"Lands shall not be purchased or acquired * * * except with the consent of the Governor."

In January, 1909, the forest purchasing board took proceedings to acquire the title to the lands involved in this litigation. The board attempted to follow the provisions of the statute, and in pursuance thereof took possession of the lands in question. The owner of the lands, the defendants' testatrix, protested that the proceedings of said board were not in accordance with the provisions of the statute, and that the state did not, by such proceedings, acquire title to said lands. This action was brought by the state to obtain a judicial determination as to the validity of the state's title to the lands. The trial court has found that the state acquired title by the proceedings of the forest purchasing board and judgment has been entered in favor of the state.

[1] We are unable to agree with the conclusion of the Trial Term that the forest purchasing board fully complied with the provisions of the statute and that title to said lands passed to the state. In the first instance, it is necessary to keep in mind that the forest purchasing board was acting under the provisions of the statute in attempting to deprive the owner of title to the lands in question. It was attempting to acquire title against the will of the owner. While it may be that it was for the best interests of the state that the lands in question should be acquired, it must be remembered that the exercise of the right of eminent domain is a harsh remedy and must be exercised in strict conformity with the terms of the statute conferring the right. A statute giving the state the right to deprive a person of his property against his will must be strictly construed and every jurisdictional provision of such a statute must be complied with. *Sharpe et al. v. Speir*, 4 Hill, 76; *Matter of Water Commissioners of Amsterdam*, 96 N. Y. 351.

[2] Several reasons are assigned by the appellants upon which it is urged that the judgment herein should be reversed. As we have reached the conclusion that the proceeding taken by the forest purchasing board to acquire the title to the lands in question was fatally defective because of the failure of the Governor to give an official consent thereto, we do not deem it necessary to refer to the other questions raised.

[3] It was conceded upon the argument and is conceded in the brief filed by the Attorney General that the provisions of the statute requiring the consent of the Governor was a mandatory provision, and that his consent was necessary to confer jurisdiction upon the forest purchasing board to acquire the title to the lands in question. It seems to us that there can be no dispute about that. The provision of the statute is plain and clear. It reads:

"Lands shall not be purchased or acquired * * * except with the consent of the Governor."

Section 47 of said act reads as follows:

"Upon the request of said board an accurate description of such lands so to be appropriated shall be made by the state engineer and surveyor, and certified by him to be correct, and said board * * * shall indorse on such description a certificate stating that the lands described therein have been appropriated by the state for the purpose of making them a part of the Adirondack or Catskill Parks; and such description and certificate shall be filed in the office of the secretary of state. Said board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing of such description and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service, the entry upon and appropriation by the state of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the state. *Such notice shall be conclusive evidence of an entry and appropriation by the state.*"

[4] It will be noted that "such notice shall be conclusive evidence of an entry and appropriation by the state," and that upon complying with said statute "the real property described in such notice * * * shall be deemed and be the property of the state." From the reading of said section it would seem clear that whatever jurisdictional steps were necessary to be taken must have been taken before the filing and service of said notice. The question is presented, therefore, whether or not there was an official consent given by the Governor to the acquisition of said lands before the filing and service of said notice.

There is no dispute about what took place. The only question is whether or not that which took place constituted a consent by the Governor within the meaning and intent of the statute. On January 19, 1909, the forest purchasing board took final action in the proceedings to acquire the land in question. Prior to that time one of the members of the board called upon the Governor and laid before him the situation in regard to these lands. The Governor stated that the lands should be acquired at once. He also made the same statement to another member of the board on another occasion. He stated, in substance, that it was desirable to acquire the land at once. This is all the evidence there is of a consent by the Governor to the action of the forest purchasing board in its effort to acquire the lands under the provisions of the statute.

No record was made of such conversation; the Governor did not meet with the forest purchasing board; and no entry was made in any book or record showing a consent by the Governor. So far as appears, the conversations with the Governor were entirely informal, and there is nothing to indicate that the Governor supposed that he was giving the formal consent required by the statute. It does not seem to us that such a consent is the consent required by the statute as a basis for acquiring the title to thousands of acres of valuable land. If the consent of the Governor was necessary to give validity to the proceeding, as we believe that it was, it does not seem to us that the evidence of such consent should be permitted to rest in parol. If the fact of the Governor's consent could be proved by evidence of his

oral statements, then the title to all lands acquired under this and like statutes might depend upon the uncertain recollection of witnesses, subject to mistakes and misunderstandings. It might also have to be determined from a conflict of evidence. It is conceivable that a case might arise where the Governor would testify that he did not give his consent and the members of the purchasing board testify that he did. Such a situation would lead, not only to uncertainty and confusion in titles, but to public scandal and loss of faith in the government itself.

It is true that the statute in question does not by its terms require the consent of the Governor to be in writing, or provide how such consent shall be given, filed, entered, or recorded. It does not follow, however, that any kind of consent is sufficient to constitute a compliance with the statute. There are many provisions contained in Constitutions and statutes providing for the consent of the Governor, mayor, Legislature, commissions, and boards. The following expressions are frequently used: "When approved by;" "subject to approval of;" "upon the approval of;" "with the approval of;" "with the advice and consent of;" "without the consent of;" "with the consent of;" and "unless * * * shall consent thereto." So far as we are informed, the courts have never held that such provisions could be construed to mean an informal oral consent or approval, which could be proved by parol evidence.

To permit a citizen to be deprived of his title to real property upon the unofficial oral statement of the state executive would be to place a construction upon the statute in question entirely in conflict with the development, history, and spirit of our system of jurisprudence. It is elementary that the history of constitutional development shows the constant hemming in and limiting of executive absolutism. English constitutional history is replete with instances of the limitations of arbitrary authority of the crown. Before an executive act under our form of government can have the force of law, it must appear that the act is authorized by law, and that it is done in accordance with the law. In our jurisprudence the unofficial oral statement of an executive does not have the force of law. Where the executive is required to perform an act in order to confer jurisdiction, such act is an official act, which must be performed in such manner that there can be no doubt or mistake about what it is or what its meaning is. It should be a matter of record, and not rest in parol. It was held in the case of *People ex rel. Babcock et al. v. Murray et al.*, 70 N. Y. 521, that an attempted oral appointment by a mayor of a person to the office of commissioner of excise was void. The reasoning of Judge Allen in that case is applicable to the question involved in the case at bar. In his opinion he said:

"It would be unfortunate if the title to office of one upon whose official acts public interests and private rights hinged did or could be made to depend upon the verbal declarations and statements of the person having the power to make the appointment, to be proved by parol and liable to be forgotten, misunderstood, or misreported, subject to all the contingencies and infirmities which are incident to verbal evidence, or evidence by parol, so pregnant of mischief and misfortune as to have led to the enactment of the statute of frauds. It will not be presumed that the Legislature, while making void con-

tracts involving trifling pecuniary interests unless evidenced by some writing, intended that important civil offices should be conferred without a commission or any writing, but simply by a verbal statement of an individual in any form which by the bystanders should be understood as expressing a present intent to make the appointment; and a liberal interpretation will be given to the statutes bearing upon the subject if necessary to avoid any such conclusion. * * * But an appointment to office by the person or persons having authority therefor, as distinguished from an election, can only be made verbally, and without writing, when permitted by the terms of the statute conferring the power. Affecting the public, and not merely private rights, and being done under the authority of the sovereign power, and not under individual authority, it should be authenticated in a way that the public may know when and in what manner the duty has been performed."

The attempted appropriation of the lands in question was undertaken without jurisdiction, and the proceeding did not vest the title in the state. The trial court has expressly found that the only consent given by the Governor was the oral consent referred to herein, and it was stated by counsel upon the argument that evidence could not be given by the state of any other consent. Under such circumstances a new trial would be a useless formality. The complaint is dismissed, therefore, with costs of the trial and of this appeal.

Judgment reversed, with costs, and complaint dismissed, with costs. All concur, except DE ANGELIS, J., who dissents, and votes for affirmance.

SWARTZ v. RITEWEB MFG. CO., Inc.

(Supreme Court, Appellate Term, First Department. October 17, 1919.)

DISCOVERY §40—EXAMINATION OF EMPLOYER IN ACTION ON ACCOUNT AND FOR WRONGFUL DISCHARGE.

In an action on an account stated and for wrongful discharge, plaintiff was entitled to examine defendant before trial as to facts showing whether account had been stated, and whether defendant had promised to pay plaintiff amounts claimed, and was also entitled to examine defendant as to the yearly hiring and its terms, though not regarding facts designed to show plaintiff was discharged without cause.

Appeal from City Court of New York, Special Term.

Action by Nathan Swartz against the Riteweb Manufacturing Company, Incorporated. From an order vacating an order for defendant's examination before trial, plaintiff appeals. Order vacating examination reversed, and order for examination modified and reinstated.

Argued October term, 1919, before BIJUR and DELEHANTY, JJ.

Mervyn Wolff, of New York City (Benjamin Jaffe, of New York City, of counsel), for appellant.

Deiches & Goldwater, of New York City (Felix M. Rosenstock, of New York City, and Oscar L. Dann, of Brooklyn, on the brief), for respondent.

BIJUR, J. In this action to recover upon an account stated and for wrongful discharge, an order was made for defendant's examination before trial as to the facts showing the statement of an account

between the parties, also as to an alleged yearly hiring of plaintiff by defendant, and the terms thereof, and plaintiff's discharge without cause. Upon defendant's motion the order was vacated.

The theory upon which the learned judge below acted in vacating the order, so far as it relates to the stating of an account, is that it is unnecessary in an action upon an account stated to set forth in the complaint or prove on the trial the subject-matter of the original debt. *Schutz v. Morette*, 146 N. Y. 137, 40 N. E. 780. The order, however, did not call for an examination of the defendant as to the items of the original debt, but only as to the facts showing whether an account had been "stated," and whether on that accounting the defendant had promised to pay the plaintiff the amounts claimed in the complaint.

Plaintiff is also, on familiar principles, entitled to examine defendant as to the yearly hiring and the terms thereof. Plaintiff concedes that defendant should not be examined regarding facts designed to show that plaintiff was discharged without cause, because on that issue defendant would have the affirmative. *Linton v. Unexcelled Fire Works Co.*, 124 N. Y. 533, 27 N. E. 406.

The order vacating the examination is therefore reversed, and the order for examination modified, by excluding the item covering the cause of plaintiff's discharge, and, as so modified, said order is hereby reinstated, without costs.

DELEHANTY, J., concurs.

(108 Misc. Rep. 165)

SIMON v. BANK OF BRITISH WEST AFRICA, Limited.

(Supreme Court, Special Term, New York County. July, 1919.)

1. PLEADING $\S$ 204(5)—WHERE SEPARATE DEFENSES INCORPORATE PRECEDING ALLEGATIONS OF ANSWER, SEPARATE DEFENSE NOT DEMURRABLE.

Where each of six separate defenses begins, "defendant repeats and realleges the foregoing allegations of this answer with the same force and effect as if more fully set forth herein and pleaded, and further alleges," thereby incorporating by reference into each defense all preceding allegations of answer, much of which incorporated matter has no connection with subsequent defenses, the sufficiency of any defense cannot be separately tested by demurrer.

2. PLEADING $\S$ 364(2)—WHERE SEPARATE DEFENSES WERE REPEATED IN EACH DEFENSE, MOTION TO STRIKE PROPER.

Where fifth defense pleaded allegations of failure of consideration in retaking of goods or documents, and nothing in preceding four defenses was necessary to complete fifth defense, and defendant in a subsequent paragraph repeated and realleged preceding allegations of his answer, and where preceding paragraphs incorporated into new defense were not material to it, plaintiff's motion to strike out certain defenses should be granted.

Action by Israel A. Simon against the Bank of British West Africa, Limited. On motion by plaintiff to strike out irrelevant matter in the defense. Motion granted in part, and defendant permitted to serve

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

a new answer, and plaintiff's time to demur or move with respect to amended answer extended.

Leonard M. Wallstein, of New York City, for the motion.

Albert Edward Maves, of New York City, opposed.

HENDRICK, J. This motion is granted as hereinafter indicated. The words "representing that the said draft would be honored by the said Levant Company" are not stricken out.

[1] Paragraphs 9, 11, 15, 18, 23, and 26 of the answer are the beginnings of six separate defenses, and each starts with the statement:

"Defendant repeats and realleges the foregoing allegations of this answer with the same force and effect as if more fully set forth herein and pleaded, and further alleges," etc.

The effect of these paragraphs is thus to incorporate by reference into the second, third, fourth, fifth, sixth, and seventh defenses all the preceding matter alleged in the answer. Much of the matter thus incorporated has no connection whatever with the subsequent defense sought to be pleaded. It is therefore impossible to test by demurrer the sufficiency of any one of these defenses separately. This method of pleading has been repeatedly and emphatically condemned by the Appellate Division of this department. *Wiener v. Boehm*, 126 App. Div. 703, 111 N. Y. Supp. 126; *Pullen v. Seaboard Trading Co.*, 165 App. Div. 117, 150 N. Y. Supp. 719; *Recknagel v. Steinway*, 58 App. Div. 352, 69 N. Y. Supp. 132; *Stemmerman v. Kelly*, 122 App. Div. 669, 107 N. Y. Supp. 379.

[2] The effect of this style of pleading is illustrated in the present case by an example which applies to all of the separate defenses above mentioned. The fifth defense pleads allegations of a failure of consideration in the retaking of the goods or documents. There is nothing in the preceding four defenses which is necessary to complete this defense, and yet the defendant, in paragraph 18, repeats and realleges the foregoing allegations of his answer in plain violation of the principles set forth in the above cited cases. Those preceding paragraphs thus incorporated into this new defense are not material to it. They incorporate into this defense of a failure of consideration the 17 preceding paragraphs of the answer, which constitute other defenses, and have no materiality to the defense of failure of consideration. Certainly the giving of the letter of credit, the presentation of the draft and documents, "that the plaintiff is not a holder in good faith," "in due course or for value," and "that the plaintiff is not a holder for value," while allegations that may be material to other defenses pleaded, have no relevancy to a failure of consideration. By incorporating the preceding allegations of the answer in this separate defense, 17 different allegations of fact stated in the answer are incorporated, not one of which has any relevancy to the defense sought to be pleaded.

I have spoken at length in relation to the vice which permeates this pleading, to emphasize, if possible, the repeated condemnations of the Appellate Division, in the hope that the court at Special Term may be relieved of some of the numerous motions that are being repeatedly made to correct pleadings which offend against the rule so frequently

announced by the Appellate Division, and which is reiterated at almost every term of the court at which those motions are made.

The motion to strike out is denied as to paragraph 8, and is granted as to paragraphs 9, 10, 11, 13, 14, 15, 17, 18, 22, 23, 25, and 26.

The defendant is required to make more definite and certain what allegations are referred to by the word "premises" in paragraphs 5, 7, 17, 22, and 27 of the answer. The word as used may apply only to the facts stated in the immediate context or may refer to all of the statements of fact in the answer.

The defendant is permitted to serve a new answer within 20 days after notice of entry of the order herein, which shall separately and clearly state the facts constituting each separate defense, upon the payment of \$10 costs.

The plaintiff's time to reply, demur, or make any motion with respect to said answer or amended answer is extended until 20 days after the service of the amended answer hereby permitted.

Ordered accordingly.

(108 Misc. Rep. 193)

PEOPLE ex rel. SONDERN v. WALSH, Superintendent of Buildings, etc.
(No. 1, Hospital Case.)

(Supreme Court, Special Term, New York County. July, 1919.)

1. LIVERY STABLE AND GARAGE KEEPERS § 4½—BUILDING PERMIT FOR GARAGE WITHIN TWO HUNDRED FEET OF HOSPITAL DENIED.

Under section 20 of the building zone resolution, as amended on June 6 and June 20, 1919, a garage cannot be lawfully erected or extended for use for more than five cars within 200 feet of a hospital maintained as a charitable institution, regardless of how the measurement may be made.

2. MANDAMUS § 3(1)—TO COMPEL REVOCATION OF BUILDING PERMIT DENIED, REMEDY BY APPEAL.

Where superintendent of buildings has issued permit for erection of garage within distance of hospital, maintained as a charitable institution, forbidden by section 20 of building zone resolution, as amended June 6 and June 20, 1919, an application for mandamus directing him to revoke permit will be denied in advance of a review of his action by the board of appeals.

Application for a peremptory writ of mandamus by the People of the State of New York, on the relation of Frederic E. Sondern, against William E. Walsh, Superintendent of Buildings, Borough of Manhattan, City of New York. Writ denied.

McKinstry, Taylor & Patterson, of New York City (Martin Taylor and W. Randolph Montgomery, both of New York City, of counsel), for petitioner.

William P. Burr, Corp. Counsel, of New York City (William T. Kennedy, of New York City, of counsel), for defendant.

McAVOY, J. The question presented requires an interpretation of the provisions of the building zone resolution, section 20 thereof, as amended on June 6 and June 20, 1919. The relator contends that a garage, for which the superintendent of buildings has approved plans

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and issued his permit under said building zone resolution, is within 200 feet of the New York Post-Graduate Hospital.

[1] Apart from the apparently technical objections to the consideration of the motion, such as that mandamus is not the proper remedy, and that the amendment does not apply to the case at bar, and that the holders of the permit have acted in good faith, the merits are comprised in this proposition: Whether the method of measurement adopted by the relator, who seeks by mandamus to have the superintendent of buildings revoke his permit, is not within the reasonable meaning of the language of section 20 of the zone resolution. I assume, therefore, that this is what the parties wish decided, although it may be that the administrative officers require a ruling on whether or not such proceedings in mandamus may be taken before a hearing is had for review of the superintendent's action by the board of appeals. Both matters will be considered. The resolution is in effect that no garage for more than five cars may be erected on any portion of a street between two intersecting streets, in which portion there exists an exit from or an entrance to a public school, or in which portion there exists any hospital maintained as a charitable institution, and in no case within a distance of 200 feet from the nearest exit from or entrance to a public school, nor within 200 feet of any hospital maintained as a charitable institution. It does not seem to need the enlightenment of construction to find that there was an apparent intent to differentiate between the locality of a garage, as compared to the entrance to a public school, and the locality of such garage, as compared to the position or place of a hospital. The language indicates the difference in its effect, and construction of the language must follow this indication. It seems obvious to me that in no case whatever, no matter how the measurement may be made, is a garage to be erected or extended for use for more than five cars within a distance of 200 feet of any hospital maintained as a charitable institution. This ground, I think, may be taken in reason, as well as pure construction, since the intent was to obviate noise, dust, smoke, odors, vapors, and other noxious nuisances from coming within any radius within 200 feet of any contiguous wall of a hospital.

[2] In regard to the proposition as to whether the court will act by mandamus, in the absence of a showing that relief has been asked of the board of appeals from the superintendent's ruling permitting the erection of the garage, I do not think that there is much doubt but that the superintendent may be directed through a mandamus writ to revoke his permit, if granted in contravention of his specific authority, and where it is in clear violation of such authority. At least, mandamus may direct him to act according to clear legal duty prescribed by law or regulation adopted in pursuance of law. But since the remedy of revocation lies, too, with the board of appeals, the unrelenting rule of judicial courts is not to rush to mandamus administrative officials until all of their machinery for action has been tried and found wanting by the aggrieved party. Therefore the writ itself is refused, although the construction asked for is given.

Judgment accordingly.

(108 Misc. Rep. 196)

PEOPLE ex rel. SONDERN v. WALSH, Superintendent of Buildings, etc.
(No. 2, Schoolhouse Case.)

(Supreme Court, Special Term, New York County. July, 1919.)

1. LIVERY STABLE AND GARAGE KEEPERS §4½—METHOD OF MEASUREMENTS UNDER BUILDING ZONE RESOLUTION.

Under section 20 of the building zone resolution, as amended June 6, 1919, providing that no garage for more than five cars may be erected within 200 feet from nearest exit from or entrance to a public school, the measurement should be made along sidewalk from in front of garage at its nearest entrance to the next means of exit or entrance in public school building.

2. MANDAMUS §3(1)—TO COMPEL REVOCATION OF BUILDING PERMIT DENIED, REMEDY BY APPEAL.

Where superintendent of buildings has issued a permit for erection of a garage within the distance from a public schoolhouse forbidden by section 20 of building zone resolution, as amended June 6, 1919, an application for a mandamus directing him to revoke the permit will be denied, in advance of a review of his action by the board of appeals.

Application for a writ of peremptory mandamus by the People of the State of New York, on the relation of Frederic E. Sonder, against William E. Walsh, Superintendent of Buildings, Borough of Manhattan, City of New York. Writ denied.

McKinstry, Taylor & Patterson, of New York City (Martin Taylor and W. Randolph Montgomery, both of New York City, of counsel), for petitioner.

William P. Burr, Corp. Counsel, of New York City (William T. Kennedy, of New York City, of counsel), for defendant.

McAVOY, J. [1, 2] This proceeding involves the same section of the building zone resolution referred to in the previous proceeding under the same title. The precise point here is as to the method to be adopted in measuring the distance between the exit and entrance of Public School No. 40 and the garage described above, and which it is claimed is 200 feet of such exit and entrance, within the meaning of said section 20 of the building zone resolution as amended June 6, 1919.

The meaning appears obvious that the measurement in this case may not be taken excepting with reference to the use of the entrance and exit to the school. The intent apparently was to guard the children in their use of exits and entrances to public schools from the danger, caused by the proximity of a garage, through the operation of vehicles near such exits and entrances, and possibly from the danger to be apprehended from fire or explosion near such exits and entrances. Obviously, then, the measurement should be made along the lines of travel—that is, upon the sidewalk from in front of the garage at its nearest entrance to the next means of exit or entrance in the public school building. When measured in this manner the restrictive clause in the zone resolution does not apply to the erection of the garage mentioned herein, so far as the school is concerned, and the motion must therefore be denied. With regard to the remedy, the same ruling will be made here as is made in the companion case decided herewith (108 Misc. Rep. 193, 178 N. Y. Supp. 192), if requested.

Judgment accordingly.

ALBANY SAV. BANK v. KINGSBURY-LEAHY CO. et al.

(Supreme Court, Special Term, Albany County. October 21, 1919.)

1. PLEADING $\Leftrightarrow$ 350(3)—MOTION FOR JUDGMENT ON PLEADINGS ADMITS FACTS PLEADED.

A motion for judgment on the pleadings, in accordance with Code Civ. Proc. § 547, admits every material fact in the answer, and plaintiff is entitled to judgment only if the facts admitted are not sufficient to raise any question of fact.

2. PLEADING $\Leftrightarrow$ 350(3)—ON MOTION FOR JUDGMENT ON PLEADINGS ONLY MATERIAL ALLEGATIONS CONSIDERED.

On motion by plaintiff for judgment on the pleadings, only material allegations in the pleadings can be considered.

3. PLEADING $\Leftrightarrow$ 8(3, 15)—ALLEGATIONS OF FRAUD AND CONSPIRACY MERE CONCLUSIONS.

Bare allegations of conspiracy or fraud do not state a cause of action, being mere conclusions.

4. CORPORATIONS $\Leftrightarrow$ 482(4)—ON FORECLOSURE OF MORTGAGE, ALLEGATIONS INSUFFICIENT TO SHOW FRAUD OF MORTGAGEE.

In a suit to foreclose a mortgage given by a corporation, where the averments of the complaint that it was executed in due form, and that the statutory certificate of consent of stockholders was adopted, etc., were not denied, allegations in the answer that the real purpose of the mortgage was to obtain money, so that one group of stockholders might buy out others, held insufficient to show that the mortgage was invalid; there being no averment that the mortgagee knew of the improper purpose.

Action by the Albany Savings Bank against the Kingsbury-Leahy Company, Theodore M. Cox, as trustee in bankruptcy, and others, to foreclose a mortgage. On motion by plaintiff for judgment on the pleadings. Motion granted.

Tracey, Cooper & Townsend, of Albany (Frederick Townsend, of Albany, of counsel), for plaintiff.

Mills & Mills, of Albany (Borden H. Mills, of Albany, of counsel), for defendant Cox.

RUDD, J. This action is in foreclosure. The complaint is in the usual form. The answer of the trustee in bankruptcy of the mortgagor company admits the material allegations of the complaint, denying certain conclusions of law, and sets up an affirmative defense alleging a conspiracy between two stockholders of the mortgagor company and an individual who is one of the directors of the company, alleging in substance that the avails of this mortgage loan made by the Albany Savings Bank upon the property of the Kingsbury-Leahy Company were used in whole or in part to declare a dividend of 50 per cent. on the stock of the company, for the sole purpose of enabling one of the two stockholders who received this dividend to purchase the stock of the other stockholder.

[1] The motion here made is by the plaintiff for judgment upon the pleadings under section 547 of the Code of Civil Procedure. The only question involved is one of law. The practice is the same as if this motion was made at the opening of the trial. The plaintiff, in

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order to succeed, must admit in fact every material fact set out in the answer, and after such admission the plaintiff is only entitled to judgment if the facts thus admitted are not sufficient to raise a question of fact. *Emanuel v. Walter*, 138 App. Div. 818, 123 N. Y. Supp. 491.

[2] Only material allegations of the pleadings can be considered. If in the answer there is any allegation of a material fact, upon which evidence must be taken to warrant judgment, the motion here sought cannot be granted. *Godwin v. Liberty-Nassau Building Co.*, 144 App. Div. 164, 128 N. Y. Supp. 791.

[3, 4] The board of directors of the Kingsbury-Leahy Company, upon the application to the plaintiff for a loan, adopted the formal resolution as required. The bond and mortgage were executed by the corporation in due form. The statutory certificate of consent of the stockholders was given, and the resolution, above mentioned, was adopted. The purpose of the loan, as certified, was "to finance corporate obligations and to furnish additional capital for the said corporation."

It is not alleged in the answer of the trustee that the bank was in any way a party to the alleged conspiracy. It is alleged that, at the time of the negotiations and the closing of the loan, the real intent and purpose was to provide funds to enable one stockholder to buy out the other, and not for the formal purpose expressed in the directors' resolution; but it is not alleged that the plaintiff had any knowledge of the financial condition of the corporation, nor that the corporation was actually insolvent. On the other hand, the answer shows that on the books of the corporation there appeared a surplus exceeding the amount of the loan.

As was stated by counsel, the real situation presented by the answer is the allegation of the defendant trustee that the bank knew that the real object of the loan—

"was one which might be illegal under certain circumstances, but would be entirely legal under other circumstances; the legality of the transaction depending on questions of fact as to which it had no information."

The answer does not allege that the bank knew the true purpose of the loan and the methods by which it was to be carried out; neither that the bank knew the real financial condition of the corporation, nor in fact knew that the contemplated dividend would result in a fraud on the creditors, and that the bank, in loaning the sum advanced upon the security of the mortgage, was a party by reason of its knowledge of what was the condition and the contemplated purpose.

The answer does not raise an issue of fact; it pleads certain conclusions. A conspiracy could not be established by alleging it as a conclusion. It can only be found as the result of certain facts, which at least point to a conclusion. Allegations of fraud or conspiracy are of no value as stating a cause of action. *Wood v. Amory*, 105 N. Y. 282, 11 N. E. 636.

We do not find in the answer in question such statement of facts, which require examination to determine whether or not as a con-

clusion a conspiracy existed. There is no allegation of act or failure to act from which it might be determined that a conspiracy had been entered into. For the reasons briefly outlined upon the pleadings, there appears to be no reason why the relief sought by the plaintiff in equity should not be granted.

An order may be entered, upon proper affidavits as to regularity of procedure, providing for the appointment of a referee to compute the amount due.

FEIL et al. v. FEIL et al.

(Supreme Court, Special Term, Albany County. October 20, 1919.)

1. PLEADING $\Leftrightarrow$ 350(3)—MOTION FOR JUDGMENT ON PLEADINGS RAISES QUESTIONS OF LAW ONLY.

On motion for judgment on the pleadings, under Code Civ. Proc. § 547, only questions of law are involved.

2. PLEADING $\Leftrightarrow$ 350(1)—PRACTICE ON MOTION FOR JUDGMENT ON PLEADINGS.

The practice on motion for judgment on the pleadings, under Code Civ. Proc. § 547, is the same as on motion for judgment at the opening of trial.

3. PLEADING $\Leftrightarrow$ 350(3)—ADMISSION OF FACTS BY MOTION FOR JUDGMENT ON PLEADINGS.

On their motion for judgment on the pleadings, under Code Civ. Proc. § 547, defendants are called upon to admit every material fact set out in the complaint, and are entitled to judgment if the complaint does not state facts sufficient to constitute a cause of action.

4. PLEADING $\Leftrightarrow$ 350(3)—ONLY MATERIAL ALLEGATIONS OF COMPLAINT CONSIDERED ON MOTION FOR JUDGMENT ON PLEADINGS.

On motion for judgment on the pleadings under Code Civ. Proc. § 547, nothing but the material allegations of the complaint can be considered.

5. PLEADING $\Leftrightarrow$ 345(1)—DENIAL OF MOTION FOR JUDGMENT ON PLEADINGS IN CASE OF NECESSITY FOR PROOF.

If in the pleadings there is an allegation of any material issue of fact on which evidence must be taken to warrant judgment, defendant's motion for judgment on the pleadings, under Code Civ. Proc. § 547, cannot be granted.

6. PLEADING $\Leftrightarrow$ 350(1)—MOTION FOR JUDGMENT ON PLEADINGS AFTER DEMUR-
RED PROPER.

In an action to reform a deed, defendants' practice in moving for judgment on the pleadings, under Code Civ. Proc. § 547, after they had interposed demurrer to the complaint for insufficiency of the facts, was correct.

7. PLEADING $\Leftrightarrow$ 345(1)—ALLEGATION OF CONCLUSION DOES NOT PREVENT GRANT OF JUDGMENT ON PLEADINGS.

An allegation in the pleadings in the nature of a conclusion is not a statement of a fact requiring the determination of a jury, and preventing the court from granting judgment on the pleadings on defendant's motion, under Code Civ. Proc. § 547.

8. PLEADING $\Leftrightarrow$ 9—ALLEGATION OF CONCLUSION INEFFECTUAL TO CONTROL ALLEGATIONS OF FACT.

If what a mortgagee and the mortgagor did with reference to foreclosure was not in and of itself a fraud upon parties who had procured reformation of the deed to the mortgagor, it was not made so, in an action by such parties to reform the referee's deed under foreclosure decree, by alleging it was induced by or through a desire to deceive and defraud.

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9. PLEADING ~~§~~8(3, 15)—ALLEGATIONS OF FRAUD OR CONSPIRACY AS CONCLUSIONS.

Mere allegations of fraud or conspiracy are valueless in stating a cause of action.

10. PLEADING ~~§~~8(15)—ALLEGATION OF FRAUD AS CONCLUSION.

In an action to reform a deed given by a referee under foreclosure decree, allegation that the mortgagor caused title to be taken in the name of another to defraud plaintiffs *held* not an allegation of fact, but purely of a legal conclusion.

Action by Louisa Feil and Theresa Feil against Charles P. Feil and others. On motion by defendants for judgment on the pleadings. Motion granted, and judgment entered.

Henry J. Crawford, of Albany, for plaintiffs.

Andrew G. Seelman, of Albany (Daniel J. Dugan, of Albany, of counsel), for defendants.

RUDD, J. In this action the plaintiffs demand judgment reforming a deed given by a referee under a decree in foreclosure, and adjudging that the plaintiffs have a life estate in certain portions of premises covered by the referee's deed, and that such life estate is superior to a mortgage made and executed by the defendant Amelia G. Feil to the defendant Bennink, and for other and further relief as it may be determined.

The defendants interpose a demurrer to the complaint, alleging that the facts are not sufficient to constitute a cause of action. The defendants move for judgment on the pleadings, under section 547 of the Code of Civil Procedure.

[1] Upon this motion only questions of law are involved.

[2] The practice is the same as upon a motion for judgment at the opening of a trial.

[3] Upon this motion the defendants are called upon to admit every material fact set out in the complaint, and are entitled to judgment if the complaint does not state facts sufficient to constitute a cause of action. *Emanuel v. Walter*, 138 App. Div. 818, 123 N. Y. Supp. 491.

[4, 5] Nothing but the material allegations of the pleadings can be considered upon this motion. If in the pleadings there is an allegation of any material issue of fact upon which evidence must be taken to warrant judgment, the motion here sought cannot be granted. *Godwin v. Liberty-Nassau Building Co.*, 144 App. Div. 164, 128 N. Y. Supp. 791.

[6] The defendants' practice in making this motion upon the pleadings is correct. *National Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846.

The undisputed facts out of which this cause of action is alleged to have grown are:

Carl F. Feil died seized in fee simple of a parcel of real estate in the city of Albany; the reasonable value of the property was between \$2,000 and \$3,000. That under the will of Carl F. Feil the

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real estate was devised to his widow during the term of her life, then to be divided among his children. That the widow died. That the children and grandchildren became the owners of undivided interests in the property. That in January, 1909, the defendant Charles P. Feil entered into an agreement with the plaintiffs in this action, by the terms of which he agreed to pay the heirs a certain sum of money for the premises and give to the plaintiffs the first floor of the building and the yard in the rear of the dwelling, to be used by them as their home during the term of their lives. That this agreement for a life use of the portion of the premises mentioned was in consideration of the amount of \$800 being fixed as the purchase price of the premises by Charles P. Feil. That subsequently a deed conveying the premises to Charles P. Feil was entered into, which was executed by all who had an interest in the premises, save two infants; but the agreement with reference to the life estate of the plaintiffs in a portion of the premises was not put in writing. That subsequently Charles P. Feil executed and delivered to one Henry J. Bennink two mortgages covering the premises, which mortgages were placed upon record. That thereafter the defendant Charles P. Feil put the plaintiffs out of possession of the premises occupied by them. That an action was brought in the Supreme Court against Charles P. Feil and others to reform the deed, by inserting therein a provision to the effect that the conveyance of the premises to Charles P. Feil was subject to the life estate of plaintiffs in and to the first floor of the dwelling and the yard in the rear thereof.

The issue raised in this action was tried, and judgment was entered directing a reformation of the deed, by inserting the following provision:

"This conveyance is made subject, however, to a life estate of Louisa Feil and Theresa Feil in the first floor and yard of the premises herein described."

It was further provided in this judgment that said reformation of the deed was to be subject, however, to the two mortgages above mentioned executed to Henry J. Bennink. Thus far no question can arise as to the allegations of the complaint as above set forth.

In the twelfth paragraph of the complaint the plaintiff alleges:

"The defendants, wrongfully and fraudulently conspiring among themselves, and for the sole purpose of defeating the said judgment of this court so reforming said deed as aforesaid, caused an action to be brought by the defendant Bennink against the plaintiffs and the defendant Charles P. Feil and the defendant Amelia G. Feil and one James F. Couser for the purpose of foreclosing the said two mortgages, executed and given by the said Feils to the said Bennink."

In the thirteenth paragraph it is alleged that the referee appointed by the court in the foreclosure action to sell the premises at public auction did sell the premises to defendant Charles P. Feil, but that:

"In pursuance of the fraudulent conspiracy aforesaid, and for the sole purpose of robbing the plaintiffs of the fruits of said judgment of this court so reforming the said deed as aforesaid, the defendant Charles P. Feil wrongfully and fraudulently caused the said referee to execute the deed of purchase in the name of said Charles P. Feil's wife, Amelia G. Feil."

In the fifteenth paragraph:

"That after the purchase of said premises by the said Charles P. Feil from said referee as aforesaid, the said Charles P. Feil fraudulently, and in furtherance of his unlawful and fraudulent purpose aforesaid, caused his said wife to execute and deliver to the defendant Bennink a mortgage upon said premises which has been recorded in the Albany county clerk's office."

In the action brought by Bennink in the Supreme Court to foreclose his mortgages the plaintiffs in this action were made parties defendant in that action. They appeared, but did not answer or raise any question. Their interests in the premises were alleged in the Bennink foreclosure to be subsequent to the rights of the mortgagee.

The usual decree was entered. A sale was had; the property was struck down to the highest bidder. A final order of confirmation was made, and a certain amount of surplus money paid into the court. The purchaser at the foreclosure sale, which the referee to sell reported was Amelia G. Feil. That report was confirmed by the court. The purchaser took such title as was in the mortgagor and the mortgagee at the time the mortgage was executed.

The allegation that there was a wrongful and fraudulent conspiracy among the parties in bringing the foreclosure action by Bennink is not sustained by the statement of any fact from which such a conclusion could follow. Bennink of right could begin an action to foreclose his mortgages. His mortgages were superior to the plaintiffs' interest in the premises acquired under the decree in the action for reformation.

[7] An allegation of any fact which would require the determination of a jury would prevent this court from granting a judgment under the pleadings. It would matter not if that fact was important or trifling; but an allegation in the nature of a conclusion is not a statement of a fact. An allegation that no valid contract was made has been held to be an allegation of the legal conclusion. *Sigua Iron Co. v. Vandervort*, 164 Pa. 572, 30 Atl. 491.

[8] The complaint must show an unlawful conspiracy, and must specify the steps taken which were in themselves unlawful and fraudulent. If what Bennink and the defendants did with reference to the foreclosure of the mortgages was not in and of itself a fraud, it is not made so by alleging that it was induced by or through a desire to deceive and defraud. *Wood v. Amory*, 105 N. Y. 282, 11 N. E. 636.

[9] Mere allegations of fraud or conspiracy are of no value as stating a cause of action. Where no facts are presented, it is just as fair to assume that a party is governed by a correct motive as by a dishonest one.

[10] The referee in foreclosure has certified that Amelia G. Feil purchased the property, and an allegation in this complaint that Charles P. Feil caused the title to be taken in the name of Amelia G. Feil for the purpose of defrauding somebody is not an allegation of a fact; it is purely a conclusion, and a legal one at that.

We cannot find in the complaint under examination an allegation of

fact which shows a fraudulent act, and neither can we find a fact stated which in itself shows a conspiracy.

Such being the situation, it clearly seems that defendants are entitled to relief, that the cause of action can be disposed of under the provisions of law upon the face of the pleadings, that the motion of the defendants should be granted, and judgment entered accordingly.

NEWTON, Atty. Gen., v. KNOTT, Sheriff.

(Supreme Court, Special Term, Columbia County. October 13, 1919.)

1. **MANDAMUS** $\Leftrightarrow$ 172—**QUESTION AS TO JURISDICTION OF CHILDREN'S COURT NOT DETERMINABLE.**

On application to the Special Term for an order directing the issuance of a writ of mandamus to compel a sheriff to take into his custody a girl abandoned at the New York Training School for Girls, the question of the jurisdiction of the Children's Court of New York, which originally sentenced the girl to the home, but refused to resentence her after she had been returned by the manager cannot be determined; that being a question for the determination of the Children's Court.

2. **INFANTS** $\Leftrightarrow$ 16—**COMMITMENT TO STATE TRAINING HOME—EFFECT OF RELEASE.**

Where an infant girl was committed from New York county as a juvenile delinquent to the state training school for girls, and the managers of the home found that she was not benefited, and in accordance with State Charities Law, § 205, returned her to the custody of the sheriff of New York county, *held* that, notwithstanding the Children's Court refused to resentence the girl, asserting that it was without authority under sections 204, 205, the sheriff, who returned the girl to the home, may be compelled to retake her into his custody.

In the matter of the application of Charles D. Newton, as Attorney General of the state of New York, for a writ of mandamus against David H. Knott, Sheriff of New York county. Application to be granted, in event of sheriff's failure to comply with suggestion made.

Charles D. Newton, Atty. Gen., and Edward G. Griffin, Deputy Atty. Gen., for applicant.

George W. Olvany, of New York City, for sheriff.

RUDD, J. This is an application by the Attorney General of the state for an order directing the issuance of a writ of mandamus against the sheriff of New York county, requiring the sheriff to take into his custody Bertha Grunner, Beatrice Goldfarb, and Sarah Kropoff, all of whom it is claimed were unlawfully abandoned by the sheriff of New York county at the New York state training school for girls, and further commanding the sheriff to take these girls before the magistrate, or before a court having jurisdiction, that the court may resentence the girls as juvenile delinquents, in accordance with the provisions of the Charities Law of the state.

The papers disclose that each of the three girls named was committed by a justice of the Children's Court for the County of New York to the care and custody of the New York state training school for girls

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at Hudson, N. Y. Bertha Grunner was received by the New York state training school for girls November 25, 1916. She was at the time of her commitment 13 years of age.

The girls, Beatrice Goldfarb and Sarah Kropoff, have been paroled in the care of their parents. They are no longer involved in this proceeding, and the motion of the Attorney General with reference to these last-mentioned girls is denied. An order to that effect may be entered.

We are still, however, concerned as to the girl, Bertha Grunner, who is at present in the New York state training school for girls at Hudson, N. Y. In accordance with the rules and practice of the institution, the personal history of Bertha Grunner, when she was first received as an inmate, was taken by Dr. Mary C. Conant, the resident physician of the institution. She was first placed in quarantine, because of her physical condition, which continued until April 2, 1917.

She was then classified as a student and entered the regular book and industrial classes of the institution. Her book work and her industrial work were both unsatisfactory. It was sought to teach to her gardening, sewing, hand laundry, and cooking. Her rating was low. Her behavior in the various classes poor, her daily life and behavior in the cottage showed, according to the affidavit of the superintendent, that she was unable to adapt herself to cottage life, either in association with other girls or following the instruction of the matron. She refused to take food, became easily excited and noisy, whistling and singing when corrected for misdemeanors, even her mood was variable, so much so that it interfered with her following any industrial training.

She was subjected to mental examination by Investigator Dr. Jessie L. Herrick. This showed that at the physical age of 14 she was mentally $9\frac{10}{12}$ years. She was rated as a "border line case." She is lacking in reasoning power, is self-centered, infantile in her emotional reactions, and lacking in mental ability sufficient to enable her to make progress in book or industrial classes.

Her parents have made application for her parole, and in March, 1919, the board of governors of the New York state training school for girls adopted the following resolution:

"Resolved, on motion duly seconded, that by reason of the report of Miss Bridgeford, investigator of the bureau of analysis and investigation of the state board of charities, and of the report of Dr. Herrick, resident physician, upon the observations made during Bertha's residence in the training school, it appears that Bertha Grunner is incapable of being materially benefited by the discipline of the institution, and further that said Bertha Grunner be returned to the sheriff of New York county, from which county she was committed, in accordance with section 205 of the State Charities Law, for sentence by the magistrate making the commitment, or for such other disposition as may be just and proper."

In accordance with this resolution the superintendent of the institution notified the sheriff of New York county that as such superintendent she would return Bertha Grunner to the care of the sheriff, under section 205 of the State Charities Law, subject to the con-

venience of the sheriff and of the Children's Court of New York City.

The sheriff, under date of June 23, 1919, requested the New York state training school for girls to cause Bertha Grunner to be taken to the Children's Court, No. 137 East Twenty-Second street, borough of Manhattan, New York City, on July 1st, at 11:30 o'clock, where the sheriff would have a deputy sheriff who would take charge of Bertha Grunner and present her for resentence before a magistrate of the court.

This was done, and from the affidavit filed on behalf of the sheriff in this proceeding we learn that Bertha Grunner was delivered at the time and place mentioned to Deputy Sheriff Burke by Clara H. Stone, parole agent, and Sarah E. Henry, marshal, of the New York state training school for girls, together with her original commitment papers and a sworn statement of the superintendent of the New York state training school for girls certifying as to the resolution of the board of managers in reference to the return of this girl, together with copies of mental tests of the condition of the girl.

It appears from the affidavit of the sheriff that immediately upon taking custody of the girl and receiving the papers mentioned, the girl was taken to the office of the clerk of the Children's Court, who in turn consulted the Presiding Justice of the court and also an Associate Justice of the court, each of whom said that the case was beyond the jurisdiction of the court, and each of the justices refused to act in the matter of resentence, leaving Bertha Grunner in the custody of the sheriff, and that the deputy sheriff having personal custody of the girl thought it was his duty to return the girl to the institution from which she was sent, which he immediately did.

The sheriff stated in his affidavit as follows:

"Deponent did not feel justified in allowing said girls to go free upon the refusal of the said justices to resentence them because of their apparent defective mental and physical condition."

In explanation it should be said that the affidavit made by the deputy sheriff, from which the above quotation is taken, refers to the girl here under consideration, and also to two other girls similarly situated, as to whom we are not concerned.

Upon the day of the appearance of the girls in the care of the sheriff before the justices of the Children's Court, the deputy sheriff returned the girl to the New York state training school for girls at Hudson, N. Y., leaving her in one of the public rooms of the institution and went away.

Upon the hearing of this motion, an attorney, who has not filed a brief, appeared making an argument as "amicus curiæ," for the purpose of showing that the justices of the Children's Court were justified in the conclusion that they were without jurisdiction to resentence the girl in question.

[1] It is not for us to pass upon the question of the jurisdiction of the Children's Court in New York. We are not called upon to endeavor to compel the Children's Court to act or even to express a thought or a suggestion by way of criticism of the Children's Court. That court must be the judge of its own jurisdiction.

[2] The application here is to direct the sheriff to take this girl in his keeping, as she no longer should be or can be in the care and custody of the institution to which she was originally committed. It may be that legislation is required; that the situation in New York county is different from that in any other county of the state.

The provisions of the statute with reference to the duty and obligation of the directors of the New York state training school is clear. That institution is maintained by the state for the purpose of training girls; thus, if possible, to redeem them. If girls are so lacking in mental equipment that after a fair trial they cannot be trained, and are subjects which only should be cared for and protected, then the New York state training school for girls is not the place where the child or the girl should be.

It is for that reason, evidently, that section 205 of the State Charities Law, relating to institutions for juvenile delinquents, was enacted, and under that statute the board of managers of the institution are vested with the power to pass upon the question as to whether or not a female who has been committed to the institution shall or shall not be returned to the county from which she was so committed.

It is apparent from the affidavit of the deputy sheriff that from his casual observation, and to his credit in the care and protection of Bertha Grunner after the court had refused to resentence her, he was afraid to allow the girl to go free because of her apparent defective mental and physical condition, and thus, apparently not knowing what otherwise to do, he returned her to the institution. She is not there by right. She is for the time a charge upon the county of New York, and that county must in some way devise a plan to protect and care for this girl. The sheriff agreed to accept the girl, and he did his part apparently in the application which he addressed to the Children's Court towards carrying out the purpose of a resentence.

Section 205 of the State Charities Law (Consol. Laws, c. 55) in substance provides that the board of managers of this institution may return girls: (1) If not of proper age to be committed; (2) because of improper commitment; and (3) whenever it shall appear to the satisfaction of the "board of managers" that a girl committed is (1) insane; (2) mentally incapable of being materially benefited by the discipline of such institution.

The girl in question was 13 years of age when committed. Section 204 of the State Charities Law provides, as to committing of juvenile delinquents to the New York state training school for girls, no person under the age of 12 shall be committed for an offense less than a felony; no person shall be committed for a definite term; any female committed under the age of 15 shall not be retained for a longer period than until she attains the age of 18. This section makes no provision apparently for paroling an inmate of a state training school into a state hospital for the insane.

This girl being "mentally incapable of being materially benefited by the discipline of this institution" under the law it is left with the board of managers of the New York state training school to determine that it is no longer proper to detain her. The law gives to the

board of managers the authority and responsibility, and provides a method to be pursued. That has been done, that method has been followed, and to-day we find that the girl is back in the institution from which she was taken.

The county of New York is failing to exercise the responsibility which belongs to the county in the care of this girl. She should not remain until she is 18 years of age in the care of the training school. She cannot be set at liberty.

The conclusion of the board of directors of the training school as to the mental condition of this girl was not the result of hasty action. It was reached only after careful examination and months of experience in the effort to do for her what the institution is maintained by the state to do for a class of juvenile delinquents. The management of the school is certainly not to be criticized for such effort.

The sheriff, failing in his effort to induce the Children's Court to resentence the girl, was prompted by a humanitarian motive when he did not leave the girl in the street, but was not well advised when he took the girl back to the training school and there left her, against the protest of the school authorities. If the Children's Court of the City of New York has no jurisdiction to resentence the girl to a place where she will be protected and cared for, then the county, having the burden of protecting this girl, must see to it that some other jurisdiction is exercised.

Upon the argument the sheriff stated that a writ of mandamus would not be necessary in order to compel him to do his duty. He stated that it was only necessary for the court to make a determination, and he stood ready to comply with any suggestion thus made.

The conclusion is that Bertha Grunner should be taken forthwith by the sheriff of New York county from the New York training school for girls, to the end that she may be resented, or that such disposition or legal proceedings may be had by the court having jurisdiction, or by the county or city authorities, as will protect and care for her.

If necessary an order will be entered directing the issuance of a writ of mandamus.

(109 Misc. Rep. 130)

DAVIDSON v. PENN-VIRGINIA COAL & COKE CORPORATION.

(Supreme Court, Special Term, New York County. October 27, 1919.)

PLEADING $\S$ 301(3)—STATEMENT OF GROUNDS OF BELIEF IN VERIFICATION OF ANSWER.

Verification of answer of defendant foreign corporation, made on behalf of the corporation by its vice president, under Code Civ. Proc. $\S$ 525, and stating "that the sources of the deponent's information and the grounds of his belief as to all matters not stated on his own knowledge are the books and records of said corporation," held sufficient compliance with section 526, requiring verification by a person other than the party to set forth "the grounds of his belief as to all matters not stated upon his knowledge."

$\Leftarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action by Robert C. Davidson against the Penn-Virginia Coal & Coke Corporation. On motion by defendant to compel plaintiff to accept its answer. Motion granted.

Julius Levy, of New York City, for the motion.

Davis, Wagner, Heater & Holton, of New York City (Guy C. Heater, of New York City, of counsel), opposed.

GIEGERICH, J. The defendant makes this motion to compel the plaintiff to accept its answer. The defendant is a foreign corporation. The answer was verified on its behalf by its vice president. The verification contains this statement:

"That the sources of the deponent's information and the grounds of his belief as to all matters not stated on his own knowledge are the books and records of said corporation."

The answer comprises both denials and affirmative allegations, set up in two separate defenses. All the affirmative allegations and most of the denials are made upon information and belief. As the defendant is a foreign corporation, the verification must comply with the requirement of section 526 of the Code of Civil Procedure, which is that, where the verification is made by a person other than the party, "he must set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge." Code of Civil Procedure, § 525; *Robinson v. Ecuador Development Co.*, 32 Misc. Rep. 106, 65 N. Y. Supp. 427. I am of the opinion that the verification here is sufficient.

Reliance is placed by the plaintiff upon *Nelson v. Baruch*, 60 Misc. Rep. 357, 113 N. Y. Supp. 449, which holds that such a verification by one not a party should show that the affiant derived his information which he states as the grounds of his belief from some person who had knowledge of the facts, or from letters and documents. In the present case, if the sources of the deponent's information had been stated to be books and records, without stating what books and records, a somewhat analogous situation would be presented to that presented in *Nelson v. Baruch*, *supra*; but the affidavit goes further, and states that such sources of information are the books and records of the defendant corporation. Taking these words in a reasonably broad sense, I think it is fair to infer that the books and records of the corporation do contain information relative to the matters in question in the answer, and that there is a sufficient presumption of the truth of such sources of information to warrant the court in treating the affidavit as a sufficient compliance with the requirements of the Code. It should be remembered that the question now presented is not one of the admissibility of evidence, but is merely a question of the sufficiency, for the purposes of the pleading, of the sources of information which the affiant sets forth as the grounds of his belief.

Motion granted, with \$10 costs. Settle order on notice.

(108 Misc. Rep. 201)

McKAY v. McADOO, Chief City Magistrate.

(Supreme Court, Special Term, New York County. July, 1919.)

COURTS §55—DEPUTY CHIEF PROBATION OFFICER OF CITY MAGISTRATE'S COURT OF NEW YORK MAY BE REMOVED BY APPOINTING POWER.

Under Inferior Criminal Courts Act, § 96, providing for the removal of "chief probation officer or any probation officer," a deputy chief probation officer of City Magistrate's Court of the City of New York may be removed at pleasure of the appointing power; the omission to specifically include deputy chief probation officers not indicating legislative intent to omit them or to design that method of their removal is under Greater New York Charter, § 1543.

Application for a peremptory writ of mandamus by George D. McKay, directing William McAdoo, as Chief City Magistrate, to reinstate applicant to his position of deputy chief probation officer of the City Magistrate's Court of the City of New York. Application denied.

Lockhart & Callahan, of New York City (Joseph M. Callahan, of New York City, of counsel), for applicant.

William P. Burr, Corp. Counsel, of New York City (Arthur Sweeny, of New York City, of counsel), for defendant.

McAVOY, J. The relator demands reinstatement in his former position as deputy chief probation officer of the City Magistrate's Court, and asks that the court direct, by its writ of mandamus, the appointing power to restore him to the position from which he alleges it was attempted ineffectually to remove him. The section of the Inferior Criminal Courts Act (Laws 1910, c. 659, § 96) providing for the removal of probation officers recites:

"The chief justice or the chief city magistrate, as the case may be, or a majority of the justices or a majority of each board of magistrates, may at pleasure remove the chief probation officer or any probation officer."

The relator's contention is that, since power is not specifically conferred on the chief city magistrate to remove at pleasure *deputy* chief probation officers, the legislative intent was to exempt such officers from summary removal under the act. It could not be imputed to the legislative design to exempt wholly from removal deputy chief probation officers. The relator therefore contends that the method of his removal is to be sought in section 1543 of the Greater New York Charter (Laws 1901, c. 466), which prohibits the removal of any person holding a position in the classified municipal civil service, subject to competitive examination, until he has been allowed an opportunity of making an explanation.

I am quite convinced that the provision of the statute which is intended to apply to the inferior criminal courts solely, and wherein the method of appointment or removal of all of its officers is sought to be included, cannot be supplemented by the general statute found in the

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earlier enacted charter of the city, and that, unless removal was authorized impliedly by the provision of section 96 of the Inferior Criminal Courts Act, there is no provision of law empowering the act of removal. I do not think that the omission to specifically include deputy chief probation officers by name or title within the class which may be summarily removed indicates a legislative intent to omit them and to show a design that the method of removing them is under terms of another statute. True construction seems to indicate that the lesser office is included within the description of the greater, and a provision in the act that a chief probation officer may be summarily removed includes within its direction power to remove his subordinate or deputy. It would be quite beyond legitimate construction to hold that the chief city magistrate may remove the head of the probationary force and all of the subordinate employes, and that he is prevented from removing a person holding office between these extremes, excepting under a provision of a statute (the charter) which this specific statute is obviously designed to supersede. I cannot think that this was the legislative intent, and therefore refuse the writ and deny the motion.

Application denied.

(189 App. Div. 310)

BECKEL v. SALOMON et al.

(Supreme Court, Appellate Division, Second Department. October 31, 1919.)

1. DISCOVERY $\Leftrightarrow$ 40—EXAMINATION OF DEFENDANT BEFORE TRIAL.

Plaintiff *held* entitled to examination of one of the defendants before trial as to facts which he was required to establish in order to prove his cause of action.

2. DISCOVERY $\Leftrightarrow$ 41—LIMITATION OF EXAMINATION OF DEFENDANT BEFORE TRIAL.

In executor's action to recover certain bonds wrongfully delivered by coexecutor to defendants, without consideration and with knowledge by defendants of wrongful character of transaction, order for examination of one of defendants before trial as to dealings on margin or speculative account, or purchase or sale of securities between defendants and coexecutor, *held* to give too wide a latitude in the examination, and it should have limited examination to the delivery of particular bonds, with circumstances thereof, consideration, defendants' knowledge of true facts, etc., leaving to judge presiding at examination to determine what questions were relevant thereto.

Appeal from Special Term, Kings County.

Action by George W. Beckel, as executor and trustee, etc., against Arthur K. Salomon, Charles H. Bernheim, and others, copartners, etc. From an order denying a motion to vacate an order directing examination before trial of defendant Charles H. Bernheim, defendants appeal. Affirmed, as modified.

Argued before JENKS, P. J., and MILLS, PUTNAM, BLACKMAR, and KELLY, JJ.

I. Maurice Wormser, of New York City (Stephen C. Baldwin, of Brooklyn, and C. Arthur Levy, of New York City, on the brief), for appellants.

M. Michael Edelstein, of New York City, for respondent.

PER CURIAM. [1, 2] The order authorized an examination as to facts which the plaintiff must establish in order to prove his cause of action. It falls, therefore, within our decision in *Oshinsky v. Gumberg*, 188 App. Div. 23, 176 N. Y. Supp. 406, and the motion to vacate was properly denied; but we think the order gave too wide a latitude in the examination. The complaint alleges that the coexecutor of the plaintiff, since removed, in violation of his duty, delivered to the defendants 16 New York City $3\frac{1}{2}$ per cent. bonds maturing May 1, 1951, and that the defendants received such bonds without consideration, with the knowledge that they belonged to the estate, and not to the coexecutor. The plaintiff claims that for the purpose of establishing these allegations he is entitled to the examination before trial.

The order provided that defendants Bernheim and Salomon be examined as to what dealings and transactions on margin or speculative account, or purchase or sale of securities, the defendants have had with one Isaac Strauss, what collateral, what cash, and particularly what New York City bonds, and the description thereof, the defendants have received from said Strauss, and at what times the defendants have re-

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ceived New York City bonds from said Strauss, together with the numbers and description thereof, what securities defendants have delivered to said Strauss, and what collateral defendants received from said Strauss, together with a full description thereof, and the times the same were so received.

It is obvious that this order permits the examination of the defendant on matters that cannot be material or relevant to the allegations of the complaint. It is difficult to say in advance what evidence would be material or relevant to these allegations; but the order should be confined to the allegations of the complaint, and it should be left to the judge who presides at the examination to determine what questions are relevant thereto. We think the order should be modified, by limiting the examination to the delivery of the 16 New York City $3\frac{1}{2}$ per cent. coupon bonds, together with the circumstances attending such delivery, the consideration therefor, the state of the accounts between the defendants and Isaac Strauss at the time of the delivery of the bonds, a complete description of the bonds, the knowledge of the defendants as to whether the bonds were held by Isaac Strauss as executor, including the fact that he was executor, the disposition of the bonds made by the defendants and the circumstances attendant thereon, and any fact relevant to the above-specified subjects of the examination.

The order should be modified, in accordance with this opinion, and, as modified, affirmed, without costs.

(189 App. Div. 886)

COCKAYNE v. HEALEY.

(Supreme Court, Appellate Division, First Department. October 24, 1919.)

PLEADING ¶368—PLAINTIFF REQUIRED TO SEPARATELY STATE AND NUMBER SEPARATE CAUSES OF ACTION.

Where plaintiff relies upon two causes of action, but fails to separately state and number them, he should, on motion of defendant, be required to serve an amended complaint, either separately stating and numbering the alleged causes of action, or eliminating the one upon which he does not place reliance.

Appeal from Special Term, New York County.

Action by Edmund Cockayne, an infant, etc., against Thomas J. Healey. From an order denying a motion for an order directing the service of an amended complaint, defendant appeals. Reversed.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

John A. McQuillan, of New York City (George H. Taylor, Jr., of New York City, on the brief), for appellant.

PHILBIN, J. The plaintiff apparently relies upon two causes of action, but fails to separately state and number them. He should be required to serve an amended complaint, either separately stating and

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numbering the alleged causes of action or eliminating the cause of action upon which he does not place reliance.

Order reversed, with \$10 costs and disbursements, and motion granted, as above indicated, with \$10 costs. Order filed. All concur.

ZIVITZ et al. v. MARYLAND CASUALTY CO.

(Supreme Court, Appellate Term, First Department, October 27, 1919.)

INSURANCE — §18—CHANGING CONDITION NOT SPECIFIED IN POLICY OF BURGLARY INSURANCE.

Where the schedule made a part of a burglary insurance policy details in question and answer form the representations of assured as to conditions affecting the risk, a provision that changes of condition of the property shall invalidate the policy must be deemed to refer to conditions set forth in the schedule, and where, in the schedule, no representations were made as to iron shutters, the removal of such shutters by insured's landlord and replacing with wire glass was not a change of material conditions.

Appeal from City Court of New York, Trial Term.

Action by Nathan Zivitz and another against the Maryland Casualty Company. From a judgment of the City Court, entered on a directed verdict for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

James J. Mahoney, of New York City (George J. Stacy, of New York City, of counsel), for appellant.

Max D. Steuer, of New York City (Jerome A. Strauss and Milton S. Cohn, both of New York City, of counsel), for respondents.

PER CURIAM. As a defense to this action to recover upon a policy of burglary insurance, the defendant pleaded change of "conditions and circumstances" of the risk without the consent of the insurer and in violation of the terms of the policy.

The proof tended to establish that on the night of January 3 or early morning of January 4, 1918, plaintiffs' loft was entered by burglars, who removed a large quantity of clothing therefrom; that the entry was made by making a hole in one of the wire glass windows of plaintiffs' premises and opening the latch on the inside; and it was conceded that at the time the policy was issued there were sheet iron shutters on the windows, but that these shutters had been removed by plaintiffs' landlord in May, 1917, by order of the fire department, apparently without the knowledge or consent of the defendant, and wire glass windows substituted therefor.

At the close of the entire case the defendant moved for the dismissal of the complaint, and plaintiffs asked for the direction of a verdict in their favor; the latter claiming that, as the iron shutters were taken away without the plaintiffs' consent, their rights under the policy were unimpaired. The court, adopting plaintiffs' view of the case,

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directed a verdict for the plaintiffs. Thereupon the defendant asked leave to go to the jury on all the issues, and on the issue that the policy was void if the circumstances and conditions of the risk were changed without the consent of the defendant, and to the denial of this motion an exception was duly taken.

Respondents urge, but do not present any authority in support thereof, that to avoid a burglary policy under the clause in question the change in the conditions and circumstances of the risk must have been brought about by the assured. Clause 6 of the policy provides that, if a change occurs, whether caused by plaintiffs or not, the policy shall be void. It appears, however, that the schedule prepared by defendant and made part of the policy sets forth in detailed question and answer form the representations of the assured as to conditions affecting the risk, and the provision that the policy shall be void if the conditions are changed must be deemed to refer to conditions of risk as set forth in the schedule forming part of the policy, not conditions of which the policy takes no cognizance. In said schedule no representations are made, and no inquiry made as to iron shutters. No change of material conditions under the terms of the policy having been shown, the defense failed, and judgment was properly directed for plaintiffs.

Judgment affirmed, with costs.

(109 Misc. Rep. 152)

SCHACHTER v. SCHACHTER.

(Supreme Court, Special Term, Kings County. October 27, 1919.)

MARRIAGE §58(7)—FRAUD JUSTIFYING ANNULMENT.

It is not fraud, for which marriage by civil ceremony can be annulled, that the man promised that there should later be a Jewish ceremony, and refused to fulfill his promise; there being no misrepresentation of an existing fact.

Action by Anna Schachter against Harry Schachter. Judgment for defendant.

Ellman & Ellman, of New York City, for plaintiff.

CROPSEY, J. The plaintiff seeks an annulment of her marriage. She bases her complaint solely upon the assertion that—

“The defendant falsely and fraudulently represented to her that, if she would procure a marriage license with him and have a ceremony performed by a person other than a Rabbi, or civil ceremony, that he would thereafter enter into a religious ceremony through a Rabbi.”

She seeks to support this by her testimony that when she spoke to him of getting married, saying they had been “keeping company” long enough, he replied:

“We shall get married two weeks later, at City Hall, and afterward make up a date for the Jewish wedding.”

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They were married at the City Hall, but the defendant refused later to have a Jewish ceremony—though both he and the plaintiff are Jews—saying he did not believe in it; that “we should go and live together without it.” The plaintiff claims she would not have married him, had he not promised to have later a Jewish ceremony, and that the marriage was never consummated.

Is there any proof of fraud in this? Did the defendant make any representation, that was material and of an existing fact? A marriage contract may be avoided like any other contract, and especially if it has not been consummated, when it was procured by fraud. But the fraud must consist of a false representation, expressly or impliedly made, of an existing fact that is a material consideration to the wronged party. Here the plaintiff claims the promise of a Jewish ceremony was vital to her, and she would not have consented to marry, had the defendant not made it, but the defendant’s statement was merely a promise, and not the assertion of an existing fact. He did not state that anything *was*, but only that something *would be*. He promised that at a future time there would be the other service. No legal fraud arises from such a promise. It is not a representation. It is a mere forecast or prophecy. It asserts nothing. It only predicts. The plaintiff was not justified in relying upon it, and cannot be relieved of the marriage compact, though the defendant failed to fulfill his pledge.

The cases cited furnish no support. In *Moore v. Moore*, 94 Misc. Rep. 370, 157 N. Y. Supp. 819, the marriage was annulled, because the defendant, at the time of entering into it, had no intention of living with the plaintiff, and it was held that “intention” was an existing fact, following the decision in *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127, 20 Ann. Cas. 910. But even this rather extreme case does not aid the plaintiff. Here there is no claim the defendant did not intend to live with the plaintiff as her husband. On the contrary, the proof shows otherwise. In *Dorgeloh v. Murtha*, 92 Misc. Rep. 279, 156 N. Y. Supp. 288, the plaintiff was under the age of consent, and there was the further finding that neither the plaintiff nor defendant intended to be married, and were coerced into having the ceremony performed.

Counsel states that in April, 1919, Mr. Justice Benedict granted an annulment in *Weinstein v. Weinstein* on the identical grounds urged here. But, he adds, no opinion was written. Without knowing the reasons that prompted that decision, it cannot be accepted as an authority, as it seems to run counter to the general rule.

The complaint must be dismissed, and judgment go for the defendant.

(189 App. Div. 123)

ADAMS et al. v. GEORGE H. RIVES MFG. CO., Inc.

(Supreme Court, Appellate Division, First Department. October 24, 1919.)

1. PATENTS ¶216—WHETHER AGENTS FOR SALE OF PATENTED DEVICE COMPLIED WITH CONTRACT QUESTION FOR JURY.

In action for breach of contract whereby plaintiffs were appointed exclusive agents for defendant for the sale of a patented device, the contract to hold good so long as sales by plaintiffs amounted to an average of \$1,000 per month or more, where on plaintiffs' case their sales amounted to more than \$1,000 a month up to the time of defendant's breach, and defendant claimed that the sales amounted to less, an issue of fact was presented, which should have been submitted to the jury.

2. PATENTS ¶216—CONTINUANCE OF CONTRACT OF AGENT FOR SALE OF PATENTED DEVICE.

Under contract whereby plaintiffs were appointed exclusive agents for defendant for the sale of a patented device, the contract to hold good so long as sales by plaintiffs amounted to an average of \$1,000 per month, the minimum which was to control the continuance of the contract was the amount of sales made by plaintiffs to their customers, and not the amount paid by plaintiffs to defendant.

Appeal from Trial Term, New York County.

Action by Daniel Adams and another against the George H. Rives Manufacturing Company, Incorporated. From a judgment on a dismissal of the complaint at the close of the whole case, and on a verdict directed in favor of the defendant on its counterclaim, plaintiffs appeal. Reversed, and new trial ordered.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

William S. Haskell, of New York City, for appellants.

W. E. Kisselburgh, Jr., of New York City (James F. Egan, of New York City, of counsel), for respondent.

DOWLING, J. Plaintiffs sue for damages for the alleged breach of a written agreement between the parties, whereby plaintiffs were appointed exclusive general sales agents for defendant for the states of New York and New Jersey for the sale of a patented device known as "the Rives auto pedal never slip pad," which patent had been issued to George H. Rives, president of defendant and was owned by it. Under this agreement, it was provided that—

"The life of this contract shall be binding and hold good so long as the Messrs. Adams & Findley's sales amount to an average of one thousand dollars per month or over (\$1,000)."

The list price of the goods was fixed at \$12 per dozen sets, less 60 per cent. f. o. b. New York City, and plaintiffs were to pay their account in full to the defendant by the 15th of each current month, for which they were to receive an additional discount of 5 per cent. Plaintiffs were "to bill and become responsible for all accounts that they may have or hereafter sell." Subsequent to June 1, 1916, defendant is alleged to have granted to plaintiffs the sales agency for certain states, in five of which they were to make additional sales of at least \$6,000

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per year, commencing August 1, 1916. It is alleged that plaintiffs' sales of the pads, within the territory granted to them, exceeded the sum of \$11,000, and that on or about February 10, 1917, defendant refused to perform its agreement, and has since refused to perform the same, and in violation thereof has sold pads in said territory without paying plaintiffs any commission therefor, and has appointed other agents to sell in plaintiffs' territory.

The complaint set forth that the original agreement in question (though bearing date May 8, 1916) was entered into by the parties on or about May 23, 1916, which is the date when it was acknowledged. The answer of the defendant specifically set up that the agreement was entered into by the parties on May 23, 1916. Upon the trial, though it appeared that work under the contract was begun about May 21, 1916, no effort was made to question the date when the contract was made as averred.

[1] The complaint was dismissed upon the ground that plaintiffs did not make sales of goods within the minimum quantity fixed by their contract, and that therefore defendant's rescission of the agreement was justified, whether it took place on February 4 or February 17, 1917. Upon the record, this was erroneous. The agreement, upon the pleadings and proof, was made May 23, 1916. Upon the record, defendant rescinded the contract on February 4, 1917. This was a period of 8 months and 12 days. During that time, plaintiffs' actual sales for New York and New Jersey amounted to either \$9,015.15 or \$8,786.05, while other orders were taken aggregating over \$1,700, which were not filled. These figures were according to the testimony of their witness, Daniel Adams. The court, in dismissing the complaint, found that the sales in New York and New Jersey amounted to only \$7,140.16.

[2] Under the terms of the agreement, the minimum which was to control the continuance of the contract was the amount of sales made by plaintiffs to their customers, and not the amount paid by plaintiffs to the defendant. The contract was one of a sales agency. Plaintiffs were to sell defendant's goods to customers, and, even though they guaranteed the accounts and paid the bills, their obligation was satisfied when they sold to customers a minimum of \$1,000 of pads per month. Even though they received a discount on their payments to defendant.

Upon the record, there was an issue of fact, which should have been submitted to the jury, as plaintiffs duly requested. On the plaintiffs' case their sales amounted to either \$9,015.15 or \$8,786.05. Either sum was an average of over \$1,000 per month for the 8 months and 12 days that the agreement was in force. Defendant's claim was that the sales only amounted to \$7,140.16, the figures accepted by the trial court, which was under the required minimum. A clear issue of fact was thus presented, which should have been sent to the jury for decision.

The judgment appealed from will be reversed, and a new trial ordered, with costs to appellants to abide the event. Order filed. All concur.

LEVY v. WALLACH et al.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

1. EVIDENCE $\Leftrightarrow$ 258(1)—EMPLOYEE NOT CHARGEABLE WITH DECLARATIONS BY EMPLOYEE.

Employer was not bound by declarations of employé, regardless of proof that employment had not terminated at the time the declarations were made, in absence of proof that employé was at such time engaged in executing authority conferred upon him, and that the declarations related to business then pending so that they constituted part of *res gestæ*.

2. EVIDENCE $\Leftrightarrow$ 89—PRESUMPTION OF CONTINUANCE OF EMPLOYMENT OVERCOME BY EVIDENCE OF TERMINATION.

In action for price, involving admissibility of declarations of buyers' employé to bind buyer, presumption that employment, shown to have existed at time of sale, continued and existed at time of declarations, was overcome by unimpeached and uncontradicted evidence that employment had terminated at time declarations were made.

3. APPEAL AND ERROR $\Leftrightarrow$ 1067—REFUSAL OF INSTRUCTION TO DISREGARD DECLARATIONS OF EMPLOYÉ REVERSIBLE ERROR.

In action for price, defended on ground that goods were worthless and had not been accepted, refusal to instruct jury to disregard evidence of declarations of buyers' employé that buyers were pleased with goods and would send a check in payment, where there was unimpeached and uncontradicted evidence that employment had terminated at time of declarations, *held* reversible error.

Appeal from City Court of New York, Trial Term.

Action by Ira J. Levy against Samuel D. Wallach and others. From a judgment for plaintiff, and from an order denying a motion to set aside the verdict and for a new trial, defendants appeal. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Wise & Seligsberg, of New York City (Leon Lauterstein, of New York City, and William W. Oppermann, of Poughkeepsie, of counsel), for appellants.

Bernard Fliashnick, of New York City, for respondent.

DELEHANTY, J. The principal ground upon which this judgment must be reversed consists of error committed by the trial judge in charging the jury. The controversy arose over the sale by the plaintiff's assignor to the defendants of a large quantity of hooks and eyes, the transaction taking place in April, 1918. Plaintiff contended that the goods were sold without warranty at a reduced price and upon full and complete inspection by the defendants. Defendants contended that the goods were purchased by sample, that they failed to conform thereto, and were wholly unmerchantable and worthless. Plaintiff obtained a complete recovery in the court below.

During the trial, wherein the facts were sharply disputed, Virginie Cohen, wife of the plaintiff's assignor, testified that on or about the 20th day of May, after the goods had been duly shipped to defendants, one Jacob Klein, who had participated in the negotiations lead-

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing up to the sale as an employé of the defendants, stated to her that defendants had received the goods in question, were pleased with the same, and that a check therefor should be forthcoming to her husband in payment. Defendants objected to the admission in evidence of the statement in question, on the ground that, when it was made, Klein was not an employé of defendants, and had no authority, therefore, to bind them by what he said. Klein was called to the stand, and testified that he never made the statement attributed to him, and that he left the defendants' service May 1, 1918. The defendants also produced one Goldfein, under whom Klein was employed, who testified that Klein had severed his connections with the defendants prior to May 1st; that is, in the latter part of April.

In his charge to the jury the court said:

"Something was said about statements alleged to have been made by Mr. Klein after these goods had been shipped. If you find that at the time Klein made those statements—the statements wherein he is alleged to have said in substance that Mr. Cohen was entitled to his check, and there was no reason why the check should not have been sent—if you find, at the time he made that statement, he was no longer in the employ of the defendants, then they are not in any wise bound by what he said."

Defendants' counsel then requested:

"Your honor charged, about Klein's testimony, that if they found that Klein was not in our employ, then they must disregard [the] testimony about his having said they should get a check. I ask your honor to charge the jury that the testimony in the case is uncontradicted that Klein was not in our employ after May 1st, and they must disregard any statement Mrs. Cohen said he made in our behalf after May 1st.

"The Court: I will let the jury decide whether there is any testimony, but I will say to them that, if Klein was not in the employ of the defendants at the time he made the statements, then they are not in the slightest degree bound by it.

"Defendants' Counsel: Exception to that."

[1] The testimony was offered and received on the theory that, Klein having been employed by defendants at the time of the sale, it would be presumed that the relation continued until the contrary was shown. Even so the proof would be insufficient to bind defendant, for, as was said in *Goetz v. Nut R. Co.*, 54 App. Div. 365, 66 N. Y. Supp. 666, cited in *Corn v. Bergmann*, 145 App. Div. 218, 129 N. Y. Supp. 1049:

"Declarations of an agent are not competent to charge a principal, upon proof merely that the relation of principal and agent existed at the time when the declarations were made. Something more must be shown. 'It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to and were connected with the business then depending, so that they constituted a part of the *res gestæ*.'"

[2,3] However, when unimpeached and uncontradicted evidence was introduced herein that Klein's employment had been terminated, the presumption was overcome. It will be noted that the witness claimed that the conversation in question occurred about May 20th, a week or two after all the goods had been delivered. It is obvious that, if the jury regarded the testimony as binding on the defendants,

it was most damaging to their case, especially in view of their testimony that the goods were not accepted, and that they had not used or sold any of them.

The jury should have been instructed to disregard the testimony of Mrs. Cohen, as indicated in the request to charge, and, having failed to do so, we think the trial judge committed error, requiring the case to be sent back for a new trial. In view of this conclusion, it is not necessary to discuss other alleged errors in the record.

Judgment and order accordingly reversed, and new trial granted, with costs to appellant to abide the event. All concur.

(108 Misc. Rep. 204)

BRONX GAS & ELECTRIC CO. v. PUBLIC SERVICE COMMISSION et al.

(Supreme Court, Special Term, New York County. July, 1919.)

1. GAS §14(1)—INJUNCTION TO RESTRAIN ALLEGED CONFISCATORY GAS RATES ISSUED ON BOND TO PROTECT CONSUMERS.

In gas company's action for a decree that Laws 1906, c. 125, fixing \$1 per 1,000 cubic feet as maximum price for gas furnished to the general public, and Laws 1905, c. 736, fixing 75 cents for that quantity as the maximum price for gas furnished to the city of New York, are at present confiscatory and unconstitutional, where company makes out a sufficiently convincing prima facie case to justify preliminary injunction, it may be granted, with appropriate incidental relief, on company's bond to protect consumers.

2. GAS §14(1)—IN ACTION TO ENJOIN GAS RATES AS CONFISCATORY, GENERAL ELECTRIC AND GAS BUSINESS NOT CONSIDERED.

In action by gas and electric company to have Laws 1906, c. 125, fixing \$1 per 1,000 cubic feet as maximum for gas furnished to the general public, and Laws 1905, c. 736, fixing 75 cents for that quantity as the maximum for gas furnished to the city of New York, declared confiscatory and unconstitutional, the question whether plaintiff's total business, which includes its electrical department, is or is not conducted at a loss, cannot be injected into the case.

3. GAS §14(1)—EVIDENCE SHOWING STATUTORY RATES CONFISCATORY AUTHORIZING TEMPORARY INJUNCTION.

Assuming correctness of the figures of a gas company, suing to have Laws 1906, c. 125, fixing \$1 per 1,000 cubic feet as maximum price for gas furnished to the general public, and Laws 1905, c. 736, fixing 75 cents for 1,000 cubic feet as the maximum price for gas furnished to the city of New York, declared confiscatory and unconstitutional, show that statutory rate has been confiscatory since January 1, 1917, a sufficient period of loss is shown, at least until all the evidence is in, and the court may grant pendente lite relief.

4. GAS §14(1)—IN SUIT TO RESTRAIN ALLEGED CONFISCATORY STATUTORY RATES AND FIX NEW RATES, INJUNCTION DENIED.

In suit by gas company to enjoin enforcement of statutory maximum rates to consumer and to city of New York, wherein it seeks primarily the fixation of a new rate, and the other relief is merely incidental thereto, and it desires no relief, unless a new rate is fixed, its motion for injunction will be denied in toto, as courts are without power to fix a rate.

Action for an injunction by the Bronx Gas & Electric Company against the Public Service Commission, the Attorney General, the District Attorney of Bronx County, the City of New York, and cus-

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tomers, consumers, etc., of plaintiff's gas. Motion for injunction pendente lite denied, should plaintiff's counsel notify court that plaintiff would be satisfied with nothing short of the fixing of a new rate, and to be granted on notice that it will be satisfied with an injunction against enforcement of existing statutory rate, with appropriate relief incidental to such injunction, upon a bond sufficient to protect consumers.

See, also, 178 N. Y. Supp. 172.

Atwater & Cruikshank, of New York City (Alfred B. Cruikshank, of New York City, of counsel), for plaintiff.

Godfrey Goldmark, of New York City, for Public Service Commission.

Charles D. Newton, Atty. Gen., pro se.

Francis Martin, Dist. Atty., of New York City, pro se.

William P. Burr, Corp. Counsel, of New York City, for city of New York.

MULLAN, J. The plaintiff is a gas and electric light company, operating exclusively in the borough of the Bronx, city of New York. The only restriction upon its price for gas is to be found in the statutes hereinafter referred to. On February 8, 1918, it petitioned the Public Service Commission, First District, for leave to charge \$1.50 per 1,000 cubic feet. On April 18, 1918, the petition was dismissed upon the stated ground that the commission was without power in the premises. The ruling of the commission was upheld by the Appellate Division on July 17, 1918 (*People ex rel. Bronx Gas & Elec. Co. v. Public Service Commission*, 185 App. Div. 891, 171 N. Y. Supp. 1095); the Court of Appeals having held, in the meantime, that the Public Service Commission had no power to supersede the statutory rate (*People ex rel. Municipal Gas Co. v. Public Service Commission*, 224 N. Y. 156, 120 N. E. 132). On March 11, 1919, the plaintiff filed with the commission, and published, a notice that on and after April 11, 1919, its rate for gas to the general public would be \$1.50 per 1,000 cubic feet.

Thereafter it brought this action to procure a decree (1) declaring confiscatory and unconstitutional the statute (Laws of 1906, c. 125) fixing \$1 per 1,000 cubic feet as the maximum price for gas furnished to the general public; (2) declaring confiscatory and unconstitutional the statute (Laws of 1905, c. 736) fixing 75 cents per 1,000 cubic feet as the maximum price for gas furnished to the city of New York; (3) declaring unconstitutional certain provisions of the Public Service Commissions Law allowing Public Service Commissions to fix the price of gas; and (4) enjoining (a) the defendants generally from enforcing the mentioned statutes, from collecting or attempting to collect penalties thereunder, from instituting civil or criminal proceedings thereunder, from interfering with plaintiff in the collection of a price of \$1.50 per 1,000 cubic feet of its gas, or such price as to this court may seem reasonable; (b) the Public Service Commission, First District, from the fixation of any rate or price to be charged by plaintiff for its gas, and from instituting any proceeding against plaintiff for that purpose; and (c) the defendant consumers of gas,

customers of plaintiff, from prosecuting a proceeding instituted by them and pending before the Public Service Commission, First District, to procure a reduction of the plaintiff's present price for its gas; and (5) granting other and incidental relief; and it now moves for an injunction, pendente lite, granting substantially all the relief it would be entitled to, if it should prevail upon the trial.

Plaintiff in its complaint and affidavits alleges that prior to January 1, 1917, the statutory rates were accepted by it, and sets out at length facts designed to show that the cost to plaintiff to make each 1,000 cubic feet of gas was, in 1917, \$1.18442; in 1918, \$1.37241; and in 1919, \$1.39, and asserts that no rate less than \$1.50 per 1,000 cubic feet will produce a reimbursement of cost and a reasonable profit.

In the opposing affidavits of the defendants it is sought to show that the plaintiff's cost data are inaccurate and misleading; that the plaintiff's valuation of its investment in the gas business is grossly inflated, and that upon accurate cost data, and a fair appraisal of the investment, the statutory rate affords to plaintiff a reasonable profit. In respect of the actual cost of manufacture for 1918, it is claimed by the defendants: (1) That the plaintiff's item of \$.0626 per 1,000 cubic feet for legal services is excessive, in that in no former year did that item exceed \$.004 per 1,000; (2) that the plaintiff's apportionment of taxes between its gas and electrical departments is unfair, in that it casts upon the gas department \$.0586 per 1,000 more than its proper share of the burden; (3) that the plaintiff's leakage item of 37,552,670 cubic feet is unreasonably large, and amounts to 15.21 per cent., as against the 8 per cent. leakage loss of other companies of nearly similar size in Greater New York, and that reasonable efficiency in controlling leakage would reduce the cost \$.0453 per 1,000; (4) that the plaintiff's amortization reserve of \$.12 per 1,000 is excessive to the extent of \$.05 per 1,000, for the reason that the plaintiff actually expended \$.07 per 1,000 for repairs and maintenance; (5) that plaintiff fails to offset against its operating cost the item of \$.02 per 1,000 received by it as revenue from sources other than the sale of gas; and that the foregoing inaccuracies, misstatements, and omissions improperly increase the apparent cost for gas for 1918 by \$.1819 per 1,000 feet.

In the defendant's affidavits it is also sought to be shown that the plaintiff's valuation of its investment is excessive for the following reasons: (1) That included in the issued capital stock of \$486,500, is an item of \$216,000, representing a stock dividend; (2) that the appraisal of the plaintiff's property made by the public service commission in 1908 was excessive, and that the valuation at the end of 1918 of \$900,000, based on that appraisal, and withdrawals therefrom and additions thereto, is consequently excessive. The defendants further endeavor to show that the plaintiff's claim of a right to a margin of profit of \$.13 per 1,000 cubic feet for dividends and surplus is excessive to the extent of \$.07 per 1,000; their argument being that no allowance should be made for a surplus during a period of abnormally high costs, and that a \$.06 per 1,000 charge for divi-

dends would suffice to pay a 7 per cent. dividend on the plaintiff's investment properly appraised.

In its replying affidavits the plaintiff answers the criticisms of its cost data by seeking to show: (1) That its item for legal expenses was larger in 1918 than formerly, and will continue to be heavy, because of its necessity to procure judicial determination that it is not receiving a fair return; (2) that its tax apportionment was fair, attaching an itemized statement showing how the apportionment was made and the reasons therefor; (3) that the defendants' leakage criticism is unfair, as the companies held up as standards charge a purely arbitrary leakage, and have a low actual leakage, for the reason that they do not manufacture gas, and manufacturing companies in a similar situation to that of plaintiff have leakages varying between 10 and 18 per cent.; (4) that the criticism of the size of the amortization reserve is unsound, for the reason that experience of 10 years has shown that a reserve of \$.12 per 1,000 cubic feet is needed, and the Public Service Commission has recommended a reserve of \$.15 per 1,000; the plaintiff remaining silent upon the criticism that it had not taken into account its revenue of \$.02 per 1,000 cubic feet from sources other than the sale of gas.

Replying to the criticism in respect of the valuation of its property, the plaintiff asserts that the stock dividend of \$216,000 represented property, services, and profits invested in its plant over a period of 8 years, during which no dividends were paid, and that, as the valuation of 1908 was the official appraisal of the Public Service Commission, it is, at least prima facie, to be presumed to be a correct valuation, and that in point of fact it was less than the actual value of the property. It is the plaintiff's contention that, even if its stock had been watered, as defendants claim it was, but which assertion the plaintiff denies, that fact would have no relevancy, as the proper basis for a computation of profits is the present value of its investment. The plaintiff states that its outstanding obligations, stocks and bonds, amount to \$1,677,500; that the book value of its investment at the close of 1918 was \$1,813,316, without allowance for franchise or going concern value, and including the land at its assessed valuation; that the lowest present valuation made by plaintiff's appraisers, added to the assessed land valuations, amounts to \$2,404,009; and that it suffered a loss, in its gas department, in 1917, of \$32,855.53, or \$.16377 per 1,000 cubic feet, and in 1918 of \$72,446.42 or \$.34775 per 1,000 cubic feet.

[1] The conflicting claims and contentions of the plaintiff, on the one hand, and of the public officials, on the other, present questions of sufficient complexity to make impracticable at this time a detailed analysis or other extended treatment. It will suffice to say that, considering the action as one brought to procure a decree declaring the fixation statutes unconstitutional at the present time, I am of opinion that the plaintiff has made out a sufficiently convincing prima facie case to compel me to grant a preliminary injunction restraining the enforcement of the statutory rate. I am, of course, restricted to merely superficial indicia, but these point very directly to the prob-

ability that the plaintiff has been suffering a loss in its gas business since January 1, 1917. The public official defendants point out that their examination of the plaintiff's figures was necessarily hasty and somewhat cursory; but, even with the making of due allowance for the brevity and incompleteness of their investigation, their criticisms are not convincing, while the plaintiff's explanations of its questioned items seem, on their face, to be reasonable and sound. It may, of course, very well be that upon a trial it could and will be shown that the plaintiff's figures are inaccurate and misleading; but, as I have said, I must confine myself to a conclusion based wholly upon the apparent situation disclosed by the papers. On these alone the plaintiff presents a strong case, that is not substantially weakened by the opposing proofs.

[2, 3] Nor can there be injected into the case the question whether the plaintiff's total business, which includes its electrical department, is or is not being conducted at a loss. That precise holding was made in *Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, 121 N. E. 772. Neither is it a sufficient answer that, assuming the correctness of the plaintiff's figures, and that the statutory rate has been confiscatory since January 1, 1917, the period of loss has lain wholly within the period of the war, with its vast economic disturbances. Under the rule stated by Judge Cardozo in the *Municipal Gas Co. Case*, I think that, at least "till all the evidence is in," a sufficient period of loss has been shown, regardless of its cause, and that, in respect of the future, prophecy must not be at the possible expense of the plaintiff. There is ample authority for granting pendente lite relief to a utility company in such a situation as that in which plaintiff apparently finds itself. *Chicago & N. W. R. Co. v. Dey* (C. C.) 35 Fed. 866, 1 L. R. A. 744; *New Memphis Gas & L. Co. v. City of Memphis* (C. C.) 72 Fed. 952; *Southern Pacific Co. v. Railroad Comm.* (C. C.) 78 Fed. 236; *Indianapolis Gas Co. v. City of Indianapolis*, 82 Fed. 245; *Metropolitan Trust Co. v. Houston & T. C. R. Co.* (C. C.) 90 Fed. 683; *Cleveland City Ry. Co. v. City of Cleveland* (C. C.) 94 Fed. 385; *Western Union Tel. Co. v. Myatt* (C. C.) 98 Fed. 335; *Kimball v. City of Cedar Rapids* (C. C.) 99 Fed. 130; *Spring Valley Waterworks v. City of San Francisco* (C. C.) 124 Fed. 574; *Ozark-Bell Tel. Co. v. City of Springfield* (C. C.) 140 Fed. 666; *Matter of Arkansas R. Rates* (C. C.) 163 Fed. 141; *San Joaquin & Kings R. C. & I. Co. v. Stanislaus County* (C. C.) 163 Fed. 567; *Contra Costa Water Co. v. City of Oakland* (C. C.) 165 Fed. 518; *Spring Valley Water Co. v. City of San Francisco* (C. C.) 165 Fed. 667; *Bonbright v. Geary* (D. C.) 210 Fed. 44; *Pacific Gas & Elec. Co. v. City of San Francisco* (D. C.) 211 Fed. 202; *Boyle v. St. Louis & S. F. R. Co.* (D. C.) 222 Fed. 539; *Springfield G. & E. Co. v. Barker* (D. C.) 231 Fed. 331; *Landon v. Public Utilities Commission* (D. C.) 234 Fed. 152.

But the plaintiff, if I understand its position correctly, does not appear to be content to procure relief against the statutory rate. Upon the extended oral argument its learned counsel again and again stated that he was not seeking a mere declaration that the statutory

rate was confiscatory, but that he insisted upon a fixation by the court of the \$1.50 rate, or such other rate as might be fixed by the court as reasonable. He stated repeatedly that any decree that fell short of fixing a rate would not answer the purpose of his client, and would furnish no relief at all, or at least none that was adequate. In taking this position he very clearly followed the burden and trend of the complaint itself, for there, in paragraph XL, it is alleged:

"That all the aforesaid reasons why the question of the validity of the statutory rates aforesaid be settled at once in this action apply with equal force to the question of the fairness of the \$1.50 rate intended to be collected by plaintiff. That the Public Service Commission has no power to fix plaintiff's rates. That, even if it had the power, it is so doubtful it could only be exercised to any good effect after a long delay and much litigation. That the present exigency is great, as plaintiff is threatened with insolvency. That the mere expense of the preparation of this case is very great, amounting to many thousands of dollars for counsel fees, and many thousands of dollars for appraisals and valuations, which plaintiff at present finds it difficult to meet. That plaintiff should not be remitted to another tribunal to repeat this litigation, or go through one substantially the same on the same facts. That the mere declaration by the court that the \$1 rate is confiscatory is and will be insufficient relief for all parties interested, under the circumstances of this case, which are unusual. That therefore it is absolutely necessary, for the purposes aforesaid, and for the protection of the plaintiff, as well as the public, that an injunction be forthwith granted against all interference with the plaintiff in the collection of at least \$1.50 per 1,000 feet for its gas."

[4] The prayer for relief seems also to have been drawn with that dominating idea in mind. If it be the case, therefore, that the plaintiff seeks primarily the fixation of a new rate, that the other relief it desires is merely incidental to and complementary of such a fixation, and that it desires no relief unless it shall procure the fixation it so urgently insists upon, I shall deny its motion in toto. I do not think that anything could very well be clearer than that, under the American form of government, our courts are without power to fix a rate, and statements in and the reasoning of numerous decisions confirm what appears to be so plain upon principle. *Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339, 344, 12 Sup. Ct. 400, 36 L. Ed. 176; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 663, 15 Sup. Ct. 484, 39 L. Ed. 567; *Interstate Com. Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 499, 17 Sup. Ct. 896, 42 L. Ed. 243; *Minnesota Rate Cases*, 230 U. S. 352, 433, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Western Union Tel. Co. v. Myatt* (C. C.) 98 Fed. 335, 343; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 307, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116. Nor can I conceive of any possible situation involving even the most exceptional hardship to a utility company, that would justify a court in departing from its proper sphere of action by arrogating to itself what heretofore has been regarded as an exclusively legislative right. It may be true that no court has heretofore had occasion directly and expressly to pass upon an application for a fixation by it of a rate; but the judges who wrote in the cases I have referred to did have occasion to define the extent of judicial power in respect

of rate matters, and their expressions, dicta though many or all of them may possibly be, leave not the least room for doubt that in their view the fixation power is wholly legislative; and plaintiff's counsel appears to have been unable to discover a single expression of a contrary view in any adjudicated case.

It is urged that the plaintiff's situation is unusual in that under a recent decision (July 24, 1918) of Ex-Justice Charles E. Hughes, sitting as a referee in the case of Brooklyn Borough Gas Co. v. Public Service Commission, 17 State Dept. Rep. 81, a mere declaration that the statutory rate is confiscatory would leave the plaintiff without recourse to any existing governmental agency, except a Legislature not in session, for the fixation of a reasonable rate. Counsel for the Public Service Commission takes a different view, and contends that a judicial declaration that the existing statutory rate is confiscatory would leave the Public Service Commissions free to fix a rate under the powers vested in them by the Public Service Commissions Law. I express no opinion upon the subject, as I believe the question has no relevancy here. The plaintiff, if its view of the matter be correct, is in no worse case than if there were no Public Service Commissions in existence, and surely that absence of a very modern example of a delegated authority to exercise legislative functions cannot be given the effect of vesting in courts of law powers that are not only wholly foreign to their history and purpose, but the exercise of which by courts would subvert our entire scheme of a division of government into the executive, legislative and judicial departments.

I am not satisfied, however, that the plaintiff is willing to stand or fall, in respect either of preliminary or final relief upon its demand for a judicial fixation of a reasonable rate. Had the complaint been so drawn as to allow no escape from the conclusion that such a fixation was intended to be a *sine qua non*, the denial of the motion before me would necessarily follow. So, if plaintiff's counsel shall notify me that the plaintiff will be satisfied with nothing short of the fixation of a rate, I shall deny the motion. If, however, he shall notify me that his client will be satisfied with an injunction against the enforcement of the existing statutory rate, with appropriate relief incidental to such an injunction, I shall grant the motion to that extent, in which case I shall require a bond sufficient for the protection of the consumers.

Judgment accordingly.

(189 App. Div. 181)

In re AMETHYST ST., UNIONPORT ROAD, AND RHINELANDER AVE. IN
CITY OF NEW YORK.

Application of BAEOHLER.

(Supreme Court, Appellate Division, First Department. October 24, 1919.)

1. NAMES ¶18—PRESUMPTION THAT SAME NAME DESIGNATES SAME PERSON OR THING.

It will be assumed, in the absence of inherent improbability or proof to the contrary, that the same name at all times designates the same person or thing.

2. HIGHWAYS ¶17—PRESUMPTION THAT SAME NAME DESIGNATES SAME HIGHWAY.

The rule that it will be assumed that the same name at all times designates the same person or thing is especially applicable where the description by metes and bounds of a highway when originally laid out is given in terms of the then ownership of adjoining real estate.

3. HIGHWAYS ¶17, 79(2, 3)—ROAD SHOWN TO BE PUBLIC STREET PRESUMED TO CONTINUE SUCH.

When a highway is once shown to exist, it is presumed to continue until it is shown to exist no longer; when a highway is once established, it continues until discontinued according to law.

4. MUNICIPAL CORPORATIONS ¶854—EVIDENCE THAT ROAD CLOSED WAS A PUBLIC STREET.

On motion for an order directing commissioners of estimate to ascertain damages caused to petitioner's property by closing a road, question being whether such road was a public street, facts *held* to show that it was a public street.

Appeal from Special Term, New York County.

In the matter of the application of the City of New York relative to acquiring title, etc., to the lands, etc., required for the opening and extending of Amethyst Street, Unionport Road, and Rhineland Avenue. From an order denying the motion for an order directing the commissioners of estimate to ascertain and determine damages caused to the property of Charles H. Baechler by the closing of Unionport Road, he appeals. Reversed.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

Lawrence E. French, of New York City, for appellant.

William P. Burr, Corp. Counsel, of New York City (L. Howell La Motte, of New York City, of counsel, and Joel J. Squier, of New York City, on the brief), for respondent city of New York.

PAGE, J. The only question involved on this appeal is whether the moving papers show that Unionport road was a public street. It was shown from the town of Westchester records that a highway was laid out by the metes and bounds therein named in 1720; that this highway, under the name of Unionport road, was extended to the "Brunks" river in 1726, was shown by an extract from the County Road Book of Westchester county.

[1-3] The learned corporation counsel claims, however, that there is no evidence furnished by the petitioner that the Unionport road of to-day was the same as the Unionport road of 1726. It is not necessary for the petitioner to show this. It will be assumed, in the absence of inherent improbability or proof to the contrary, that the same name at all times designates the same person or thing. This rule is especially applicable where the description by metes and bounds of the highway when originally laid out is given in terms of the then ownership of adjoining real estate. Further, when a highway is once shown to exist, it is presumed to continue until it is shown to exist no longer; when a highway is once established, it continues until discontinued according to law. *Beckwith v. Whalen*, 65 N. Y. 322; *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397, 406, 407, 31 N. E. 887; *City of Buffalo v. D., L. & W. R. Co.*, 190 N. Y. 84, 96, 82 N. E. 513, 16 L. R. A. (N. S.) 506. Therefore the petitioner has alleged sufficient to show prima facie that the Unionport road as it exists to-day was legally established on or before 1726.

Furthermore, it was shown that in a partition action in 1893 a map was filed in the office of the register of Westchester county, showing that the property abutted on Unionport road. The petitioner states of his own knowledge that the Unionport road existed prior to 1895, when this territory was annexed to and became a part of the city of New York; that during all that time it was used by the public as a highway and street for both pedestrians and vehicles, and that since 1895 the street was cleaned by the street cleaning department, patrolled by the police department, and that street lamps were erected and maintained by the city. It further appears that the board of aldermen of the city of New York on July 26, 1904, adopted an ordinance, previously adopted by the board of estimate and apportionment and thereafter approved by the mayor, which provided that the route of the New York, Westchester & Boston Railway Company should cross Unionport road. The ordinance provided that no street should be crossed by the railway at grade, and that all streets now opened and in use, crossing the line of said railway, must be carried over or under the railway by and at the cost and expense of the railway company. On June 17, 1911, the city filed section 37 of the final map in the office of the register of New York county. On this map Unionport road was continued with grades passing under the structure of the railway. On October 5, 1911, the board of estimate and apportionment approved the plan of the bridge for carrying the tracks of the railway company over Unionport road. The bridge was erected, and the railroad is now in operation and crosses the bridge. On July 10, 1913, an amendment of the map of section 37 was filed in the New York county register's office, upon which the portion of Unionport road involved in this proceeding was omitted, and, as other streets bounding the block were graded at that time, this portion of Unionport road thereby was closed.

[4] From this statement of the facts it is clear that Unionport road was a public street. Not only was it shown to have been legally opened, but also it was shown to be such by long public use and acts of

the public authorities in recognizing and adopting the highway. *Matter of Hunter*, 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616.

The order should be reversed, with \$10 costs and disbursements, and the motion granted. Order filed. All concur.

LEVY v. SHOUR,

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

PRINCIPAL AND AGENT ~~§~~146(2)—LIABILITY OF AGENT OF UNDISCLOSED PRINCIPAL.

An agent, acting for an undisclosed principal, who signed contract in his own name, is individually liable, though he described himself in the order constituting the memorandum of sale as a manufacturer's selling agent.

Appeal from City Court of New York, Trial Term.

Action by Meyer Levy against Louis N. Shour. From a judgment dismissing plaintiff's complaint at the close of the opening of his counsel, and from an order denying motion for new trial, plaintiff appeals. Judgment reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Greenberg & Levy, of New York City (Alex B. Greenberg, of New York City, of counsel), for appellant.

Samuel S. Breslin, of New York City (Budd S. Weissner, of New York City, of counsel), for respondent.

DELEHANTY, J. The action is to recover damages for failure of defendant to deliver certain merchandise sold the plaintiff pursuant to a written order in which defendant described himself as follows: "Louis N. Shour, manufacturers' selling agent"—and signed "L. N. Shour." Nothing contained in the paper indicated for whom defendant was acting as agent, nor is the name of any alleged principal disclosed thereby. These facts having been stated in the opening of plaintiff's counsel, the court then dismissed the complaint, on the ground that no personal liability existed against defendant.

Under the well-established rule, it requires no extended citation of authority to show that an agent acting for an undisclosed principal becomes personally liable upon his contract. In *Meyer v. Redmond*, 205 N. Y. at page 483, 98 N. E. at page 908, 41 L. R. A. (N. S.) 675, the court cites with approval the doctrine upon this subject as laid down in *Magee v. Atkinson*, 2 Mees. & Wels. R. 440, as follows:

"At this day the law must be considered as settled that a vendor or purchaser dealing in his own name, without disclosing the name of his principal, is personally bound by his contract, and it makes no difference that he is known to the other party to be an auctioneer, or broker, who is usually employed in selling property as the agent for others. Even where he discloses the name of his principal, if he signs a written contract in his own name mere-

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ly, which contract does not upon its face show that he was acting as the agent of another, or in an official capacity in behalf of the government, he will be personally bound thereby."

The facts presented herein are well within the authority cited, and lead to the conclusion that the complaint was unwarrantably dismissed.

Judgment reversed, and new trial granted, with costs to appellant to abide event. All concur.

(108 Misc. Rep. 291)

MELISH v. NEW YORK CONSOL. R. CO.

(Supreme Court, Trial Term, Kings County. July, 1919.)

1. NEW TRIAL $\S$ 76(1)—SETTING ASIDE EXCESSIVE VERDICT IN DISCRETION OF COURT.

The authority conferred upon the trial court by Code Civ. Proc. $\S$ 999, to set aside a verdict because it is for excessive damages, involves the exercise of a sound judicial discretion, but the power in a proper case must be exercised.

2. DAMAGES $\S$ 132(7)—EXCESSIVE DAMAGES FOR PERSONAL INJURY REDUCED.

Where eminent clergyman fell in nighttime by stepping into open space on defendant's unlighted, unguarded elevated railroad stairs to a station, where a step was out, and fractured his right wrist and his hip bone, resulting in a permanent limp and a permanent impairment of motion in hand and wrist, though able to write without substantial physical restriction and to follow his vocation, and incurred \$2,000 expenses, without loss of salary, a verdict of \$48,000 was excessive, and under Code Civ. Proc. $\S$ 999, would be reduced to \$30,000.

Action by John Howard Melish against the New York Consolidated Railroad Company. On motion by defendant to set aside a verdict of \$48,000 for personal injuries as excessive. Verdict reduced to \$30,000, to follow upon plaintiff's filing of the usual stipulation.

Edward J. Byrne, of Brooklyn, for plaintiff.

Thomas L. Hughes, of New York City, for defendant.

KAPPER, J. [1] The authority conferred upon the trial court by section 999 of the Code of Civil Procedure to set aside a verdict because the same is for excessive damages, involves the exercise of a sound judicial discretion. The power in a proper case must be exercised. The courts, as was said by Mr. Justice Cullen in *Meade v. Brooklyn Heights R. R. Co.*, 3 App. Div. 432, 39 N. Y. Supp. 320, "are very chary of interfering with the award of damages made by juries, but there must come a point at which it is our duty to intervene."

[2] In the present case, the plaintiff recovered a verdict of \$48,000 for personal injuries. He is a clergyman of eminence. He had a severe fall, occasioned by stepping into an open space in the nighttime on the defendant's unlighted and unguarded elevated railroad stairs leading to one of its stations, where one of the steps was out. He was serious-

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ly injured. His right wrist was badly fractured and his hip bone suffered a similar result. He walks with a limp, and has not the free use of his right hand. Notwithstanding these serious impairments, he is enabled to follow his vocation and to write without substantial physical restriction. His expenditures incurred in an endeavor to effect a cure amounted to upwards of \$2,000. He seems to have suffered no other actual money loss, in so far as concerns a diminution of his salary, nor a depreciation thereof during his disability. Such injuries as he suffers from to-day—that is, the limping due to some shortening of the leg, and the lack of grasp and impairment of motion in the right hand and wrist—are permanent. Defendant insists that the verdict should not have exceeded \$10,000, while the plaintiff quite naturally contends that the verdict should not be disturbed.

"I know of no precedents that establish a schedule of compensation for injuries, and certainly there is none that binds a trial court in the exercise of its sound discretion upon the facts of any particular case. Prior decisions may guide and enlighten the court, and, in a sense, may constrain it; but they need not restrain it, for the reason that no two cases morally can present precisely similar circumstances of pain, suffering, impairment, or of loss." *Per Jenks, J., in Mullady v. Brooklyn Heights R. R. Co., 65 App. Div. 549, 551, 72 N. Y. Supp. 911.*

There must, however, at this period of time be a consideration of the purchasing power of the dollar. The diminished extent to which money will go is a factor that cannot be ignored. Hence changed conditions in that respect demand a changed standard. Had this verdict been rendered five years ago, I doubt whether it would be questioned, even by the prevailing litigant, that the result was out of all proportion and reason. I am unable to accept defendant's view, for the evidence of permanent suffering is clear and satisfactory, although it may not at present appear that there will be an actual diminution in plaintiff's earning power. But with a permanent crippling, such as is here established, it is not too speculative to say that plaintiff's future earning capacity may be affected. I have considered the case in all its aspects with due care, and am constrained to reach the conclusion that the verdict was unduly enlarged by the belief which must have been entertained by the jury that the defendant exercised practically little or no care and that its negligence was gross. I feel that the duty resting upon me under the Code requires a reduction of the verdict to the sum of \$30,000, which will accordingly follow upon the plaintiff's filing the usual stipulation.

Ordered accordingly.

SILBERSTEIN et al. v. MITTELMAN et al.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

PRINCIPAL AND AGENT **§123(7)—EVIDENCE OF AUTHORITY OR RATIFICATION**
ADMITTING ORDER GIVEN SALES AGENT.

In an action against vendors for failure to deliver, evidence of authority or ratification *held* sufficient to authorize the admission in evidence of the order given by plaintiff vendees to the vendors' claimed agent, so that it was error to dismiss the complaint.

Appeal from City Court of New York, Trial Term.

Action by Solomon Silberstein and others against Isaac Mittelman and another. From a judgment dismissing the complaint, and from an order denying their motion for new trial, plaintiffs appeal. Judgment and order reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Burnstine & Geist, of New York City (Abraham A. Hoffman, of New York City, of counsel), for appellants.

Marks & Marks, of New York City (Harry M. Marks and Henry Pearlman, both of New York City, of counsel), for respondents.

GUY, J. In this action for breach of vendors' agreement to deliver, the trial judge dismissed the complaint at the close of plaintiffs' case.

Plaintiffs claim that the alleged contract, by which defendants agreed to furnish 15 cases of linen, was made with one Solomon as agent of defendants.

Subsequent to the giving of the order 9 cases were delivered by defendants and paid for. At the opening of the trial defendants' counsel admitted that Solomon called upon the defendants and was told what he could sell for the defendants, and that he made a sale. An employé of the plaintiffs testified that after the alleged default of the defendants in furnishing the balance of the order he called upon the defendant Mittelman; that they talked about the sale that was made through Solomon, and Mittelman said that the reason for the non-delivery of the balance of the goods was because there was a strike, and transportation on the railroads was very bad; and that the best Mittelman could do at that time was to give plaintiffs 1 case that he had on hand, and 2 other cases when he got them in, provided he got a written release from the plaintiffs.

Although the evidence of authority or of ratification was slight, it was sufficient to authorize the admission in evidence of the order given Solomon, and it was error to dismiss the complaint. *Mullen v. Quinlan Co.*, 195 N. Y. 109, 87 N. E. 1078, 24 L. R. A. (N. S.) 511.

Judgment and order reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

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(189 App. Div. 140)

In re McGRATH.

(Supreme Court, Appellate Division, First Department. October 21, 1919.)

1. MANDAMUS $\S$ 168(2)—To COMPEL PLACING NAME ON BALLOT OF PERSON HOLDING CERTIFICATE OF INDEPENDENT NOMINATION.

Under Election Law, $\S$ 123, subd. 6, providing that the name of no person signing a certificate of independent nomination can be counted, unless such person shall be registered on one of the days of registration, a candidate named in such certificate is not entitled to have granted his application for an order compelling the board of elections to place his name on the ballot without proof that a sufficient number of his nominators had registered.

2. MANDAMUS $\S$ 143(1)—DISMISSAL OF APPLICATION TO PLACE NAME ON BALLOT AS PREMATURE ERRONEOUS.

Where objections were filed to a certificate of independent nomination for office of justice of the Municipal Court of New York City, and the board of elections declined to place the candidate's name on the ballot, *held*, the application for an order requiring placing of the name on the ballot should not have been dismissed as premature by the Special Term, the matter being one of public interest, even though the applicant did not show that a sufficient number of his nominators had registered and the time for registration had not expired, for public policy required the court to entertain the application in advance of the completion of registration, to the end that all questions might be promptly decided.

3. ELECTIONS $\S$ 153—JURISDICTION OF BOARD OF ELECTIONS ON OBJECTIONS TO CERTIFICATE OF NOMINATION.

Under Election Law, $\S$ 184, providing that questions raised by written objection to a certificate of independent nomination shall be passed on as provided in section 125, which relates to party devices, and declares that questions shall be determined upon application to the Supreme Court, board of elections of city of New York, with which was filed a written objection to a certificate of independent nomination on the ground that a sufficient number of nominators had not registered, has no jurisdiction to determine that question; its duties being wholly ministerial.

4. ELECTIONS $\S$ 144—DUTIES OF BOARD OF ELECTIONS.

As Election Law, $\S$ 190, enjoins upon the board of elections the duty of enforcing the election laws, it is the duty of the board to refrain from acting upon papers purporting to be certificates of nomination, which do not appear on the face thereof to be executed in the form and manner required by law.

5. ELECTIONS $\S$ 153—OBJECTIONS TO CERTIFICATE OF INDEPENDENT NOMINATION UNNECESSARY.

As Election Law omits provision of earlier law that certificates of independent nomination to which no objection is filed are to be deemed valid, if apparently conforming to statute on their face, such rule does not apply to certificates of independent nomination, and they may be held invalid without objection.

Appeal from Special Term, New York County.

In the matter of the application of Patrick J. McGrath for an order directing the Board of Elections of the City of New York to print his name on the official ballot at the general election to be held November 4, 1919, as candidate of the Home Rule party for the office of Justice of the Municipal Court, Borough of Manhattan, Sixth District. From an order denying the application, applicant appeals. Order reversed, and matter remitted to Special Term for hearing on the merits.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

H. & J. J. Lesser, of New York City (Jacob J. Lesser, of New York City, of counsel, and Samuel F. Hyman, of New York City, on the brief), for appellant.

William P. Burr, Corp. Counsel, of New York City (Russell Lord Tarbox, of New York City, of counsel, and John F. O'Brien, of New York City, on the brief), for respondent.

LAUGHLIN, J. The application for an order directing the board of elections to print the name of Patrick J. McGrath on the official ballot as the candidate of the Home Rule party for justice of the Municipal Court was presented on an order to show cause, based on an affidavit made by him and on two letters from the board of elections annexed thereto.

So far as material to the points presented for decision, the affidavit shows that on the 11th day of September, 1919, a certificate of independent nomination of the Home Rule League, nominating the affiant for said office, "was duly filed" with said board; that it was "in form, as provided for by law and contained the names of about 3,964 electors, residents of the said Municipal Court district, all of whom were qualified to sign the said certificate of independent nomination as deponent is informed and verily believes"; that the number of electors essential to file such a certificate was 2,210; that on the 14th day of September, 1919, objections to said certificate were duly filed with said board by one De Hayes, claiming to be an elector in said district; that on the 15th day of September, 1919, affiant obtained an order directing said De Hayes to show cause at Special Term why a hearing on the objections should not be had, and on the 17th of September, 1919, said application was denied on the ground that it was premature, and an appeal from that order was taken to this court, where it was then pending; that the objections filed by De Hayes have not been heard or determined, and are still pending; that on the 17th of September, 1919, the board of elections objected to the name by which the independent body was designated on said certificate of nomination, and that the name was thereafter duly changed to "Home Rule"; that on the 8th of October, 1919, the affiant received a letter from the board of elections dated the day before, stating that his name would not appear on the official ballot, because the certificate purporting to nominate him for said office failed to comply with the requirements of section 123 of the Election Law (Consol. Laws, c. 17)

"for the following reasons, among others. That many of the signatures to the aforesaid certificate of nomination purport to have been taken before witnesses who did not reside at the same address or within the same election district for the last two general elections; that no character certificates have been filed for many of the witnesses taking signatures, and also that many of the persons signing the said certificate are not residents of the Sixth Municipal Court district, and as a result thereof the certificate fails to contain the requisite number of valid signatures."

[1, 2] This court is reversing herewith, without opinion, the former order denying the application as premature and remitting the matter to the Special Term for a hearing on the merits. Subdivision 6 of section 123 of the Election Law provides, among other things, that the

name of no person signing such a certificate of nomination shall be counted, unless such a person shall be registered on one of the days of registration. The last day of registration was October 11th. In view of this statutory provision it is manifest that the right of a person so nominated to have his name printed on the official ballot depends upon, among other things, whether before or after filing the certificate of nomination a sufficient number of electors signing same shall have registered or shall register, and consequently, without proof of that essential fact, the application of the appellant could in no event be granted.

The appellant did not show that a sufficient number of his nominators had registered, and, inasmuch as the period for registering had not expired, the court denied the application as premature. Of course, this appellant was not entitled then, in any event, to an order requiring the printing of his name on the official ballot, for his due nomination for the office depended on whether or not a sufficient number of his nominators registered for the election. We are of opinion, however, that, this being a matter of public interest, and the time for the determination of objections being comparatively short, public policy required that the court entertain the application in advance of the completion of the registration, to the end that all questions presented, relating to the validity and sufficiency of the certification of nomination, might be promptly decided, leaving only the question with respect to registration, which would be immaterial if the other objections to the nominating certificate should be sustained.

[3] The motion for the order from which this appeal was taken was also made before the last day of registration, and it does not appear that the requisite number of those who signed the nominating certificate had registered. The appellant did not ask for a hearing on the objections, but prayed a peremptory order requiring the printing of his name on the ballot, on the ground that the board was without jurisdiction to determine that it would not be so printed, as evidenced by its letter of October 7th or otherwise. It is quite evident that the petitioner, in making his second application, proceeded in disregard of the objections raised to the certificate of nomination, for in his affidavit he does not attempt to meet them, and does not show that the certificate of nomination was executed in the manner and form required by law or that it was sufficient. The certificate of nomination is neither annexed to nor made a part of the motion papers, and sufficient facts were not shown to enable the court to decide the questions arising on the objections thereto. The appellant attempts to justify his second application to the court by said letter of October 7th, which he seems to regard as removing his nominating certificate from the files of the board. It, however, had no such effect, and the board had no authority to pass upon the objections filed.

From the enactment of the Election Law, being chapter 909 of the Laws of 1896, until the amendments thereto made by chapter 649 of the Laws of 1911, the board, with whom independent nominating certificates were filed, was authorized in the first instance to pass upon the objections filed thereto and was likewise authorized to determine con-

troversies with respect to party emblems (sections 56, 57, and 65 of chapter 909 of the Laws of 1896). Under the former statute as under the present law, a written objection to any certificate of nomination might be filed within three days after the certificate was filed (section 13, c. 262, Laws 1890; section 66, c. 680, Laws 1892; sections 56, 65, and 134, Election Law of 1896, c. 909 and section 13 of chapter 262, Laws of 1890 and section 65 of chapter 680, Laws of 1892, provided that all certificates of nomination in apparent conformity with the provisions of the statute should be deemed valid, unless objections thereto were made as therein provided.

In the enactment of the Election Law of 1896 the provision to the effect that the certificate should be deemed valid unless objections thereto were filed was omitted. Under the statute as it existed before this provision was omitted, it was held that, where no objection was filed to such certificate, the nomination was to be deemed valid, and the official or officials with whom the certificate was filed had no jurisdiction in the premises, other than the ministerial duties enjoined on them by the statute, on the assumption that the nomination was valid. In *re Cowie* (Sup.) 11 N. Y. Supp. 838. See, also, *People ex rel. Tuers v. Dooling*, 69 Misc. Rep. 391, 125 N. Y. Supp. 857, affirmed 141 App. Div. 918, 125 N. Y. Supp. 857. It thus appears that, while the board of elections was authorized in the first instance to pass upon the objections duly filed to the nominating certificates, it had not, at least not prior to 1896, jurisdiction to inquire into the validity of such nominating certificates, if they were in apparent conformity with the provisions of the statute.

But the authority of the board of elections to pass upon the objections filed to nominating certificates and to determine conflicts with respect to party emblems was repealed by the said chapter 649 of the Laws of 1911, by section 134 of which it was provided that the question raised by a written objection to a certificate of nomination should be passed upon as provided in section 125; and in section 125 it was provided that "any question arising with reference" to any device or party name, "or with reference to the construction, sufficiency, validity, or legality of any such certificate," should be determined "upon the application of any citizen" by the Supreme Court or a justice thereof within the district, or county judge of that county, and that the final order of Special Term must be made on or before the twelfth day, or in the case of a certificate of nomination of town or village officer, seven days preceding the day of election. These were important amendments, and indicate quite clearly that in changing to an original hearing, on the objections in court what was formerly a review of the action of the board thereon, the Legislature intended to divest the board of any power or authority to pass upon the questions presented by the objections filed to the certificate of nomination. I think that the duties of the board of elections with respect to the receiving and filing of certificates of nomination are now wholly ministerial.

[4, 5] The duty of executing the election laws, however, is expressly enjoined upon the board by section 190 of the Election Law. Therefore it is its duty to refrain from acting upon papers purporting to be

certificates of nomination which do not appear on the face thereof to be executed in the form and manner required by law. In other words, it must refrain from acting upon a certificate which is invalid on its face; but the board has no judicial power to investigate or decide with respect to the validity of such a certificate depending on matters dehors the record. That the former rule, that all certificates to which no objection is filed are to be deemed valid, no longer obtains, is shown by implication by *Matter of Greenwald v. Boyle*, 179 App. Div. 672, 167 N. Y. Supp. 154, affirmed 221 N. Y. 688, 117 N. E. 1068, where the board, as here, gave notice after a certificate had been on file with it 11 days, and no objection thereto had been filed, that it deemed the certificate insufficient, and the court instead of deciding that it was too late to question the sufficiency of the certificate, or that the court had no authority or duty in the premises other than to act upon the certificate as valid, proceeded to decide whether or not the certificate was valid and sufficient, and decided that it was, and ordered the board to so regard it. The same is implied from *Matter of Stoddard*, 158 App. Div. 525, 143 N. Y. Supp. 739, wherein it was held that the validity of such a certificate could not be decided until after the registration was complete, although that was after the time prescribed for filing objections, and the court there also held that, on objections being then filed, the validity of nominating signatures could be judicially considered.

The only authority cited in support of the claim that the board may investigate and decide any question with respect to the validity of such certificates is subdivision (2), of section 760 of the Penal Law (Consol. Laws, c. 40), which provides that a person who—

"files or receives for filing a certificate of nomination, knowing that any part thereof was falsely made, * * * is punishable by imprisonment for not more than five years."

Those provisions did not warrant the board in rejecting the certificate of nomination on the ground that in its opinion certain signatures thereon were forged, for manifestly the members of the board run no risk of prosecution under the statutory provisions last quoted for not rejecting a certificate of nomination which they merely suspect, or are of opinion is in part forged. The jurisdiction of the board, therefore, was limited to an examination of the face of the certificate of nomination and to counting the names of the nominators who registered. In so far as its letter indicates that it went beyond this, its action was null and void, and the certificate is deemed to be and remain on file and of precisely the same force and effect as if such action of the Board had not been taken.

We might well affirm the order on the ground that the second application was made in disregard of the objections; but the objections were presented by the former application, and we think that both applications should be remitted to the Special Term, for a hearing on the merits with respect to the objections filed, the sufficiency of the certificate of nomination on the face of the papers required to be filed and of the registration of nominators, but without costs. All concur.

(189 App. Div. 135)

In re MURPHY.

(Supreme Court, Appellate Division, First Department. October 21, 1919.)

1. ELECTIONS §=144—CANDIDATE BY INDEPENDENT CERTIFICATE OF NOMINATION.

A candidate who presents an independent certificate of nomination is not entitled to an order compelling the board of elections to print his name on the official ballot, without showing that the certificate was in due form, duly executed, and that the required number of nominators had registered.

2. MANDAMUS §=169—DISMISSAL OF APPLICATION TO PLACE NAME ON BALLOT PREMATURE.

An application by a candidate who presented an independent certificate of nomination for an order compelling the board of elections to place his name on the official ballot should not, where the time was short, be dismissed by the Special Term, although the period of registration had not expired, and it was not shown that a sufficient number of nominators had registered; but the Special Term should entertain the application, and, after determining whether it was in proper form, ascertain whether sufficient number of nominators had registered.

3. ELECTIONS §=153—DUTIES OF BOARD OF ELECTIONS AS TO INDEPENDENT CERTIFICATE OF NOMINATION.

Duties of board of elections with respect to independent certificates of nomination are wholly ministerial, and such board has no power to go outside of, beyond, or behind the records, or to pass on questions involving matters which require evidence dehors the record.

4. ELECTIONS §=158—EFFECT OF FILING OF CERTIFICATE OF INDEPENDENT NOMINATION.

While the duties of the board of elections are, under Election Law, §§ 123, 124, 128, purely administrative, jurisdictional defects in a certificate of independent nomination are not waived by the receipt and filing of the petition by the board.

5. ELECTIONS §=153—DUTY OF BOARD OF ELECTIONS TO EXECUTE ELECTION LAWS.

Under Election Law, §§ 122, 123, 128, 134, 190, the board of elections, while its duties are ministerial and subject to judicial review under section 125, is bound to execute the election laws, and to count the number of nominators who have registered, and determine in the first instance whether the certificate is in due form.

Appeal from Special Term, New York County.

In the matter of the application of Harry J. Murphy for an order directing the Board of Elections of the City of New York to print his name on the official ballot at the general election to be held on November 4, 1919, as candidate of the Home Rule party for the office of Member of Assembly for the Sixteenth Assembly District, New York County. From an order denying the application (179 N. Y. Supp. 619), applicant appeals. Reversed, and matter remitted to Special Term for hearing.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

H. & J. J. Lesser, of New York City (Jacob J. Lesser, of New York City, of counsel, and Samuel F. Hyman, of New York City, on the brief), for appellant.

William P. Burr, Corp. Counsel, of New York City (Russell Lord Tarbox, of New York City, of counsel, and John F. O'Brien, of New York City, on the brief), for respondent.

LAUGHLIN, J. The application was presented on an order to show cause based on the appellant's affidavit and two letters of the respondent, annexed thereto. The affidavit shows that a certificate of independent nomination of the Home Rule League, nominating the affiant for said office, was filed with the board of elections on the 2d day of September, 1919, and that it was in form "as provided for by law," and contained the names of about 1,500 electors, residents of said assembly district, all of whom were duly qualified to sign said certificate, as he was informed and verily believed; that the requisite number of electors was 928; that no objection was filed to the certificate within the statutory period therefor; that objection by the board by letter of September 17th was made to the party name, and it was changed to "Home Rule," and that on the 8th of October he received a letter from the board, dated the day before, stating that his name would not appear on the official ballot, for the reason that the certificate purporting to nominate him failed, to comply with section 123 of the Election Law—

"for the following reasons, among other things: That many of the signatures to the aforesaid certificate of nomination purport to have been taken before witnesses who did not reside at the same address or within the same election district for the last two general elections, and also that many of the signatures of persons of same name and residence on both certificates and signature book of last registration were very evidently written by different persons, and as a result thereof the certificate fails to contain the requisite number of valid signatures."

[1, 2] The board presented no affidavit in opposition to the motion. The nominating certificate was not made part of the motion papers, and it does not clearly appear to what extent, if any, the objections made thereto by the board in said letter are based upon what is shown on the face of the paper required to be filed. It was not shown whether or not the requisite number of nominators registered and the registration was not complete when the motion was made. For the reasons stated in the opinion of Matter of McGrath, 189 App. Div. 140, 178 N. Y. Supp. 231, handed down herewith, we are of opinion that appellant was not entitled to the order prayed for without showing that the certificate of nomination was in due form and duly executed as required by the statute, and that the requisite number of nominators duly registered, and on that ground the order might be affirmed, without prejudice to another application on sufficient papers; but, in view of the limited time before it becomes necessary to have the names of candidates published and the ballots printed, we think the application should not be scrutinized technically, and the court should have entertained it, and should have required the production of the certificate of nomination and of matters of record, and thereupon should have summarily decided whether the certificate was valid and sufficient on its face and on matters of record required in connection therewith, and, if so, then whether a sufficient number of the nominators registered.

[3] As is shown in the opinion in the McGrath Case, the authority of the board was wholly ministerial, and it had no power to go outside of, beyond, or behind the records, and was not authorized to pass

upon any question relating to the forgery of the name of any nominator, notary, or subscribing witness, and, inasmuch as no objection to the certificate was filed, the court likewise was confined to matters of record.

[4, 5] The Legislature undertook to prescribe definitely the requisites of a valid nominating certificate and with respect to the sufficiency thereof. It is provided, among other things, by section 123 of the Election Law (Consol. Laws, c. 17), that the nominators need not all sign the same certificate, and consequently, where a certificate is presented, the board is not then called upon to determine upon the sufficiency of the number of signers. Moreover, the statute prescribes the period within which certificates may be filed (Election Law, § 128), and it is manifest that the statute contemplates that such certificates shall be filed when presented, for section 134 of the Election Law provides that the time from which the period for filing objections runs is the time of the filing of the nominating certificate. If such a certificate be presented at the last moment permitted by law for filing, it might be impossible for the board to pass upon the sufficiency of the certificate on its face instantly. I am of the opinion, therefore, that while the powers and duties of the board of elections are ministerial only, jurisdictional defects are not waived by the receipt and filing of the certificate, and if the certificate be not substantially in the form and executed and authenticated in the manner required by law, it is invalid, and remains invalid, although it may have been received and filed by the board.

By said section 123 it is provided that the nominating certificate may be executed by the electors, by making oath before a notary or other officer, whose certificate shall be attached. The form of the nominating certificate is prescribed in said section, and it is expressly provided that every such certificate shall be substantially in that form. An alternative method of authentication is prescribed, and by it the elector signs in the presence of a subscribing witness, and the statute prescribes the qualifications of such witnesses, but does not provide that all the qualifications shall be shown on the nominating certificate. It does, however, prescribe the form of oath to be executed by the subscribing witness and attached to the nominating certificate, in which the subscribing witness is required to swear to all his qualifications, excepting that he is a freeholder or has been a resident of the county for five years. The statute further requires that there shall be filed in the office of the board a certificate by certain persons in the form required with respect to the good character of subscribing witnesses. It is then provided in subdivision 4 of section 123 that a person making a false affidavit, certificate, or statement, or an officer knowingly signing a certificate to a false affidavit, certificate, or statement, is guilty of a misdemeanor and shall be punished as therein provided. It is finally provided in subdivision 6 of that section that no name of a person signing the certificate of nomination shall be counted, unless he shall have registered as a qualified voter on one of the days of registration. Section 122 of the Election Law pre-

scribes the number of nominators required on an independent certificate of nomination.

There is no express provision in the statute with respect to who shall determine whether a sufficient number of the nominators are registered; but, since there is no duty devolved upon the board to present the question for judicial decision, it is manifest that the duty of counting the number of nominators who have registered devolves upon the board under section 190, which requires the board to execute the election laws. That likewise, however, is a ministerial duty, and is, of course, subject to judicial review under section 125 of the Election Law, which provides, among other things, that any question arising with respect to the "construction, sufficiency, validity or legality" of any certificate shall be determined by the Supreme Court or a justice thereof or the county judge "upon the application of any citizen." No objection having been filed to the certificate nominating the appellant, no objection depending on evidence dehors the record is now available; but he is not, as his counsel seems to think, entitled, regardless of the validity of the nominating certificate on the face of the records, and of whether the requisite number of the nominators have registered, to have his name printed on the official ballot.

The order is therefore reversed, without costs, and the matter remitted to the Special Term for a hearing in accordance with views herein expressed. All concur.

(109 Misc. Rep. 158)

PEOPLE ex rel. SMALL v. LEO et al.

(Supreme Court, Special Term, Kings County. October 15, 1919.)

LIVERY STABLE AND GARAGE KEEPERS ~~§ 41½~~—ERECTION OF GARAGE IN BUSINESS DISTRICT PROHIBITED.

Building Zone Resolution July 25, 1918, § 4, subd. 15, *held* to prohibit erection of public garage in business district, notwithstanding existence of garage on opposite side of street not in business district, since section 7, subd. (e), permitting erection of garage "in any portion of a street between two intersecting streets in which portion there exists a garage," refers by use of words "in which portion" to that portion within business district.

Certiorari by the People, on the relation of August Small, against John P. Leo and others, constituting the Board of Appeals for the City of New York, and the Liberty-Wyona Company. Writ sustained, and resolution of Board reversed.

Levy, Gutman & Goldberg, of Brooklyn, for petitioner.

William P. Burr, Corp. Counsel, of New York City (Joseph I. Berry and F. E. V. Dunn, both of New York City, of counsel), for defendants.

Meier Steinbrink, of Brooklyn, for intervener.

FABER, J. This proceeding was instituted by the relator, who is the owner of premises situated at the northeast corner of Frank-

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lin avenue and President street, in the borough of Brooklyn, to review the action of the board of appeals in granting to the owner of premises located at the northwest corner of said Franklin avenue and President street permission to erect thereon a public garage. The superintendent of buildings refused to grant the permit upon the ground that the premises upon which such garage was proposed to be erected were located within a business district, and therefore the erection of a garage thereon would be in violation of section 4, subd. 15, of the building zone resolution adopted July 25, 1916, by the board of estimate and apportionment of the city of New York, which prohibits the erection of garages for use by more than five motor vehicles in a business district, subject, however, to the exceptions contained in section 7, subd. (e), of said resolution. An appeal was taken by the respondent intervener from the decision of the superintendent of buildings to the board of appeals, and such board, after a hearing of the matter, reversed the decision of the superintendent and granted the desired permit. The premises owned by the respondent intervener are concededly located in a "business zone," as established by said zone resolution. Section 4, subd. 15, of said building zone resolution provides as follows:

"Sec. 4. *Business Districts.*—In a business district no building or premises shall be used, and no building shall be erected which is arranged, intended or designed to be used, for any of the following specified trades, industries or uses: * * * (15) Garage for more than five motor vehicles. * * *

Section 7, subd. (e), of said zone resolution, as amended, provides as follows:

"Sec. 7. *Use District Exceptions.*—The board of appeals * * * may in appropriate cases * * * determine and vary the application of the use district regulations herein established in harmony with their general purpose and intent, as follows: * * * (e) Permit in a business district the erection or extension of a garage or stable in any portion of a street between two intersecting streets in which portion there exists a garage for more than five motor vehicles or a stable for more than five horses at the time of the passage of this resolution. * * *

It is claimed by the respondent intervener that a garage for more than five motor vehicles exists on the south side of said President street, between said Franklin avenue and Classon avenue (which is the street one block west of Franklin avenue), and therefore subdivision (e) of section 7 applies, and that the decision of the board of appeals is correct. With this contention I am unable to agree, for the reason that the alleged existing garage on the south side of President street is 100 feet west of Franklin avenue and is not within the "business district" zone, and therefore does not come within the provisions of the section which reads:

"* * * In any portion of a street between two intersecting streets in which portion there exists a garage."

The words "in which portion" mean clearly that portion within the business district.

The writ should be sustained, with costs, and the resolution of the board of appeals reversed.

(189 App. Div. 173)

STABILIMENTO METALLURGICO LIGURE v. JOSEPH.

(Supreme Court, Appellate Division, First Department. October 24, 1919.)

1. SALES §150(1)—BREACH OF CONTRACT TO DELIVER.

One who repudiates a contract to deliver goods is liable in damages.

2. PLEADING §51—COMPLAINT STATING SEPARATE CAUSES DEFECTIVE.

A complaint stating that an Alabama corporation contracted to deliver steel rails, but failed to do so, and that such corporation transferred its assets and liability to a Texas corporation, and that the Texas corporation transferred its assets and liability to defendant, and that the Alabama corporation and Texas corporation had both repudiated the contract, and that defendant was the sole stockholder in the Alabama corporation and the Texas corporation, was bad, in that it contained allegations appropriate to three different causes of action.

3. PLEADING §427—OBJECTION TO EVIDENCE AS NOT WITHIN ISSUES.

Where a defendant does not demur to a complaint, which states allegations appropriate to several causes of action, but answers, he cannot upon the trial object to the reception of evidence, on the ground that it was immaterial upon the theory which he supposed was the cause of action set forth, if such evidence was material on another, which plaintiff contended was the cause of action he intended to allege.

4. PLEADING §38½—OFFICE OF COMPLAINT.

The office of a complaint is to inform the defendant with reasonable certainty of the cause of action that the plaintiff claims he has against him, that the defendant may be able to plead.

5. PLEADING §52(2)—SEPARATE STATEMENT OF CAUSES OF ACTION.

If the statement of facts in the complaint is such that there might be two distinct causes of action stated, and such was the purpose of plaintiff, the defendant is entitled to have each cause of action separately stated and numbered, under Code Civ. Proc. § 481, subd. 2, and section 483, notwithstanding section 519, which provides that allegations must be liberally construed, etc.

6. PLEADING §204(3)—DEMURRER TO ONE OF SEVERAL CAUSES OF ACTION ALLEGED.

Where a complaint states several causes of action, defendant may demur to one and answer the others.

7. PLEADING §11, 22—MATTERS OF EVIDENCE AND REPETITIONS.

A pleader should allege the ultimate facts which he must prove to sustain his cause of action, and not the evidence tending to establish those facts, and should bear in mind that continued repetition of fact once well pleaded adds nothing to its force and value, and is condemned.

Appeal from Special Term, New York County.

Action by the Stabilimento Metallurgico Ligure against Leonard Joseph. From an order denying a motion for an order directing the plaintiff to make the allegations of the complaint definite and certain, to strike therefrom allegations which are immaterial and redundant, to strike therefrom allegations which are evidentiary, and to separately state and number the various causes of action which are set forth in the complaint, defendant appeals. Reversed, with leave to amend.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

Sporborg & Connolly, of Port Chester (William D. Sporborg, of New York City, of counsel), for appellant.

Hunt, Hill & Betts, of New York City (William M. Aydelotte, of New York City, of counsel), for respondent.

PAGE, J. The complaint sets forth six causes of action arising upon six different contracts of sale of merchandise. These are separately stated and numbered. The defendant contends that within the allegations of each cause of action there are stated facts which might give rise to several causes of action, and that by reason thereof, and the redundant statement of facts, evidence, and conclusions of law, the complaint is so indefinite and uncertain that the issue tendered cannot be determined. In my opinion, this criticism of the complaint is well founded. To review the complaint in detail, and specifically point out the immaterial and redundant matter, or to demonstrate the allegations therein, which, grouped under one specified cause of action, in reality set forth three distinct theories of liability, would be impossible, without exceeding the reasonable limits of an opinion. The same vices appear in each separately stated cause of action. A brief statement of the first cause of action will suffice to demonstrate the uncertainty and lack of definiteness of the complaint.

[1, 2] The plaintiff, a foreign corporation, organized and existing under and by virtue of the laws of the kingdom of Italy, on the 20th of September, 1915, entered into a contract with the Phoenix Iron & Steel Company, an Alabama corporation, which we will designate as the Alabama corporation, whereby the Alabama corporation agreed to sell and deliver to the plaintiff about 2,000 long tons of old steel rails at \$29.50 per ton, to be delivered to the plaintiff at Genoa, Italy, between the months of December, 1915, and March, 1916, the cost of insurance and freight to be paid by the Alabama corporation; payment for the merchandise to be made on plaintiff's behalf in the manner therein provided. The Alabama corporation delivered to the plaintiff, in accordance with the terms of the contract, about 1,300 tons of old steel rails, for which the plaintiff duly paid. It is then alleged that the Alabama corporation prior to the making of the contract had secured a permit to do business as a corporation in the state of Texas, and until March 23, 1916, transacted business in that state; that on said date the Phoenix Iron & Steel Company was organized for the general purpose of trade, and transacted business under and by virtue of the laws of Texas. This corporation we will designate the Texas corporation. It is alleged that the Texas corporation took over, succeeded to, and became vested with all of the assets, and assumed, for value received, all the contracts and liabilities, of the Alabama corporation; that the Texas corporation continued and undertook for value received the fulfillment of the contract and business of said Alabama corporation, and the Texas corporation became the sole owner thereof; that thereafter the Alabama corporation ceased doing business and its rights and franchises were abandoned.

It is alleged that the defendant on December 5, 1916, filed in the office of the clerk of the county of New York a certificate, certifying that he was conducting and transacting business under the name of the Phoenix Iron & Steel Company of Galveston, Tex., and from and after that date the defendant conducted business in the city of New York under that name; that on or about said date defendant took to his own account all the assets and for value received assumed all

the liabilities of the Texas corporation; that the contracts and obligations between the plaintiff and the Alabama corporation and the Texas corporation and all rights and liabilities thereunder were taken over and assumed by the defendant, and that the defendant continued to carry on the business under said contracts without change or modification thereof until about the month of June, 1917. It is alleged that the Alabama corporation, the Texas corporation, and the defendant have severally wholly failed, neglected, and refused to deliver the remainder of about 700 tons of old steel rails to plaintiff. Due performance of the plaintiff and readiness and ability to receive and pay for the rails according to the contract is alleged. Then follow allegations of damages. From these statements it would appear that the plaintiff was suing the defendant for a breach by him of an executory contract with the Alabama corporation, which had been assumed by the Texas corporation, and in turn by the defendant. Therefore liability for damages was predicated upon the defendant's neglect or refusal to perform.

Interwoven with these allegations are others which allege that the Alabama corporation, the Texas corporation, and the defendant had severally repudiated the said sale, in so far as it had not been performed, and notified plaintiff that performance thereof would not be completed. If the Alabama corporation repudiated the contract and wrongfully refused to perform it, that corporation became liable to the plaintiff in damages. It would be this liability that was assumed by the Texas corporation and the defendant, and not the burden of performing an executory contract. By its terms the time for performance of the contract had expired prior to the incorporation of the Texas corporation. Unless extended by mutual consent, the execution of the contract would not have been assumed by the successors of the Alabama corporation. With tiresome repetition the plaintiff has alleged that the defendant was the chief executive of, and controlled, both the Alabama corporation and the Texas corporation, that he owned all the capital stock thereof, and other allegations tending to show that these corporations existed as a mere cloak under which the defendant personally conducted his business, and hence the contract, while in form that of the Alabama corporation, was in fact the personal contract of the defendant. Thus there is presented in each cause of action allegations appropriate to three different causes of action, some of which are appropriate to one and entirely immaterial to the others.

The learned justice at Special Term, while recognizing the defects in the complaint, said:

"Nor do I think it is necessary that the liability of the defendant need be stated in two different causes of action. If the plaintiff proves the facts alleged in the complaint, it would make little difference to the defendant upon which of the two theories held by his counsel his liability was predicated."

[3] This statement would be appropriate, if the defendant, instead of challenging the complaint, had answered, and upon the trial objection had been made to the reception of evidence that it was immaterial upon one theory, which counsel for the defendant had supposed was the cause of action set forth, and was material on another, which the

plaintiff's attorney contended was the cause of action he had intended to allege, or after verdict and judgment.

[4-6] It seems to me the learned justice has failed to appreciate that the office of a complaint is to inform the defendant with reasonable certainty of the cause of action that the plaintiff claims he has against him, that the defendant may be able to plead. If the statement of the facts is such that there might be two distinct causes of action stated, and such was the purpose of the complaint, then the defendant is entitled to have each cause of action separately stated and numbered. He may demur to one and answer the others. He may have a defense to one which he would not have to the others. It is his right to be afforded an opportunity to intelligently meet the issue tendered, and not be compelled to imitate the plaintiff and draw a rambling inconsequential answer, that he may be in position to meet at the trial any possible issue the ingenuity of counsel may be able to spell out from a confused mass of statements of fact.

[7] The plaintiff's attorney does not inform us what he claims to have stated as a cause of action, but throws around his complaint as a shield section 519 of the Code of Civil Procedure, which he states is a conclusive answer against the motion and this appeal. That section, however, was not intended to abrogate all the rules and requirements of pleading. "The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties." That substantial justice may be done, a defendant has the right to be informed with reasonable exactitude of the cause of action alleged against him. As Chief Justice Ruger said:

"It was formerly the settled rule to construe doubtful pleadings most strongly against the pleader; but this rule has been so far modified by the Code as now to require them to be liberally construed, with a view to substantial justice between the parties. This modification has, however, been held to extend only to matters of form, and not * * * to the fundamental requisites of a cause of action. * * * A construction of doubtful or uncertain allegations in a pleading, which enables a party by thus pleading to throw upon his adversary the hazard of correctly interpreting their meaning, is no more allowable now than formerly. * * * It is in the nature of things that a party, who is required to frame his issues for the information of his adversary, and the court, must be responsible for any failure to express his meaning clearly and unmistakably." *Clark v. Dillon*, 97 N. Y. 370, 373.

The rule of liberality in the construction of pleadings was not intended to change the fundamental requirement that the complaint must contain a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition, and where the complaint sets forth two or more causes of action the statement of facts constituting each cause of action must be separate and numbered. Code Civ. Proc. § 481, subd. 2, and section 483. We cannot determine whether the pleader intended to set up one cause of action or three. If he intends to state but one cause of action in each separately stated and numbered cause of action, then he should plainly and concisely state the facts constituting that cause of action, and leave out allegations that have no relevancy or materiality thereto. If he intended to state two or more causes of action, then the allegations which would present each cause

of action must be separately stated and numbered. We have not passed upon the specific objections that there are redundant allegations, evidentiary statements of fact, and conclusions of law contained in the complaint. All of these objections are well founded; but, as there will be an opportunity to serve an amended complaint, we shall expect the pleader to observe the few simple rules of code pleading, and present a plain and concise statement of the facts constituting each cause of action without unnecessary repetition, and in which each cause of action that he desires to present will be separately stated and numbered; that he will allege the ultimate facts which he must prove to sustain each cause of action, and not the evidence tending to establish those facts, and will bear in mind that continued repetition of a fact, once well pleaded, adds nothing to its force or value, and is expressly condemned. His own intelligence should be a sufficient guide, without its being necessary for the court to further indicate wherein these requirements have been violated in the complaint under consideration.

The order will therefore be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs, with leave to the plaintiff to serve an amended complaint upon payment of the costs within 10 days after the service of a copy of the order to be entered herein, with notice of the entry thereof. Order filed. All concur.

(189 App. Div. 179)

CALAME et al. v. JOSEPH.

(Supreme Court, Appellate Division, First Department. October 24, 1918.)

PLEADING ~~§~~64(2)—SEPARATE CAUSES OF ACTION IN ONE COUNT.

In an action on a contract under which plaintiffs were to get commissions for selling iron and steel materials, allegations that defendant was indebted to the plaintiff for money laid out and expended and for charges and commissions in the purchase and sale of goods, rendered a count bad as stating two causes of action, where the contract did not provide for the purchase of merchandise nor expenditure of money in behalf of the defendant.

Appeal from Special Term, New York County.

Action by Henry A. Calame and others against Leonard Joseph. From an order denying a motion for an order directing the plaintiff to make the allegations of the complaint definite and certain, to strike therefrom allegations which are immaterial and redundant, to strike out therefrom allegations which are evidentiary, and to separately state and number the various causes of action which are set forth in the complaint, the defendant appeals. Reversed, with leave to amend.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

Sporborg & Connolly, of Port Chester (William D. Sporborg, of New York City, of counsel), for appellant.

Hunt, Hill & Betts, of New York City (William M. Aydelotte, of New York City, of counsel), for respondents.

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PAGE, J. There is present in the complaint in this case all of the vices of the complaint considered in *Stabilimento Metallurgico Ligure v. Joseph*, 189 App. Div. 173, 178 N. Y. Supp. 241, decided herewith, and some besides. The plaintiffs allege that they were appointed general agents of the Alabama corporation for the sale of iron and steel materials and metals in Italy upon a commission basis. The various allegations in the complaint in that case as to the incorporation of the Texas company and the filing of the certificate to do business under the trade-name, the assumption of the contract obligations of each successor, and the control and ownership of the stock of the corporations by the defendant are repeated, except in this case the plaintiff attaches an exemplified copy of the certificate of dissolution of the Texas corporation and in the body of the complaint copies the certificate for use of the trade-name filed with the county clerk, while in the other the fact of such dissolution and of the filing of the certificate was alleged. In addition to the different theories of liability that might be spelled out in this complaint from these allegations, there is the further objection that in each of the two causes of action the plaintiffs have alleged that the defendant is indebted to the plaintiff for money laid out and expended and for charges and commissions in the purchase and sale of goods, wares, and merchandise. The contract does not provide for the purchase of merchandise, nor for the expenditure of money in behalf of the corporation. Therefore there is more than one cause of action stated in each of the separately stated and numbered causes of action alleged in the complaint.

The order will therefore be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs, with leave to the plaintiff to serve an amended complaint, upon payment of the costs within 10 days after the service of a copy of the order to be entered herein with notice of the entry thereof. Order filed. All concur.

J. A. KIRSCH & CO., Inc., v. ROULSTON, BECKERT & CO., Inc.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

1. SALES 6-162—CONSTRUCTIVE DELIVERY OF GOODS SOLD IN POSSESSION OF THIRD PERSON.

Where defendant ordered from plaintiff 300 cases of evaporated milk, Holly brand, to be shipped from warehouse, and defendant's truckman refused to accept the milk first tendered because it was not Holly brand, whereupon plaintiff's representative gave him two orders on another warehouse, one for 150 cases of milk, and the other for 150 cases of Holly milk, held that, where those in charge of the warehouse told the truckman when he presented the orders he was too late, there was no constructive delivery; Personal Property Law, § 124, subd. 3, providing that, where goods at time of sale are in possession of a third person, the seller has not fulfilled his obligation to deliver unless such third person acknowledges to buyer that he holds the goods on the buyer's behalf.

6- For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. **SALES ⇐162—ORDERS ON WAREHOUSE NOT "DOCUMENTS OF TITLE."**
Orders on a warehouse to deliver cases of milk, where warehouse receipts are retained by seller, are not "documents of title," within Personal Property Law, § 124, subd. 3, relating to delivery of goods in possession of a third person other than the seller.
3. **SALES ⇐164—BUYER NOT OBLIGED TO ACCEPT PARTIAL DELIVERY.**
Where a buyer ordered 800 cases of Holly brand evaporated milk, and the seller could not deliver that number of cases of Holly brand, the buyer was not obligated to accept a partial delivery.

Appeal from City Court of New York, Trial Term.

Action by J. A. Kirsch & Co., Incorporated, against Roulston, Beckert & Co., Incorporated. From a judgment on a directed verdict for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

John L. Lyttle, of New York City (Earle W. Webb, of New York City, of counsel), for appellant.

Benjamin I. Shivers, of New York City, for respondent.

GUY, J. This is an action for goods sold and delivered, and defendant appeals from a judgment entered upon a verdict directed for plaintiff.

Defendant gave a written order, dated February 14, 1919 (erroneously stated in the record as March 14, 1919), for 300 cases of evaporated milk, Holly brand, to be shipped at once "ex warehouse." On February 17 defendant sent its truckman to plaintiff for the merchandise. The truckman testified that plaintiff's representative, Miss Lobel, gave him an order for 124 cases; that he returned the order to Miss Lobel, whereupon she gave him another order on the Beach street warehouse; that upon presentation of the order at the Beach street warehouse the clerk brought down milk which was not the Holly brand, and on the truckman's refusal to take it the clerk gave him back the order; that the truckman then went back to plaintiff's place of business, gave the last order, which was for Artic brand milk, to Miss Lobel, and after waiting some time he finally got two orders on the York Storage & Warehouse Company, one for the delivery to defendant of 150 cases of milk, and the other for 150 cases of Holly milk. The truckman further testified that at about 4 o'clock in the same afternoon he called with his truck at the York warehouse and presented the orders, but was told he was too late; that there were no other trucks at the warehouse then, and men who looked like workmen were "standing around there"; and that on other occasions he received merchandise from the same warehouse as late as 4:30. At no time afterward did defendant send for the merchandise. On February 19 it returned the two orders to the brokers who made the sale, for the reason, as stated in the letter inclosing the orders, that plaintiff was willing to sell the same brand of milk to defendant through a different broker at 70 cents a case less than the contract price. On or about March 21 the brokers returned the orders to the

plaintiff, with a copy of the letter received by them from defendant.

Upon the trial plaintiff produced a receipt from the York Storage & Warehouse Company, dated February 17, 1919, for the merchandise in question, and showed that the milk had not been taken from the warehouse. The warehouse receipt apparently was never delivered to the defendant. At the close of the case, upon defendant's motion to dismiss and plaintiff's motion for the direction of a verdict, the court directed a verdict for the plaintiff, holding that the delivery to and acceptance by the defendant of plaintiff's written orders on the warehouseman was sufficient to place the merchandise in the power of the defendant, and under the authorities delivery was thus established.

In the cases cited by the trial judge in his memorandum there are statements which justify the conclusion reached. For instance, in *Gross v. Ajello*, 132 App. Div. 25, at page 27, 116 N. Y. Supp. at page 382, the court says that—

"The delivery of the order on the warehouse for the peas would have justified a recovery of the purchase price"—citing *Salmon v. Brandmeier*, 104 App. Div. 69, 93 N. Y. Supp. 273, and *Horst v. Montauk Brewing Co.*, 118 App. Div. 300, 103 N. Y. Supp. 381.

In the *Salmon Case* the court said (104 App. Div. 69, 93 N. Y. Supp. 273):

"Where manual delivery of goods is inconvenient on account of their bulk it is unnecessary, placing the goods in the power of the vendee is sufficient. An actual delivery is not required. A symbolic delivery suffices, and delivery of an order on the warehouseman may be enough." *Dunham v. Pettee*, 8 N. Y. 508.

And the court in the *Horst Case* restates the rule as laid down in the *Salmon Case*. In the *Horst Case*, however, there was the additional fact of the vendor sending to the vendee warehouse receipts for the merchandise claimed to have been delivered to the defendant.

An examination of the authority relied upon by the court in the *Salmon Case* (*Dunham v. Pettee*, supra) for the doctrine herein stated does not justify the conclusion that the mere giving of a delivery order upon a warehouseman constitutes a delivery of the goods, so as to warrant a recovery for goods sold and delivered. The *Dunham Case* was not an action for goods sold and delivered. There plaintiffs sold to defendants a quantity of iron stored in public store, upon which the sum of \$750 was paid by the buyers; the balance of the purchase price being payable on delivery within 60 days from the date of the contract. The complaint alleged that the plaintiffs were ready and willing to deliver the iron to the defendants and receive the balance of the price therefor, and in all respects to comply with the terms of the contract on their part, and that they within the 60 days mentioned in the contract offered and tendered to defendants the iron, but that the latter were not ready and willing to receive it and pay the balance of the price, and wholly refused to do so. In their answer defendants denied that plaintiffs were ready and willing to comply with the terms of the contract, or that they offered and tendered the iron to the defendants. It appears from the report of the case that a custom

house permit addressed to the storekeeper was tendered to the defendants, and that after defendants' alleged default it was agreed between plaintiffs and defendants that the former might dispose of the merchandise to a third party upon a sale which had been agreed upon between the defendants and such party at a fixed price per ton, without prejudice to plaintiffs' claim for the difference between that price and the price fixed in the contract between plaintiffs and defendants, or to defendants' claim for a restoration of the \$750 paid. The jury found a verdict for the plaintiffs for the difference between the contract price and the price realized on the resale. The appellate court held that the plaintiffs were excused from doing more than was actually done toward performance; that it was shown that the storekeeper would have delivered the iron without payment of the storage due previous to the date of the contract; that it was not necessary to bring the iron to the defendants' office and tender it there; and that the offer to deliver was made in good faith and in substantial compliance with the contract.

[1-3] It is clear, therefore, that the Dunham Case is not authority for the proposition that in this case there was a delivery of the merchandise in question. Further, the statute (Personal Property Law [Consol. Laws, c. 41] § 124, subd. 3) provides:

"Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods."

Here there was no acknowledgment on the part of the warehouseman that he held the goods on defendants' behalf; and it is evident that the delivery orders, the warehouse receipt having been retained by the seller, were not documents of title within the meaning of the act. It is notable, too, that while one order was for 150 cases of Holly brand milk, the other order for the remaining 150 cases did not designate the brand of milk, and in view of the different attempts of the plaintiff to comply with its contract in February, 1917, this fact may be material, for unless the plaintiff could deliver the 300 cases of Holly brand milk defendant was not obligated to accept a partial delivery.

Judgment and order reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(189 App. Div. 886)

LORD CONST. CO. v. EDISON PORTLAND CEMENT CO.

(Supreme Court, Appellate Division, First Department. October 24, 1919.)

1. DISCOVERY §40—SCOPE OF PLAINTIFF'S EXAMINATION OF DEFENDANT BEFORE TRIAL.

Plaintiff is entitled to examine defendant before trial only as to allegations of complaint, as limited by bill of particulars.

2. DISCOVERY §55—AFFIDAVIT FAILING TO SET FORTH FACTS REQUIRED BY CODE DEFECTIVE.

Affidavit for order for examination by plaintiff of defendant before trial, which failed to set forth facts required by Code Civ. Proc. § 872, subd. 1, is defective, and order for examination obtained thereon will be vacated.

Appeal from Special Term, New York County.

Action by the Lord Construction Company against the Edison Portland Cement Company. From an order denying defendant's motion to vacate order for examination of defendant before trial, defendant appeals. Reversed, and motion to vacate granted.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

Gregory, Stewart & Wrenn, of New York City (Allen S. Wrenn, of New York City, of counsel), for appellant.

Larkin & Perry, of New York City (Francis C. Nickerson, of New York City, of counsel, and Albert Stickney, of New York City, on the brief), for respondent.

PHILBIN, J. [1, 2] The order for examination is entirely too sweeping. The plaintiff is entitled to examine only as to the allegations of the complaint as limited by the bill of particulars. Moreover, the affidavit upon which the order for examination was obtained fails to set forth the facts required by subdivision 1 of section 872 of the Code of Civil Procedure.

The order denying the motion to vacate should be reversed, with \$10 costs and disbursements, and the motion to vacate granted, with \$10 costs. Order filed. All concur.

KROLL et al. v. ORIENTAL NAV. CORPORATION.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

1. SHIPPING §139(1)—CLAUSE IN BILL OF LADING LIMITING LIABILITY VALID.

Clause in bill of lading, limiting liability to \$100, is consistent with clause providing "that, in the event of claims for short delivery when the steamer reaches her destination, the price shall be the market price," and shipper in case of loss in transit can recover only \$100, despite provision of Harter Act §§ 1, 2 (U. S. Comp. St. §§ 8029, 8030).

2. CONTRACTS §153—EFFECT MUST, IF POSSIBLE, BE GIVEN TO EVERY PART.

In construing a contract the court must look at the instrument as a whole, and must give effect, if possible, to every part thereof.

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Appeal from City Term of New York, Trial Term.

Action by Georges Kroll and another against the Oriental Navigation Corporation. Judgment for plaintiffs, and defendant appeals. Judgment modified, and, as modified, affirmed.

Argued May term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Duncan & Mount, of New York City (Russell T. Mount, of New York City, of counsel), for appellant.

I. L. Broadwin, of New York City, for respondent.

DELEHANTY, J. [1] This action was instituted to recover damages for the loss of a lathe, valued at \$1,918.80, shipped by the plaintiffs in defendant's boat and lost in transit. In the court below the trial justice following a decision rendered by himself in the case of Mariani Brothers, Inc., v. Thomas Wilson Sons & Co., Ltd., held that a clause in the bill of lading limiting the defendant's liability to \$100 was void under the provisions of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445, c. 105, §§ 1, 2 [U. S. Comp. Stat. §§ 8029, 8030]), and directed a verdict in favor of the plaintiff for the full amount of the claim. In the meantime the Appellate Division of this department has reversed the case upon which the decision herein was based (Mariani Brothers Inc. v. Thomas Wilson Sons & Co., 188 App. Div. 617, 177 N. Y. Supp. 335), but plaintiff still claims to be entitled to affirance herein under a clause in the bill of lading which provides:

"(9) Also that, in the event of claims for short delivery when the steamer reaches her destination, the price shall be the market price at the port of destination on the day of the steamer's entry at the custom house, less all charges saved."

[2] It is well settled that in construing a contract the court must look at the instrument as a whole, and must give effect, if possible, to every part thereof. An examination of the bill of lading herein discloses that the foregoing provision is not in conflict with the provision mutually limiting the value of the package to \$100, but, on the other hand, is quite consistent therewith. The obvious meaning of the two clauses, taken together, is that the agreed value of each package does not exceed \$100, and that in the event of a claim for short delivery the price shall be the market price at destination, but not exceeding the agreed value of the package.

Judgment modified, by reducing the amount thereof to \$100, with appropriate interest and costs in the court below, and, as modified, affirmed, with costs to appellant on appeal. All concur.

(189 App. Div. 167)

LEWENTHAL et al. v. LEWENTHAL et al.

(Supreme Court, Appellate Division, First Department. October 24, 1919.)

SALES §218—REVESTMENT IN SELLER OF TITLE TO PART OF SHIPMENT REJECTED.

Where the corporate buyer of imitation pearls from a German house rejected part of the shipment as defective, which rejection was ratified by the seller, and, after a remittance was made for the shipment, less a deduction for defective pearls held subject to the seller's order, the buyer company endeavored to return the defective pearls, but could not on account of war conditions, and on its liquidation and dissolution the defective pearls were stored in the name of the buyer company until the controversy about them could be determined, such pearls did not belong to the buyer company; title having reverted in the seller.

Appeal from Special Term, New York County.

Action by Benjamin Lewenthal and another against Isaac Lewenthal and others. From an interlocutory judgment directing defendants to account for certain merchandise as assets of a corporate defendant, they appeal. Reversed, and judgment entered for defendants, dismissing the complaint.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRILL, and PHILBIN, JJ.

S. A. Lowenstein, of New York City (Paul Armitage, of New York City, of counsel), for appellants.

Harry Sammet, of New York City (Max D. Steuer, of New York City, of counsel, and Jerome A. Strauss and Harry Sammet, both of New York City, on the brief), for respondents.

PAGE, J. The action is brought by the plaintiffs, as stockholders and directors, to recover from their two brothers as directors, charging a waste of corporate assets of the Royal Jewelry Manufacturing Company. While the complaint specified several charges of waste, there was only one item that was urged on the trial, and that was that the defendants had wrongfully taken 481 dozen of imitation pearl beads out of the storage warehouse, removed them to their individual place of business, sold some, and had others on hand, and refused to turn over or account for the same to the plaintiffs or the corporation.

Defendants assert that these goods are not assets of the corporation, but are rejected merchandise, held by the company as a bailee for the vendor, Alexander & Co., and that, acting on instructions from that concern, they took and disposed of these goods, and that the proceeds belong to Alexander & Co.

The following facts were found by the court:

The four Lewenthal brothers were officers, directors, and equal stockholders in this corporation. The company had been in business for some years. Prior to November 27, 1914, the jewelry company had for many years purchased imitation pearl beads from Alexander & Co., whose place of business was at Gablonz, Bohemia. During the year 1914 the jewelry company placed orders with Alexan-

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der & Co., and received various shipments of beads. The corporation and its officers discovered that "a quantity of them were imperfect and defective, contained milk spots, and were unmerchantable." On the 27th day of November, 1914, the corporation wrote to Alexander & Co. the following letter:

"Upon examining the stock of A87, 88, and 89 pearl beads received on your invoice dated July 25th, which arrived here on September 18th, we find a number of them imperfect. They show the same milk spots as those we received from you last season. We are now examining each string carefully, and will let you know at next writing the exact number and quantities that are imperfect. We will hold same *subject to your order, as they cannot be sold in the condition they are in. Kindly advise us by return mail what disposition to make of the same.*"

And on December 7, 1914, it wrote the following letter:

"We give you below an itemized list of the pearls received in bad condition:

A-37	50 dozen
38	134% "
89	152% "
65	8% "
2037	42% "
2192	23 1/2% "
2193	54 1/2% "
2194	16% "

"As written you before, *it is impossible for us to make use of these beads in the condition they are in, and we would ask you to kindly advise us by return mail what disposition you wish us to make of the same, as we are holding them subject to your order.*"

In answer to the letter of November 27th Alexander & Co. wrote the following letter to the defendant:

"We are in receipt of your favor 27th and are sorry to hear that from the beads 37, 38, 39, sent 25th July. *Please select such which are not good and send them by parcel post via Italy back, and we will credit you for it.*"

Thereafter, in February, 1915, the defendant corporation debited the account of Alexander & Co. on its books with the sum of \$1,529.-20, being equivalent to 7,551.63 kronen, representing the purchase price of these goods, plus duty and freight, which purchase price, plus duty and freight, had already been credited to Alexander & Co. on its books, and thereafter, and on or about the 9th day of March, 1915, the defendant corporation made up a statement of its account with Alexander & Co., deducting 7,551.63 kronen, which left a balance due Alexander & Co. of 11,108.65 kronen. The defendant corporation purchased foreign exchange drawn on the Wiener Bank Verein for the amount of 11,108.65 kronen, the balance shown to be due by the said statement, and inclosed the same, with the statement aforesaid in the following letter:

"We inclose draft for Kr. 11,108.65, covering bills as per inclosed statement, less deductions made for goods, *which we are holding subject to your order. The attached duplicate credit memorandum will explain these deductions.*"

Thereafter Alexander & Co. received the draft, statement, and debit note, and accepted the same. After the receipt of the letter of March 9, 1915, Alexander & Co. wrote to the defendant corporation the following letter, under date of January 25, 1916:

"The pearls 87/88/89 etc., which you hold to our disposition amount Kr. 7,551.63 and 169.55 as per your debits notes, please take out of the storehouse and take it in the place of your new firm 302 Fifth avenue. As soon as there will be a possibility to ship them to us, you will please do so."

This letter was not received by the individual defendants until the latter part of August, 1916. During the year 1915 they had endeavored to return the goods to Alexander & Co., but owing to war conditions were unable to do so, and the goods remained packed in the place of business of defendant corporation, subject to the order of Alexander & Co., up to November 23, 1915, at which date the agreement liquidating the corporation was entered into by all the parties hereto. In this agreement it was provided that all merchandise, fixtures, and furnishings should be sold at public auction to the highest bidder "except the merchandise of Alexander & Co., of Gablonz, Bohemia," and certain other merchandise, and then provided:

"As to the merchandise concerning which there is a controversy, to wit, that of Alexander, * * * it is agreed that the same be stored in a storage house in the name of the corporation until the controversy is adjusted or determined."

The agreement also provided that all mail addressed to the Royal Jewelry Manufacturing Company, excepting such as may contain remittances, shall, after the receipt of same, be transmitted to the purchaser of said name or his assignee, who shall be entitled to the sole possession of said mail. After the signing of this agreement the goods of Alexander & Co. were stored in the Chelsea Storage Warehouse in the name of the defendant corporation. The letter of January 25, 1916, of Alexander & Co. addressed to the Royal Jewelry Manufacturing Company was received in August, 1916, by the individual defendants, who had purchased the name, merchandise, etc., of the defendant corporation, and continued to use its name as a trade-name.

From the foregoing findings it seems very clear that this merchandise was not the property of the defendant corporation, but was the property of Alexander & Co.

The learned trial justice in his opinion discusses the right of the corporation to rescind, stating that the statute (Personal Property Law [Consol. Laws, c. 41] § 150) does not authorize the rejection of a part of an entire shipment, and says that it did not give the buyer the right to select and retain such of the beads in each shipment as suited it and reject the rest. If the goods had been returned to the seller pursuant to their rejection, title would doubtless have reverted in the seller. He overlooks, however, the fact that the right to rescind, not alone is not questioned by Alexander & Co., but it was expressly ratified, and that the disposition of the goods by the defendants in taking them out of the storage warehouse and into their possession was by the express direction of Alexander & Co. The goods could not have been returned because of the condition of war that existed between this country and the empire of Austria-Hungary. It is not necessary that the goods should be physically returned to the

seller, if he accepts a tender, and exercises dominion over and directs the disposition of them.

The learned trial justice also states that the letter of the counsel, Mr. Werner, under date of May 23, 1916, negatives the conclusion that the rescission had been accepted by Alexander & Co. In making this statement he overlooks the fact that the letter of January 25, 1916, of Alexander & Co., was not received until August, 1916, and therefore at the time the letter was written by Mr. Werner these goods were being held subject to the order of the seller, and the return of them had not been accepted. The learned counsel for the respondent in his brief argues that debiting the account of Alexander & Co. with the value of these goods shows that the corporation had paid for them prior thereto, but this argument is unsound. It is shown that there was a credit balance in Alexander & Co.'s account, which included the value of these goods, together with the freight and other charges, and the entering of the same as a debit against Alexander & Co. was a necessary bookkeeping entry. These goods were never paid for by the defendant corporation, for the reason that only the balance of the account was paid by the draft of March 9, 1915.

The interlocutory judgment should be reversed, with costs, and judgment entered for the defendant, dismissing the complaint, with costs. Settle order on notice. All concur.

(189 App. Div. 312)

PEOPLE v. ABRAITIS.

(Supreme Court, Appellate Division, Second Department. October 31, 1919.)

1. RAPE § 54(2)—COMPLAINANT'S DISCLOSURES NOT CORROBORATING EVIDENCE.

In a prosecution for rape, under a count charging sexual intercourse with a female not defendant's wife and under the age of 18 years, under Penal Law, § 2010, the court's refusal to charge that disclosures by the complainant of the alleged fact that the defendant had sexual intercourse with her are not to be taken as the corroborative evidence required by section 2013 was error.

2. RAPE § 54(2)—DEFENDANT'S KEEPING COMPANY WITH HER AND BEING AT PLACE OF ALLEGED CRIME AS CORROBORATING COMPLAINANT.

In a prosecution for rape, under Penal Law, § 2010, under a count charging sexual intercourse with a female under 18 years of age, not defendant's wife, it was error for the court to refuse to charge that the fact that defendant was "keeping company" with complainant, and "was at the place where the alleged offense is stated to have taken place, is not of itself the corroboration as required by the statute" (section 2013).

3. CRIMINAL LAW § 822(1), 829(12)—REFUSAL OF PROPER INSTRUCTIONS NOT CURED BY INSTRUCTIONS GIVEN.

The rule that a charge must be considered as a whole, and its correctness is not to be resolved upon isolated parts, is applicable where it can be seen with "reasonable certainty" that error in isolated parts neither misled the jury nor influenced the verdict, and court's instruction on corroborative evidence held not to cure the harm of its refusals of defendant's instructions on corroboration of complainant in a prosecution for rape.

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Appeal from Kings County Court.

August Abraitis was convicted of the crimes of rape in the second degree, abduction, and assault in the second degree, and from such judgment, and also from an order denying his motion for a new trial on the ground of newly discovered evidence, he appeals. Judgment and order reversed, and new trial ordered.

Argued before JENKS, P. J., and MILLS, RICH, KELLY and JAYCOX, JJ.

Harry H. Oshrin, of New York City, for the appellant.

Ralph E. Hemstreet, Asst. Dist. Atty., of Brooklyn (Harry E. Lewis, Dist. Atty., of Brooklyn, on the brief), for the People.

JENKS, P. J. [1, 2] The defendant was found guilty in the County Court upon an indictment for rape in the second degree, abduction, and assault in the second degree. He comes to this court with a certificate of reasonable doubt. The count for rape charged sexual intercourse with a female not his wife, under the age of 18 years. Section 2010, Penal Law (Consol. Laws, c. 40). The court refused under exception to charge that disclosures by the complainant of the alleged fact that the defendant had sexual intercourse with her are not to be taken as corroborative evidence such as the statute requires. Section 2013, Penal Law. The court refused, under exception, to charge that the fact that the defendant was "keeping company" with the woman, and "was at the place where the alleged offense is stated to have taken place, is not of itself the corroboration as required by the statute." *Id.* The requests presented sound propositions of law. *People v. Carey*, 223 N. Y. 519, 119 N. E. 83, and *People v. Kingsley*, 166 App. Div. 320, 151 N. Y. Supp. 980, respectively.

[3] The learned and able assistant district attorney does not gain-say the law of the requests, but submits that the court did not charge otherwise, and contends that the terms of the refusals did not indicate that the court thought that the requests were unsound; and the counsel points out that the court, in comment upon the requests, said that it had already charged on the subject of corroboration, and that it declined "to assume your [the jury's] prerogative, and pick out any particular part of the evidence as corroboration or as failure of corroboration," but that it submitted "the whole question, whether on all the evidence here presented there is corroboration." It is true that prior to these requests the court had said that as to the counts of rape and abduction "it is requisite that there be corroboration, because the unsupported testimony of the complaining witness, the young girl, as to the elements that go to make up the crime, would not be sufficient—that must be corroborated"—but nothing more. And it is true that after the jury had retired, and had returned to the courtroom for instruction as to "what is meant by corroborative evidence," the court did explain the nature of corroborative evidence in general terms that are not exceptionable.

The rule that the charge of the court must be considered as a whole, and its correctness is not to be resolved upon isolated parts to which

we are cited, is applied when it can be seen with "reasonable certainty" that error in an isolated part or parts neither misled the jury nor influenced their verdict. *People v. Dimick*, 107 N. Y. at page 26, 14 N. E. 178; *People v. McCallam*, 103 N. Y. 587, 9 N. E. 502. I cannot conclude "with reasonable certainty" that the court's disposition of the subject of corroborative evidence undid the harm that was inherent in the refusals of the said specific requests. The facts remain that the court had refused to charge that opportunity was not of itself corroboration that the statute requires; that the disclosure of the alleged fact that defendant had sexual intercourse with the complainant "is not to be taken as corroborative evidence such as the statute requires." These requests were not limited to the asking of the court to disintegrate the testimony for the purpose of instruction as to isolated parts thereof, but asked for instructions that certain kinds of testimony were not evidence of corroboration within the contemplation of the said statute.

I think it was the duty of the court upon such requests to declare whether certain testimony was evidence of corroboration; yet we find that the court in effect refused to rule, because it would not pick out parts of the testimony. When the court declined to exercise its "prerogative," upon the theory that it would not interfere with the "prerogative" of the jury, the court in effect cast its duty upon the jury.

As I think these exceptions well taken were fatal to the judgment, I advise that the judgment and order of the County Court of Kings County be reversed, and a new trial ordered. All concur.

EICHLER v. KAHNWEILER et al.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

1. PRINCIPAL AND AGENT §104(2)—AUTHORITY OF SALESMAN TO WARRANT MERCHANDISE.

A salesman with authority to sell has no authority to warrant the merchandise sold, unless he has been given express authority to do so, or unless such authority can be implied from the fact that it is customary for agents to give a warranty on sales of merchandise of that description.

2. PRINCIPAL AND AGENT §119(6)—BURDEN OF PROVING AUTHORITY OF SALESMAN TO WARRANT GOODS.

Buyer, who relies on warranty made by seller's salesman, has the burden of proving the express authority of the salesman to warrant the goods, or the custom from which the implied authority to so do is presumed.

3. PRINCIPAL AND AGENT §166(4)—RATIFICATION OF WARRANTY MADE BY SALESMAN.

Where agent's authority was limited to soliciting orders subject to approval of seller, mere delivery of goods and acceptance of part of purchase price, without actual knowledge of the making of warranty by salesman, did not render seller liable for representations of salesman on ground of ratification.

4. SALES ~~§~~278(3)—IMPLIED WARRANTY OF FITNESS ON DISCLOSURE OF PURPOSE BY BUYER.

Where seller and buyer were on equal footing as to ability to judge fitness of goods for intended purpose, buyer's disclosure of purpose for which goods were intended was insufficient, under Personal Property Law, § 96, subd. 1, to raise implied warranty of fitness for such purpose, in absence of evidence that buyer in placing order relied on seller's skill and judgment.

Appeal from City Court of New York, Trial Term.

Action by Samuel Eichler against Mina Kahnweiler and another. From a judgment for defendant upon the verdict of a jury, and from an order denying a motion to set aside the verdict, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Henry Amster, of New York City (Louis Salant, of New York City, of counsel), for appellant.

Maurice L. Shaine, of New York City (Edward C. Weinrib and Louis Richman, both of New York City, of counsel), for respondents.

DELEHANTY, J. Plaintiff, as the assignee of the Metropolitan Lumber Company, instituted this action to recover a balance of \$1,106.35 with interest, the purchase price of oak lumber sold and delivered to the defendants; part payments having been made in the sum of \$800. The order for the purchase and sale of the merchandise was in writing, signed by the defendants, and specified that the same should be oak of designated dimensions and at stated prices. The pleadings and the record show that in the court below the respondents contended there was no obligation on their part to pay for the goods, inasmuch as the lumber failed to conform to a warranty made by the salesman at the time the merchandise was ordered. The learned trial justice correctly charged the jury:

"If you should further find that, in making that representation over his signature, Morris, the selling agent, did not have authority to do so, that his employer, the plaintiff, never gave him authority to make representations or warranties of that kind as to the quality of the goods sold, but that matters of that kind could only be binding when referred back to the house—that is, to the plaintiff—and signed by it, then, even though the warranty were given, it would be unavailing to the defendant here."

[1] It is an established rule of law that a salesman with authority to sell has no authority to warrant the merchandise sold, unless he has been given express authority to do so, or unless such authority can be implied from the fact that it is customary for agents to give a warranty on sales of merchandise of that description.

[2] The further rule is equally well established that the burden is upon the vendee, who relies upon the warranty, to prove either the express authority or the custom from which the implied authority is presumed. In the case at bar the defendants gave no proof, either that Morris had express authority from the Metropolitan Lumber Company to warrant the lumber, or that it was customary for lumber salesmen to

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give warranties of the kind relied upon by the defendants. The only proof upon the subject was furnished by a witness for the plaintiff, the manager of the lumber company, to the effect that the authority of Morris was limited to soliciting business, subject to the approval of his employers. The court, therefore, erred in refusing to grant the motion made by the plaintiff for the direction of a verdict.

[3] Nor can a ratification of the acts of the salesman be spelled out from the evidence adduced. No actual knowledge of the making of the warranty having been brought home to the plaintiff, the mere delivery of the goods and acceptance of part of the purchase price is not sufficient to render him liable for the representations of the salesman.

[4] Lastly, the court committed reversible error in charging, at the request of counsel for defendants, that if the defendant disclosed to the salesman the purpose for which the lumber was used, then there was an implied warranty of fitness for that purpose. The subsection of the Personal Property Law covering a transaction such as this provides that it must appear that the buyer relies upon the seller's skill or judgment before an implied warranty arises. Personal Property Law (Consol. Laws, c. 41) § 96, subd. 1. So far as skill and knowledge of the goods are concerned, it would seem from the record that both parties were upon an equal footing as to the ability to judge of the fitness of the lumber in question for the purposes for which it was intended and there is nothing to show that the defendants, in placing the order, were relying upon the seller's skill and judgment.

The judgment should accordingly be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

ROSEN v. DRUSS et al.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

1. MASTER AND SERVANT §40(2)—EVIDENCE ADMISSIBLE IN ACTION FOR WRONGFUL DISCHARGE.

In action for wrongful discharge of designer, employed under contract authorizing his discharge if he should prove unsatisfactory, evidence as to whether employer employed or needed another designer following discharge was material upon question of whether alleged dissatisfaction was the real cause of the discharge.

2. MASTER AND SERVANT §40(2)—EVIDENCE ADMISSIBLE IN ACTION FOR WRONGFUL DISCHARGE.

In action for wrongful discharge of designer, employed under contract authorizing his discharge if he should prove unsatisfactory, where employer alleged dissatisfaction because of errors in calculation of quantity of goods, requiring the raising of prices on price tickets after the goods had been made up, evidence that prices had been raised because of advance in cost of material was admissible upon question of whether alleged dissatisfaction was real.

3. EVIDENCE §590—WEIGHT OF EVIDENCE AS AFFECTED BY TESTIMONY AT FORMER TRIAL.

An instruction that jury, in considering weight of testimony of certain employes, might consider that they had testified on a previous trial, when not employed, was improper; such fact being immaterial.

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Appeal from City Court of New York, Trial Term.

Action by Meyer Rosen against David Druss and another. From a judgment for defendants, entered upon a verdict of a jury, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Jacob Manheim, of New York City, for appellant.

I. Gainsburg, of New York City (H. Danziger, of New York City, on the brief), for respondents.

BIJUR, J. Plaintiff sued for damages for wrongful discharge from his employment as a designer in defendants' factory. The contract provides that the defendants may discharge the plaintiff if he should "at any time prove unsatisfactory" to defendants.

Both sides are agreed that the learned judge below correctly interpreted the law as applicable to the case, to the effect that defendants were entitled to discharge the plaintiff at any time if they were dissatisfied with his services, but that the dissatisfaction must be genuine, and be the real cause of the discharge. *Beck v. Only Skirt Co.*, 176 App. Div. 867, 163 N. Y. Supp. 786; *Studner v. H. & N. Carburetor Co., Inc.*, 185 App. Div. 131, 172 N. Y. Supp. 836.

[1] But, notwithstanding that the trial judge further charged that the defendants "could not discharge the plaintiff simply for the purpose of getting rid of him or of reducing their expenses," he refused to allow plaintiff's counsel on cross-examination to ask the defendants whether, after plaintiff's discharge, they "took another designer on"; also "whether they needed a designer any more at that time." It is apparent that, if plaintiff could have shown that no designer was required at the time of plaintiff's discharge, that fact would constitute a material circumstance for the consideration of the jury in determining whether the alleged dissatisfaction was the real cause of plaintiff's discharge.

[2] Similarly, defendants having claimed that the chief cause of their dissatisfaction was errors by plaintiff in the calculation of the quantity of goods required for making up the various styles of garments, and that defendants were consequently under the necessity of raising the price on their price tickets after the goods had been made up, plaintiff's counsel was prevented from asking: "Did you ever raise the price of your garments because the materials were going up that season?" This question was not objected to as irrelevant or immaterial, but only in respect to its form. It was manifestly introductory to further questions, designed to show that the change in the prices which defendants claimed were made were induced, not by the alleged errors in calculation by plaintiff (which he, by the way, denied), but by the rise in the price of material. Had plaintiff been able to establish this fact, it would have had a material bearing on the issue whether the alleged dissatisfaction was real or only feigned.

[3] In the course of the trial, also, testimony was given by two of the defendants' present employes, and the learned trial judge instructed the jury that, in considering the weight to be attached to their tes-

timony, it might take into consideration the fact that they had testified on a previous trial of this case, when they were not employed by the defendants. There was no evidence in the case as to what testimony these witnesses had given on the former trial, but, even had there been, the fact was immaterial.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(189 App. Div. 102)

**SOCIETA ITALIANA PROGRESSO DUCA DEGLI ABRUZZI v.
VICCHIARIELLE.**

(Supreme Court, Appellate Division, Second Department. October 10, 1919.)

1. ASSOCIATIONS §18—VALIDITY OF ELECTION OF PRESIDENT.

Where by-law of association declared one year as the official term of the president of the association, the election of a president prior to termination of the term of a previously duly elected president, who has not resigned or been removed, is void.

2. ASSOCIATIONS §18—DETERMINATION OF CLAIMS TO PRESIDENCY OF ASSOCIATION.

Question which of two rival claimants is president of certain association cannot be determined in action of replevin.

Appeal from Orange County Court.

Action by the Societa Italiana Progresso Duca Degli Abruzzi against Alphonse S. Vicchiarielle. From a judgment for plaintiff in an action in replevin, and from an order denying a motion for a new trial, defendant appeals. Reversed, and complaint dismissed.

Argued before JENKS, P. J., and MILLS, RICH, PUTNAM, and BLACKMAR, JJ.

John Palmieri, of New York City, for appellant.

Peter J. Brancato, of New York City, for respondent.

PER CURIAM. [1] Defendant's election as president at the meeting of January 29, 1917, having been proved, following the terms of by-law IV, declaring one year as the official term, his tenure for that time was protected, making a different case from that of an association without such a by-law as in *Ostrom v. Greene*, 161 N. Y. 353, 55 N. E. 919. Hence, without defendant's resignation or removal, there could be no vacancy to be filled by another election within the year, and the so-called election in April, under which plaintiff claimed title, was void.

[2] Plaintiff's president is entitled to the possession of the chattels which are the subject of this action. The action turns upon the question which of the rival claimants is plaintiff's president, and that question cannot be determined in this action. *Concord Society v. Stanton*, 38 Hun, 1.

It follows that the judgment and order of the County Court of Orange County must be reversed, and the complaint dismissed, with costs.

(109 Misc. Rep. 191)

EAST ROCHESTER CONST. CO., Inc., v. EYER et al.

(Supreme Court, Special Term, Monroe County. November 3, 1919.)

1. DISCOVERY §33—ON EXAMINATION OF DEFENDANT BEFORE TRIAL, MATERIALITY OF TESTIMONY AND FAIRNESS OF APPLICATION QUESTIONS FOR COURT.

On application for examination of defendant before trial, the necessity and materiality of the testimony is a question for the court, as is also the good faith and fairness of the application.

2. DISCOVERY §36—PURPOSE OF EXAMINATION OF DEFENDANT BEFORE TRIAL.

The fundamental purpose of the examination of the defendant before trial is to enable the moving party to obtain testimony for use at the trial in support of his cause of action as alleged in his pleading, and not to enable him to cross-examine his adversary, nor to put his adversary on record, nor that he may prepare his rebuttal.

3. DISCOVERY §36—ORDER FOR EXAMINATION BEFORE TRIAL NOT ALLOWED AS TEST OF ISSUES.

An application to examine the defendant as a witness before trial cannot be properly granted for the sole purpose of enabling a litigant to examine his adversary, or his adversary's witnesses, to ascertain whether or not he will be able to maintain his cause of action or to succeed against an asserted affirmative defense.

4. DISCOVERY §41—EXTENT OF EXAMINATION BEFORE TRIAL IN ACTION FOR FALSE REPRESENTATIONS.

In an action for damages for false and fraudulent representations, if the representations claimed to have been made and relied on were false, defendant not intending to do as he represented he would, such false statement may be deemed the statement of a material existing fact, because it falsely represented the state of his mind, upon which issue the testimony of defendant's conduct thereafter is important, and as to which matters the defendant may be examined as a witness before the trial.

Action by the East Rochester Construction Company, Incorporated, against Harry C. Eyer and others. Hearing on motion to vacate an order for the examination of the defendant Eyer before trial. Motion denied.

Warren, Shuster & Case, of Rochester, for the motion.
James M. E. O'Grady, of Rochester, opposed.

THOMPSON, J. In the complaint, in an action for damages for false and fraudulent representations, it is alleged, with other things, that the defendants falsely represented to plaintiff:

"That the defendants intended to construct concrete pavements and sidewalks upon said property as soon as the weather would permit in the spring of 1917. That concrete sidewalks, sewers, water mains, and gas mains would be laid in the streets, avenues, and boulevards upon said tract at the same time, and that, when begun, the work of such construction would be pushed continuously to completion."

The answer of the defendant, here sought to be examined, denies these allegations, and alleges that he did say:

"That if Brotsch would proceed to erect the 50 houses described in the contract that Eyer would attempt to get the village to open up and improve the streets and build sidewalks in the vicinity of the lots described in the complaint, and that the defendant Eyer intended to and would, early in the spring of 1917, use his influence with the village to get them to extend the

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water mains and sewer to said property as fast as the construction of said 50 houses warranted it, and that defendant Eyer would attempt to get the Rochester Railway & Light Company to extend its gas mains and electricities to said property, and that he would use his influence with all of said persons to get them to push said work to a speedy conclusion."

In plaintiff's affidavit, upon which the order to examine defendant was granted, these matters are set out, together with reference to the complaint and the answers of the various defendants, and further:

"That it is necessary for plaintiff to ascertain on examination of the said defendant, Eyer, before trial, just what was done by him in connection with these matters."

The defendant challenges the propriety of this provision of the order, upon the ground that the alleged false statements were not statements of material existing facts, but were so-called promissory statements, and were fraudulent or otherwise dependent upon the state of the mind of the person making them at the time made; that therefore the testimony of the acts of the defendant thereafter, whether in compliance with said representations or contrary thereto, is inadmissible.

[1,2] There is some confusion in the decisions with reference to the scope of orders directing the examination of parties before trial, probably arising largely out of the fact that the relief to be granted is largely in the discretion of the court. However, there are certain accepted principles that have come to be of universal acceptance. The necessity and materiality of the testimony is a question for the court, as is the good faith and fairness of the application. It is fundamental that the purpose of the examination is to enable the moving party to obtain testimony for use at the trial in support of his cause of action as alleged in his pleading. It is not to enable him to cross-examine his adversary; nor, indeed, is it intended to make opportunity for him to put his adversary on record, in order that he may prepare for his rebuttal. *Kornbluth v. Isaacs*, 149 App. Div. 108, 133 N. Y. Supp. 737; *Vogel & Co. v. Construction Co.*, 148 App. Div. 639, 133 N. Y. Supp. 225.

[3] Nor do I think it is proper that such application be granted for the sole purpose of enabling a litigant to examine his adversary, or his adversary's witnesses, to ascertain whether or not he will be able to maintain his cause of action, or to succeed against an affirmative defense which is asserted against him. The application is not designed to be a preliminary test of the issues, but to enable the applicant to obtain testimony that is material and needful (*Terry v. Ross Heater & Mfg. Co.*, 180 App. Div. 714, 167 N. Y. Supp. 747) to a proper and adequate presentation of the facts necessary to sustain the allegations of his cause of action or defense. It is doubtless true that in the exercise of a proper discretion the court has power to order a general examination of the party as well before as at the trial (*Herbage v. City of Utica*, 109 N. Y. 81, 16 N. E. 62), and in some instances the courts have held that this is proper, even to the extent of ordering a defendant to be examined generally, not only as to his defense, but also with reference to his affirmative defense and counterclaim. *Schweinburg v.*

Altman, 131 App. Div. 795, 116 N. Y. Supp. 318; Smith v. Flynn, 163 App. Div. 868, 147 N. Y. Supp. 1142.

[4] In the case at bar the question is whether or not the testimony of the defendant upon the subjects set out in the affidavit is material and necessary to the plaintiff upon the trial of this action. It seems to me it is. If the representations here claimed to have been made and relied upon were false, defendant not intending to do as he represented, such false statement may be deemed the statement of a material existing fact, because it falsely represented the state of his mind. Deyo v. Hudson, 225 N. Y. 602, 122 N. E. 635, citing Adams v. Gillig, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127, 20 Ann. Cas. 910, and Ritzwoller v. Lurie, 225 N. Y. 464, 122 N. E. 634. And testimony of defendant's conduct thereafter is important upon this issue.

The order was rightly granted and must stand. The motion to vacate is denied, with \$10 costs.

BLOOM v. ABRAM BLOOM CO., Inc.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

1. EVIDENCE § 442(6)—PAROL EVIDENCE INADMISSIBLE TO VARY WRITTEN CONTRACT.

Where a written contract for the sale of thread "as sample spools delivered" was complete, and established conclusively that the thread was to be half right and half left twist, parol evidence that the thread was sold "as is," without any such agreement, is inadmissible, and where improperly admitted, the issue raised by such evidence should not be submitted to the jury.

2. SALES § 180(2)—ACCEPTANCE OF PORTION OF GOODS CONFORMING TO CONTRACT DOES NOT BAR REJECTION OF BALANCE FOR NONCOMPLIANCE.

Under Personal Property Law (Sales of Goods Act) § 125, subds. 2, 3, a buyer's acceptance of a portion of thread delivered which conformed to the requirements of the contract does not prevent rejection of thread which did not conform to the contract requirements; the rule that acceptance of a part of a delivery of goods which were required to be delivered as a whole not applying, and the case being one where the buyer makes delivery of goods of different description not included in the contract.

Appeal from City Court of New York, Trial Term.

Action by Irving Bloom against the Abram Bloom Company, Incorporated. From a judgment for plaintiff, entered on a verdict of a jury, defendant appeals. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Abraham I. Spiro, of New York City, for appellant.

Morris & Samuel Meyers, of New York City (Samuel Meyers and Louis J. Elias, both of New York City, of counsel), for respondent.

BIJUR, J. Plaintiff sued for some \$2,000 balance due for goods sold and delivered to defendant under a written contract. The contract provided for a sale by the plaintiff to defendant of 800 to 1,100 pounds of thread "as sample spools delivered." Defendant testified

without substantial contradiction that the sample spools consisted of four, of which two were right twist and two left twist. It also offered practically uncontradicted proof to a custom of the trade that thread of this character was always delivered one-half right twist and one-half left.

A first shipment was satisfactory, but in the second and last shipment 201 pounds were right twist and 487 pounds left. The defendant kept 201 pounds of right twist and 201 pounds of left, and tendered the balance back to the plaintiff as not being in compliance with the contract. The contract price for all the thread accepted by the defendant was \$2,921.75, and defendant, having paid plaintiff \$3,000, counterclaimed for the excess, \$78.25.

[1] Plaintiff's contention at the trial was that the goods had been sold "as is." In support of that contention, and over defendant's appropriate objection, plaintiff was permitted to testify to conversations accompanying the making of the contract. As the contract is plainly complete on its face, parol evidence to vary it was incompetent. *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961. The written contract, quite apart from the unnecessarily proved custom of the trade, established conclusively that the thread to be delivered must be half right and half left twist. *Marks v. Cowdin*, 226 N. Y. 138, 123 N. E. 139.

The learned judge left it to the jury to determine whether the contract was one for thread "as is," or half right and half left twist, as provided in the contract. This was manifest error, for which the judgment must be reversed. The learned judge further charged that, if the jury believed the contract was "as is," they must render a verdict in favor of plaintiff; and if they found it was a sale by sample, then defendant, having accepted, retained, and used a part of the delivery, must be held to have accepted all, and that defendant's sole recovery on its counterclaim could be for the difference in value between the 287 pounds right twist, and the same quantity equally divided between right and left, as to which there was no applicable proof. Defendant's counterclaim for the overpayment was dismissed. The verdict of the jury was necessarily in favor of plaintiff for the entire amount claimed.

[2] The rule that the acceptance of a part if a delivery of goods, which are required to be delivered as a whole, is an acceptance of the whole, exemplified in cases like *Mendetz v. Wood*, 86 Misc. Rep. 52, 148 N. Y. Supp. 92, has no application to the instant case, which falls under subdivision 2 or 3 of section 125 of the Personal Property Law (Sales of Goods Act [Consol. Laws, c. 41]). These subdivisions provide, respectively, that where the seller delivers to the buyer a quantity of goods larger than the contracted amount, or makes a delivery part of which consists of "goods of different description not included in the contract," the buyer may accept those covered by the contract and reject the rest.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

(189 App. Div. 165)

PAINTER v. FLETCHER.

(Supreme Court, Appellate Division, First Department. October 24, 1919.)

1. APPEAL AND ERROR ¶1002—SUFFICIENCY OF CONFLICTING EVIDENCE.

Where the court submitted specific questions of fact to the jury, and the evidence was conflicting, but sufficient to sustain the jury's findings, the verdict must stand.

2. GUARANTY ¶36(2)—OF ACCOUNTS CONSTRUED.

Where guaranty covered accounts due to one personally, there could be no recovery for accounts carried by him for a disclosed principal.

3. INTEREST ¶18(1)—ALLOWED ON RECOVERY ON ACCOUNT.

On recovery on an account, where the interest was determinable by simple computation, it should be considered as liquidated, and interest allowed.

Appeal from Trial Term, New York County.

Action by Linda A. Painter against Austin B. Fletcher, as executor of one Braker, deceased. From a judgment of the Supreme Court, New York County, in favor of plaintiff, entered upon a special verdict, both plaintiff and defendant have appealed. Judgment modified and affirmed.

See, also, 182 App. Div. 616, 169 N. Y. Supp. 914.

Argued before CLARKE, P. J., and DOWLING, PAGE, and MERRELL, JJ.

Wilder, Ewen & Patterson, of New York City (John Ewen, of New York City, of counsel, and William R. Wilder, of New York City, on the brief), for plaintiff.

Safford A. Crummey, of New York City (Charles F. Brown, of New York City, of counsel), for defendant.

PAGE, J. An appeal was taken to this court from a judgment dismissing the complaint upon the pleadings and the opening of counsel. We then determined that if the agreement between the plaintiff and the defendant's testator was intended by both parties thereto to be an inducement to Braker to sign the composition agreement between Ellingwood & Cunningham and their creditors, and if the making of the agreement was secret and unknown to the creditors of Ellingwood & Cunningham and intended by the plaintiff to be concealed from the creditors, the agreement would be void. We pointed out that the facts from which these inferences could be drawn were not before the court. The judgment was reversed, and a new trial ordered. 182 App. Div. 616, 169 N. Y. Supp. 914.

[1] Voluminous evidence was received upon the second trial, and there were presented clearly defined issues of fact, upon which the evidence was conflicting. The court submitted specific questions of fact to the jury and directed them to find a special verdict. The jury answered these questions in the negative. There was sufficient evidence to sustain the verdict. The judgment on the defendant's appeal is affirmed.

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[2] The plaintiff has appealed from the judgment, and asks a modification. We find that the trial court erred in including the H. J. Braker special account as a part of the "just indebtedness" of Ellingwood & Cunningham to Braker, which was the subject of the guaranty by plaintiff. This account was carried by Braker for a disclosed principal, and not on his own behalf. The guaranty only covered the liability to him personally, and not to the person for whom he was agent or trustee.

[3] We are also of opinion that the plaintiff is entitled to interest on the recovery. The amount was determinable by a simple arithmetical computation, and therefore should be considered as liquidated. We have considered the other contentions of the plaintiff, but do not find them meritorious. The judgment will therefore be modified, by adding thereto the sum of \$8,769.13, being 50 per cent. of the amount of the special account, and providing for interest.

Judgment modified, and, as modified affirmed, with costs to the plaintiff. Settle order on notice. All concur.

PAULSEN v. BIERMAN et al.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

1. APPEAL AND ERROR §927(3)—FAVORABLE INFERENCES FROM TESTIMONY INDULGED ON REVIEWING DISMISSAL OF COMPLAINT.

In reviewing a judgment dismissing the complaint on the ground that plaintiff, who was struck by defendant's automobile, was guilty of contributory negligence, plaintiff is entitled to have the benefit of the most favorable inferences from the testimony.

2. MUNICIPAL CORPORATIONS §706(7)—QUESTION OF CONTRIBUTORY NEGLIGENCE OF PERSON INJURED ON STREET FOR JURY.

In an action by plaintiff, who was struck by defendant's automobile while attempting to cross streets at an intersection, question of plaintiff's negligence held for the jury.

Appeal from City Court of New York, Trial Term.

Action by Peter Paulsen against Julia Bierman and another. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Edward A. Scott, of New York City, for appellant.

Samuel I. Hartman, of New York City, for respondents.

GUY, J. Plaintiff sues to recover damages for injuries sustained through the alleged negligence of the defendants. On the evening of September 13, 1917, while plaintiff was attempting to cross Third and Fourth avenues at Fifth street, he was struck and knocked down by the automobile of the defendant Julia Bierman, operated by her husband, the codefendant, and at the close of plaintiff's case the court dismissed the complaint, upon the ground that his evidence showed that plaintiff was guilty of contributory negligence.

[1, 2] Plaintiff testified that, accompanied by one Hansen, he walked from the northeast corner of Fifth street and Third avenue, westerly across Third avenue; that as he came to pass the second track on Third avenue he saw an automobile down at Fourth street, coming up on the north-bound Third avenue track; that at about the place where plaintiff was crossing the Fourth avenue car tracks leave Third avenue and proceed northwesterly along Cooper Square, or Fourth avenue, making a space of about 14 feet between the Third avenue downtown track and the Fourth avenue uptown track; that at that point there is no sidewalk between Third avenue and Fourth avenue; that to the south of plaintiff, as he approached the Fourth avenue north-bound track, was an elevated railroad column; that as he reached the north-bound Fourth avenue track he was struck by defendant's automobile, which came around the column from Third avenue and up Fourth avenue without blowing any horn or giving any signal, throwing the plaintiff down on the street. The testimony of plaintiff's companion tended to corroborate plaintiff's version of the accident.

The plaintiff was entitled to the most favorable inferences from the testimony, and in the light of that rule, under well-established authority (*Baker v. Close*, 204 N. Y. 93, 97 N. E. 501, 38 L. R. A. [N. S.] 487), the question of contributory negligence was for the jury.

Judgment reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

(189 App. Div. 155)

In re LEIST. In re RIKER. In re ARTHUR AVE. IN BOROUGH OF THE BRONX, CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. October 24, 1919.)

1. EMINENT DOMAIN §153—PERSON ENTITLED TO AWARD ON GRADING OF STREETS.

An award for damage to buildings by reason of intended regulation of a street is payable to the owners of the property at the time the street is regulated or graded, and not when the city acquires title to the land.

2. EMINENT DOMAIN §153—RIGHT TO AWARD ON WIDENING OF STREETS.

Where a city condemns land in widening a street, and title passes, the right to an award of damages thereafter is personal property, which does not pass to the grantee of owner of abutting land entitled thereto.

3. EMINENT DOMAIN §153—EFFECT OF CONVEYANCE ON RIGHT TO AWARD.

A grantee, having a right to claim on ground of estoppel, that title had passed on condemnation before deed was given to her with covenants, did not pass such right, where she conveyed by deeds of bargain and sale, without full covenants.

Appeal from Special Term, New York County.

In the matter of the applications of Henry G. Leist and Elizabeth C. Riker for payment of award made for parcels No. 168 and No. 168A on the damage map, on the report of commissioners on estimates and assessments in the proceeding to open Arthur Avenue, from Tremont Avenue to Pelham Avenue, in the Borough of the Bronx, City of New

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York. Cross-appeals from an order directing the comptroller to pay certain awards to Elizabeth C. Riker, and from an order denying the petition of Henry G. Leist for the payment to him of such awards. First order modified, and second order reversed.

Argued before CLARKE, P. J., and DOWLING, SMITH, PAGE, and PHILBIN, JJ.

Harry H. Holbert, of New York City (Samuel Stark, of New York City, of counsel), for appellant.

Clarence C. Ferris, of New York City, for respondent.

SMITH, J. The first award, called 168, is for property actually taken in the widening of the avenue. The second award, 168A, is described in the report of the commissioners of estimate and assessment as for damage to buildings by reason of the intended regulation of the street. In the proceedings to acquire title the commissioners were appointed on November 14, 1896. The report of the commissioners was duly confirmed by an order entered on the 4th day of June, 1903. By resolution of the board of street opening title to the lands required for said avenue was vested in the city of New York on the 1st day of June, 1897, pending the completion of the proceedings. Thereafter Arthur avenue was regulated and graded between June 28, 1898, and February 5, 1901.

[1] As to the award 168A, which is described by the commissioners as an award for damage to buildings by reason of the intended regulation of the street, this court is agreed. The law is well settled that that award is payable to the owners of the property at the time the street is regulated or graded. In *Re City of New York*, 80 App. Div. 622, 80 N. Y. Supp. 842, the law is stated in an opinion by Judge McLaughlin:

"The damages to buildings located upon the line of the proposed street are to be ascertained as of the time when the street is actually opened, and not when the city acquires title to the land."

To this is cited *People ex rel. New York City Church v. Coler*, 60 App. Div. 77, 69 N. Y. Supp. 863; *Matter of Rogers Place*, 65 App. Div. 1, 72 N. Y. Supp. 459. It appears that the land here in question was actually taken and the grade changed, while the respondent Riker was the owner of these premises, and for which she was required to pay the sum of \$800, so that in equity, as well as in law, she is entitled to that award.

[2, 3] As to the award 168 for the premises actually taken in the widening of Arthur avenue, we have reached a different conclusion. At the time of the conveyance by Leist to Regina Maier, under which the respondent claims as a subsequent grantee with a full-covenant deed, the title to the property condemned by the city had already passed, while there might be an action by the grantee Maier against Leist for a breach of covenant, we do not find in the deed any words which expressly or by fair implication assume to assign the award which should be made for the land which did not pass and which had been condemned. The right to that at the time of the giving of the deed

to Maier was personal property, and could only pass by an assignment thereof, and was not conveyed by the deed. Whether or not the grantee, Maier, if she were here, could claim an estoppel, as against her grantor, from claiming that title had passed before the giving of the deed, in view of his covenant in his deed, it is not necessary here to discuss. In the chain of title to the respondent we find the deed from Mary McManus to Charles E. McManus, as well as the deed from Charles E. McManus to Bernard Theis, to have been merely deeds of bargain and sale, without full covenants. The full-covenant deed given by Mary McManus to Bernard Theis, after she had parted with her title to Charles E. McManus, does not repair the break in the chain of title from Regina Maier. This respondent, therefore, cannot claim, as assignee of Regina Maier, any right that she might have had to the award. See *Matter of Mayor, Trinity Avenue*, 116 App. Div. 252, 101 N. Y. Supp. 613; *King v. Mayor*, 102 N. Y. 172-175, 6 N. E. 395; *Harris v. Kingston Realty Co.*, 116 App. Div. 704, 101 N. Y. Supp. 1104.

The order denying the petition of Henry G. Leist should therefore be reversed, without costs, and motion granted, so far as to direct payment of the award of \$145, known as award 168, to the appellant Leist, with interest. The order directing payment of the awards to Elizabeth C. Riker should be modified, by striking out the provision therein for the payment to Elizabeth C. Riker of the award of \$145, known as award 168, and by providing that said award, with interest, be paid over to the appellant Leist, and, as so modified, affirmed, without costs. Settle orders on notice. All concur.

(189 App. Div. 107)

GORMAN v. DOE et al., Board of Registration, etc.

(Supreme Court, Appellate Division, Second Department. October 11, 1919.)

ELECTIONS —72—RIGHT TO REGISTRATION.

One is not entitled to registration in an election district, because of having taken a lease for a house therein providing for possession October 1, where unable to get possession, because of an order in dispossession proceeding giving a tenant therein till October 14th to get out.

Appeal from Special Term, Kings County.

Application by Thomas J. Gorman for mandamus to John Doe and others, constituting the Board of Registration of Electors of the Twenty-Seventh Election District, County of Kings. From order denying the petition, petitioner appeals. Affirmed.

The petitioner's affidavit presented the following facts:

"That heretofore, in the month of July, 1919, Edward J. Martin, my brother-in-law, with whom I have been living for the past 28 years, took a lease in writing on premises known as 45 Putnam avenue, which is in the Twenty-Seventh election district of the Eleventh assembly district of the county of Kings, and that the said lease recites the fact that we were to have possession of the premises on the 1st day of October, 1919. Prior to the 1st day of October, 1919, I have been living with my brother-in-law, whose name is above mentioned, at 315 Quincy street, for the last 8 years, which is in the

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Third election district of the Seventeenth assembly district. We are unable to get possession of the premises 45 Putnam avenue, due to the fact that an order of the court in a dispossession proceeding gave the tenant therein time until Tuesday, the 14th day of October, 1919, in order to get out."

On the denial of the above application the petitioner's appeal was heard by this court on the original papers.

Argued before JENKS, P. J., and PUTNAM, BLACKMAR, and KELLY, JJ.

A. I. Nova, of Brooklyn, for appellant.

William P. Burr, Corp. Counsel, and William R. Wilson, both of New York City, for respondents.

PER CURIAM. We are of opinion that the facts set forth in the petition were insufficient to entitle the petitioner to registration, and therefore the order must be affirmed, but without costs.

ARISTO HOSIERY CO., Inc., v. LICHTEN.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

APPEAL AND ERROR 1177(2)—JUDGMENT BASED ON WRONG MEASURE OF DAMAGES.

Judgment based on a wrong measure of damages must be reversed and new trial ordered.

Appeal from City Court of New York, Trial Term.

Action by the Aristo Hosiery Company, Incorporated, against Harold Lichten. From a judgment for plaintiff, and from an order denying his motion for new trial, defendant appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Samuel J. Rawak, of New York City, for appellant.

Henry A. Blumenthal, of New York City, for respondent.

PER CURIAM. The contract called for delivery at Philadelphia, and the trial judge erroneously charged the jury that the place of delivery was New York. The judgment being based on a wrong measure of damages, it must be reversed, and a new trial ordered, with costs to appellant to abide the event.

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(109 Misc. Rep. 96)

COOPER-SNELL CO. v. STATE.

(Court of Claims of New York. October 20, 1919.)

1. **STATES ⇨184—RESTORATION TO CALENDAR OF CLAIM, DISMISSED THROUGH MISUNDERSTANDING OF COUNSEL.**

Where claims were dismissed upon claimant's failure to be present at time for which they had been set for trial, because of misunderstanding or breach of understanding between claimant's counsel and member of Attorney General's staff, court will restore claims to calendar, if it has jurisdiction to hear claims on their merits.

2. **STATES ⇨184—JURISDICTION OF COURT OF CLAIMS WHERE CLAIMANT HAS NOT FILED NOTICE OF INTENT TO FILE CLAIM.**

Where highway contractor filed claims against state in 1914, but has never filed notice of intention to file claim, as required by Code Civ. Proc. § 264, Court of Claims has no jurisdiction, notwithstanding Laws 1918, c. 603, conferring jurisdiction over claims of such contractor, if claim "shall be filed * * * within six months from the time this act takes effect," though such notice of intention shall not have been filed; such act applying to claims existing, but not filed, and not to claims already filed.

3. **CONSTITUTIONAL LAW ⇨70(3)—LEGISLATURE ALONE CAN IMPOSE CONDITIONS AS TO CLAIMS AGAINST STATE.**

The Legislature alone has the power to say what conditions it will impose upon the acceptance by its citizens of the benefits of remedial legislation which it enacts, and courts cannot interfere therewith.

4. **STATES ⇨184—FACTS SHOWING JURISDICTION OVER CLAIMS MUST BE ALLEGED.**

Facts and circumstances showing that date of accrual of claim was within six months of date of filing, so as to give Court of Claims jurisdiction under Laws 1919, c. 175, must be alleged, the mere allegation that claims were filed within six months from date of accrual being statement of a conclusion.

Ackerson, P. J., dissenting.

Claims 1549-A and 1688-A by the Cooper-Snell Company against the State of New York. On motions by claimant for orders vacating and setting aside orders dismissing claims, and to restore claims to the calendar. Denied.

John C. Wait, of New York City, for claimant.

Carey D. Davie, Deputy Atty. Gen., for the State.

SMITH, J. Separate motions have been made by claimant in the above claims for orders vacating and setting aside orders granted by this court at its Utica 1919 term held on January 6, 1919, dismissing these claims, and to restore the claims to the calendar.

[1] The claims were regularly upon the calendar at the Utica term and had been duly noticed for trial by the Attorney General but claimant was not present nor represented in court, claiming that there was a misunderstanding or a breach of an understanding between its counsel and a member of the Attorney General's staff as to the disposition that would be made of the claims at the Utica term, and claiming also that had its counsel been present in court when the motions were made, he would have been able to convince the court that the motions should not be granted. Whatever the facts may be with regard to a misunderstanding or a breach of an understanding be-

tween the claimant's counsel and the Attorney General's office, we would not hesitate to grant these motions and restore these claims to the calendar as a matter of favor, if not of right, were we not convinced by the facts as now exhibited by claimant that this court is without jurisdiction to hear and determine the claims upon their merits and to make awards therein in claimant's favor and against the state.

The claims, as shown by claimant's moving papers and by the records and files of this court, were filed in May, 1914, but no notice of intention to file them, as required by section 264 of the Code of Civil Procedure, has ever been filed. Upon this condition of fact, beyond question this court would be without jurisdiction to hear and determine the claims. It appears, however, that the Legislature in 1918 passed an act, which became a law on May 10, 1918, being chapter 603 of the Laws of that year, which in terms conferred jurisdiction upon this court to hear, audit, and determine the alleged claim of the Cooper-Snell Company against the state for extra work and damages alleged to be due such company in the construction of a section of highway known as the Dolgeville Village county road, numbered 868, in the county of Herkimer, and also the alleged claim of said company for damages by reason of extra work, labor, services, and damages sustained by and because of the alleged negligence of the state in not furnishing proper grades for work in connection with highway contract known as the Manheim Center and Salisbury Center road, numbered 463, in the county of Herkimer. The act also provided:

"No award shall be made or judgment rendered herein against the state * * * unless such claims *shall be filed* [italics ours] with the Court of Claims within six months from the time this act takes effect; but such claims shall not be defeated nor the jurisdiction of such court impaired because of the failure to file notices of intent to file such claims as provided in section 264 of the Code of Civil Procedure."

[2] These claims, as filed, are for extra work and damages, as alleged in the claims, connected with and growing out of the performance by claimant of the highway contracts mentioned in the act of 1918, and claimant urges that the act confers jurisdiction upon the court to hear them, and authorizes the court to make awards in its favor upon them, notwithstanding the fact that they were not filed within six months after the act took effect, but were in fact filed nearly, if not quite, two years prior to the time when the act took effect. We cannot agree with this contention. The natural and unmistakable meaning of the language of the act of 1918 is that its terms were to apply to claims already existing but thereafter to be filed, and not to claims which had already been filed. It must be presumed that the Legislature was fully aware of the status of the claimant's claims against the state and of the facts which made remedial legislation necessary and appropriate. If, therefore, it had been intended by the Legislature to confer jurisdiction upon the court to hear, audit, and determine claims already filed with this court, it would not have inserted in the act the provision requiring the claims to be filed with the court within six months from the time the act should take effect, and those words, as used in the act, are utterly meaningless unless they

mean that the benefits of the act were to extend to claims thereafter to be filed.

This exact question was before this court in *Ross v. State*, 103 Misc. Rep. 196, 175 N. Y. Supp. 304, where we held, construing a similar remedial statute, that a new filing was necessary in order to obtain the benefits of the act, and our decision there was affirmed by the unanimous decision of the Appellate Division, Third Department (186 App. Div. 156, 159, 173 N. Y. Supp. 656, 658); the court there saying, as to this point:

"The act giving the right provides, as we have seen, that no judgment 'shall be rendered hereunder against the state, * * * unless such a claim shall be filed with the Court of Claims within one year from the passage of this act.' 'The Legislature has said that the thing shall not be done, and that is enough.'"

[3] Upon the argument and in his brief claimant's counsel insisted strenuously that the Appellate Division neither affirmed nor overruled the holding of the court upon the point now under consideration, but rested its decision entirely upon the unconstitutionality of the remedial statute. We do not so read the opinion. The court there held that the act then under consideration was constitutional, and held, as we have above noted, that, the Legislature having said that the claims should be filed within a limited time after the passage of the remedial act, that was enough, or in other words that the court was bound by that declaration of the Legislature. It is not the province of courts to characterize as an idle ceremony, and hence to brush aside a requirement prescribed by the Legislature in the exercise of its lawful powers and functions. In enacting remedial legislation so long as it confines itself within constitutional limitations, the Legislature is the general court of last resort. It, and it alone, is the custodian of the conscience of the people of the state, and it, and it alone, has the power to say what conditions it will impose upon the acceptance by its citizens of the benefits of remedial legislation which it may determine in its wisdom to enact.

That claimant well understood the meaning of the act of 1918 to be as we have held it to be appears from the fact that since the act took effect it has filed with this court two claims against the state, viz., 15709 and 15710, for extra work and damages growing out of the performance by it of the highway contracts mentioned in the act, and, although these claims differ in amount and in phraseology of statement from the claims which have been dismissed, they are clearly recognizable as being based in general upon the same considerations, facts, and circumstances as the dismissed claims, and these new claims, as filed, state and allege that they are filed "under act of Legislature, chapter 603, Laws of 1918." These new claims now remain undisposed of on our court calendar. However, it appears from our files and records that they were not filed until November 12, 1918, which was not within six months after May 10, 1918, the date upon which chapter 603 of the Laws of 1918 took effect.

Claimant's contention that the act of 1918 confers jurisdiction of the claims in question seems, therefore, to be an afterthought to re-

lieve itself of the result of its neglect seasonably to comply with the plain meaning of the enabling act of 1918. We think the contention is without merit.

[4] Claimant further urges in support of these motions that jurisdiction to hear and determine these claims has been conferred by chapter 175 of the Laws of 1919, which conferred jurisdiction upon this court to hear and determine a certain class of claims against the state, where no notice of intention to file such claims had been filed. The application of the act of 1919 above referred to was confined by its terms to those claims only—

"which have been previously filed with the Court of Claims within six months from the date of accrual thereof and before December 31, 1917."

The nature of these claims is of the class specified in the act of 1919, and if they had been in fact filed with this court within six months of the date of their accrual, they would have been within the protection of the act. Claimant in its moving papers alleges that—

"This claim was duly filed with the clerk of the Court of Claims and with the Attorney General of the state of New York on or about May, 1914, and within six months after the cause of action upon said claim accrued."

This allegation as to the date of filing is one of fact, but as to the filing having been within six months after the cause of action upon the claim accrued it is the statement of a conclusion. Nowhere in claimant's motion papers is there any allegation of any facts or circumstances supplementing the facts alleged in the claims themselves, from which claimant has drawn or the court may draw the conclusion reached by claimant that the claims were filed within six months from the date of the accrual thereof. The facts stated and alleged in the claims as filed in no way support, but expressly negative, the conclusion of claimant that the claims were filed within six months from the date of their accrual.

Claim 1688-A alleges that the work of the performance of the high-way contract upon which the claim is based was entirely completed and performed by the claimant on or about November, 1911, and it demands judgment against the state for the sum of \$22,000, with interest thereon from the 1st day of December, 1911. Claim 1549-A alleges that the work upon which it is based was entirely completed and performed on or about November, 1911, that at least a partial settlement was had on May 6, 1912, and demands interest from the 1st day of December, 1911. The claims, as we have seen, and as was conceded upon the argument, were not filed until May, 1914, about two years after the date of the accrual thereof, as stated in claimant's pleading.

If facts and circumstances exist, in addition to those alleged in the claims, which, being proved, would show or tend to show that the date of the accrual of the cause of action was within six months previous to May, 1914, those facts and circumstances should have been alleged in the claims, or, for the purposes of this motion, should have been exhibited in claimant's moving papers. From the facts before us we cannot hold that these claims accrued within six months prior to the

dates of their filing, but must hold that it appears that they accrued, if at all, long prior to that period.

The motions to restore, therefore, are denied without prejudice, however, to new applications to be made on new papers showing the facts and circumstances, in addition to those stated in the claims as filed to support claimant's contention that the claims were filed within six months after the date of their accrual.

PARIS, J., concurs.

ACKERSON, P. J. (dissenting). I believe the motion to restore the above-entitled claims to the calendar of this court should be granted. I believe that the claimant herein is entitled to have its day in court. These claims were regularly filed in this court, and set forth that the claimant is entitled to a substantial amount of money for extra work and materials and for damages by reason of negligent engineering and inspection on the part of the state in connection with two highway contracts. No notices of intention were ever filed, as required by section 264 of the Code of Civil Procedure. The claimant, however, endeavored to remedy this defect by going to the Legislature. The Legislature, by chapter 603 of the Laws of 1918, which became a law on May 10, 1918, passed an act entitled:

"An act to confer jurisdiction on the Court of Claims to hear, audit and determine the alleged claims of the Cooper-Snell Company against the state for damages alleged to have been sustained by such company, and to render judgment therefor."

This act, it will be seen, therefore, referred specifically to these very claims in its title. It referred to them more specifically in the body of the act itself. It required such claims to be filed with the Court of Claims within six months from the time this act takes effect, and then adds the following clause:

"But such claims shall not be defeated nor the jurisdiction of such court impaired because of the failure to file notices of intent to file such claims as provided in section 264 of the Code of Civil Procedure."

My Associates contend that under this act these claims should have been refiled within six months from May 10, 1919. These claims were on file during all of that time. There is nothing said in the act about refiled them. My reasons for this position are set forth in the dissenting opinion in the case of *Glen Ross v. State*, reported in 103 Misc. Rep. at page 197, 175 N. Y. Supp. 304. That dissenting opinion has never been overruled, so far as I am aware, but the principles I there contended for have been specifically approved by the Appellate Division in the case of *Rogers v. State*, reported in 184 App. Div. at page 341, 171 N. Y. Supp. at page 338, where the learned Presiding Justice of the Appellate Division used this language:

"The statute gives permission to file a claim within a year after the act takes effect; that is, to May 4, 1917. Concededly, no new claim was filed after the act took effect, but the claim had been filed before that time. It would seem an unnecessary ceremony to refile a claim already filed. The spirit of the statute should save any claim filed before May 4, 1917. The statute is

remedial, and, if the only fault with reference to the appellant's claims is the failure to file a notice of intention, the objection seems so technical, where the claim itself is duly filed, that the statute may be given the broad and liberal interpretation we have suggested."

The position taken by the majority of this court in dismissing the claim of Glen Ross was affirmed by the Appellate Division, but upon entirely different grounds than those mentioned in the prevailing opinion in this court. The principles contended for in the dissenting opinion in this case in this court were not disapproved. Judge Woodward, in his opinion in the Appellate Division, has taken the position that it was unnecessary to consider that question. He used this language:

"The suggestion of the claimant's counsel that the claim filed with the Board of Claims in 1914, after the two-year limit had been passed, may be accepted by the Court of Claims under this special statute, need not be considered, because this claim was one which, as between individuals, would have constituted a cause of action 'to recover damages for a personal injury, resulting from negligence,' * * * and no right would have survived the three years next succeeding the accident on the 16th of September, 1911, if the state had been an individual or corporation."

To recapitulate, we now have this situation: These claims were filed in May and June, 1914. They were claims which the court did not have jurisdiction to hear unless a notice of intention was filed in accordance with section 264 of the Code of Civil Procedure. No such notice was filed. The Legislature thereafter passed an act giving this court jurisdiction to hear these specific claims, notwithstanding no notice of intention was filed, which act became a law May 10, 1918. Thereafter, and on January 6, 1919, this court dismissed these claims upon the ground that no notice of intention was filed. Such order dismissing these claims, in view of the act of the Legislature giving the court the power to hear these claims, as above referred to, was wrong, and made, in my judgment, under a misapprehension of the law. The claims should now, therefore, be restored to the calendar, and the claimant given its day in court.

Chapter 603 of the Laws of 1918 did not call for a refile of these claims. They were on file at all the times mentioned in that act for them to be on file. The reason for not refiling the claims after the special act was passed was set forth in the dissenting opinion in the Glen Ross Case in this court, and approved in the opinion of Presiding Justice Kellogg in the case of *Rogers v. State*, above referred to.

The application of the claimant, therefore, to have the claims restored to the calendar, should be granted.

(109 Misc. Rep. 107)

DRENNAN v. STATE (two cases).**McDONALD v. SAME..**

(Court of Claims of New York. October 23, 1919.)

1. BRIDGES §37—KEEPING OF FLAGMAN AND SIGNAL BELLS AT DRAWBRIDGES SUFFICIENT.

Where guard gates at the approaches of a drawbridge or lift span were impracticable, because of a trolley wire, the state's failure to install them was not negligence. The keeping of flagman or watchman at each end of such bridge, and the providing of a gong and also an automatic ringing bell, were reasonable and ample precautions.

2. BRIDGES §46(6)—NEGLIGENCE OF FLAGMAN AT DRAWBRIDGE CAUSE OF INJURY TO TRAVELER.

In an action against the state for personal injuries, resulting from an accident upon a highway drawbridge over a canal, evidence held to fairly establish claimant's contention that, as they approached the bridge in their automobile, the flagman negligently and carelessly signaled them to pass over it, when he knew it was about to be raised.

3. BRIDGES §44(1)—CONTRIBUTORY NEGLIGENCE OF TRAVELERS ON NEGLIGENCE INVITATION BY FLAGMAN TO CROSS DRAWBRIDGE.

Where a drawbridge crossing a canal was about to be raised, and before starting to raise it an electric bell was kept ringing from the time of the signal to raise the bridge and until after the automobile had crossed over part of it, and the claimants for damages for personal injury were familiar with the bridge, its manner of operation and dangers, they were not negligent in acting upon the invitation and direction of the flagman to proceed in their automobile across the bridge.

Claims by Thomas C. Drennan, by Lillian M. Drennan, and by Thomas McDonald against the State of New York for damages for personal injuries received in an accident at a canal bridge upon a highway. Tried together, and judgment for each of the claimants.

Costello, Burden, Cooney & Walters, of Syracuse, for claimants.

Edward M. Brown, Deputy Atty. Gen., for the State.

SMITH, J. These claims are for damages for personal injuries claimed to have been sustained on August 12, 1916, at the bascule canal bridge by means of which North Salina street in the city of Syracuse passes over the Oswego Canal. The bascule bridge is of a type which has hinges at one end, and on these hinges the bridge is raised and lowered as occasion requires by appliances devised for that purpose. Salina street runs almost due north and south, and the canal runs in a northwesterly and southeasterly direction, crossing Salina street at an angle of about 35 degrees; the northerly and southerly ends of the bridge crossing the street diagonally on lines running northwesterly and southeasterly. This bridge was hinged at its northerly or northeasterly end, and when operated was raised and lowered at its southerly or southwesterly end. Its operating appliances were controlled at a station on the easterly side of the street something less than two-thirds of the distance from the extreme northerly corner of the bridge on the west side of the street to the extreme southerly corner thereof on the east side of the street.

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The operation of raising the bridge changes its plane from a level through inclines of various degrees toward a perpendicular, and to a stage which permits the passage of boats; the floor or deck of the bridge slipping down toward north and toward the east in increasing degrees as the process of raising the bridge is continued.

This bridge, because of its type, its position in and with reference to the street, and the manner of its operation, constituted a very dangerous condition, requiring of the state great care in guarding against accidents to travelers on the street. As originally designed, the bridge was to be equipped with gates of the ordinary railroad crossing type, and standards upon which to hang such gates had been erected at both ends of the bridge; but no gates had been installed, because it had been found that their operation would be interfered with by the trolley wires of the street surface railroad whose tracks extended through Salina street and across the bridge.

To warn travelers in the street that the bridge was about to be raised, the state had installed an electric bell and a gong, both operated from the bridge tender's cabin—the former by closing a switch by means of a lever, after which the bell rings continuously until the switch is opened again; the latter by pulling a rope attached to the hammer of the gong. The state also employed flagmen, whose duty it was to guard the approaches to the bridge and to warn travelers in the street when the bridge was about to be raised.

On the evening of August 12, 1916, between the hours of 7 and 8 o'clock, claimants were riding south on North Salina street in an automobile driven by claimant Lillian M. Drennan; claimants Thomas C. Drennan and Thomas McDonald being seated in the rear seat. The automobile was driven upon and over the bridge just as it was being raised to permit the passage of a boat on the canal, and, while the southerly or southwesterly end of the bridge was elevated a short distance from the level of the street, the automobile ran off the elevated end of the bridge and tipped over on its side, injuring the claimants.

It is claimed on behalf of the claimants that the state was negligent in failing to guard the approach to the bridge, and in failing to give suitable warning that the bridge was about to be raised, and also in that the flagman or watchman at the north end of the bridge actually invited them to enter upon and cross the bridge at a time when he knew the bridge was about to be raised for the passage of a boat on the canal.

[1] The evidence does not disclose whether or not there were any lights or signals of any kind upon the bridge, other than the electric bell and gong above mentioned, which bell and gong were ringing at and before the time when the automobile entered upon the bridge. There were no guard gates at the approaches, for the reason, as stated above, that with this type of bridge, at the location where it was placed, such gates were impracticable, and failure to install and operate them under the circumstances did not constitute negligence. The means provided by the state to warn users of the street when the bridge was about to be operated and to guard against accidents were reasonable and ample, if its employes reasonably attended to their duties.

[2] As to the conduct of the watchman or flagman at the north approach to the bridge at the time of this accident there is a conflict of testimony, but the weight of the evidence fairly establishes the contention of claimants that as they approached the bridge the flagman negligently and carelessly motioned to them to pass over and across the bridge when he knew it was about to be raised. This is denied by the flagman, who is corroborated by the flagman at the southerly end of the bridge, who was at least 70 or 80 feet distant from the flagman at the northerly end of the bridge at the time. All three claimants testify positively to this direction of the flagman, and I am convinced that they speak the truth. Mr. Drennan, one of the claimants, is and for years has been a merchant of standing in the city of Syracuse, Lillian M. Drennan is his wife, and claimant McDonald occupies a position of trust and responsibility with the New York Central Railroad Company. They are all persons of intelligence, and as witnesses appeared to be telling a frank and truthful story of the events leading up to and connected with the accident.

[3] It is true that the gong had been rung by the bridge tender before starting to raise the bridge, and that the electric bell was kept ringing from the time the signal to raise the bridge was given until after the automobile had passed over the southerly end of the bridge. It is also true that all the claimants were familiar with the bridge, its manner of operation, and its dangers; but if, as I think the evidence fairly establishes, they were invited to enter upon the bridge by the servant of the state, placed there to notify them when danger existed and to guard their safety, they were justified in concluding that the way was safe for them to proceed, and they were not negligent in acting upon the invitation and direction of the flagman.

As a result of the injuries sustained by him and his wife, claimant Thomas C. Drennan was obliged to pay and did pay for medical and hospital care and attendance the sum of \$998, in addition to which he should recover as compensation for his injuries in the loss of services and society of his wife the sum of \$1,500, making in all the sum of \$2,498, for which he is entitled to judgment.

The injuries sustained by Mrs. Drennan were slight, and the expense of her medical treatment, etc., was paid by her husband and has been included in the amount awarded to him. As compensation for the injuries received by her, she should have judgment for the sum of \$250.

Claimant McDonald necessarily paid for medical attention and treatment \$432, with clothing damaged and destroyed of the value of \$40. As compensation for his injuries, he should recover the sum of \$1,000, making in all the amount of his recovery \$1,432.

Findings in accordance herewith may be presented for signature.

ACKERSON, P. J., concurs.

SCHNEIDER v. HODGKINS FIELD HARDWARE CO., Inc.

(Chautauqua County Court. November 3, 1919.)

SALES §—392—To RECOVER PRICE ON RESCISSION FOR BREACH OF WARRANTY, BUYER MUST RETURN GOODS UNLESS VALUELESS.

In an action for damages for alleged breach of warranty in the sale of three automobiles, where the uncontradicted evidence disclosed that one of them went into plaintiff's possession, the evidence was conflicting as to whether plaintiff or defendant held possession of the others, and there was no evidence of any offer to return them, plaintiff has not brought himself within Personal Property Law, § 150, subd. (d), relating to seller's breach of warranty, rescission, and permitting recovery of price paid, and cannot recover the full purchase price, in the absence of testimony that they were valueless.

Appeal from Municipal Court of Dunkirk.

Action by Lawrence Schneider against the Hodgkins Field Hardware Company, Incorporated. From a judgment for plaintiff, and from a denial of defendant's motion to set aside the verdict and for new trial, defendant appeals. Judgment reversed, and new trial granted.

John L. Hurlbert, of Dunkirk, for appellant.

John L. Sullivan, of Dunkirk, for respondent.

OTTAWAY, J. This is an appeal from a judgment entered in the Municipal Court of the City of Dunkirk, New York, upon the verdict of a jury, in favor of the plaintiff and against the defendant, for \$500 damages and \$41.80 costs, and an order of said Municipal Court denying the motion of defendant to set aside the verdict of the jury and for a new trial.

This action was brought to recover damages for an alleged breach of warranty in the sale of three automobiles by the defendant to the plaintiff, for which the plaintiff paid the sum of \$500. The plaintiff has recovered of the defendant the purchase price of said automobiles. Upon the trial of the action, neither party gave any evidence as to the value of the automobiles, either as warranted or as they were when sold. Apparently the plaintiff based his right to recover and the amount of damages upon the purchase price paid by him for the automobiles. He based this claim upon section 150 of the Personal Property Law (Consol. Laws, c. 41). Subdivision (d) of said section provides:

"Where there is a breach of warranty by the seller, the buyer may * * * rescind the contract to sell or the sale and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid."

The uncontradicted evidence discloses that one of these automobiles went into the possession of the plaintiff. As to the possession of the other two automobiles, the evidence is conflicting, whether it was in fact in the possession of the plaintiff or the defendant. No evidence was given of any offer to return these automobiles to the

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defendant. Under these circumstances, the plaintiff has not brought himself within the provisions of subdivision (d) of section 150 of the Personal Property Law, and the plaintiff could not recover the full amount of the purchase price of these automobiles, in the absence of testimony showing they were valueless. *Frieder v. Rosen*, (Sup.) 147 N. Y. Supp. 442.

The judgment of the Municipal Court is reversed, and a new trial granted in the Municipal Court of the City of Dunkirk, with costs to the defendant to abide the event of the action.

(108 Misc. Rep. 275)

PEOPLE v. HIMMANEN.

(Chëmung County Court. July, 1919.)

1. SCHOOLS AND SCHOOL DISTRICTS ⇨160—DEFENSE TO PROSECUTION UNDER COMPULSORY EDUCATION ACT.

In a prosecution under Education Law, § 624, relating to compulsory education of children between 8 and 16 years, the only defense is that they are not in proper physical and mental condition to attend school.

2. SCHOOLS AND SCHOOL DISTRICTS ⇨160—DEFENSE TO PROSECUTION UNDER COMPULSORY EDUCATION ACT.

Where father of two children, physically and mentally able to attend school, resided $3\frac{1}{2}$ miles from schoolhouse by one road and a little less than 2 miles by a shorter road, which had water standing in it in places during rainy weather, failed to send them to school, it was no defense, in prosecution for violation of Education Law, § 624, relating to compulsory education, that distance and condition of road made it unreasonable to require him to send them, in view of section 623.

3. SCHOOLS AND SCHOOL DISTRICTS ⇨160—PRESENTATION OF EXCUSE FOR NON-ATTENDANCE UNDER COMPULSORY EDUCATION ACT.

The excuse raised by father of several children, in his prosecution under Education Law, § 624, relating to compulsory education, that the distance from his house to schoolhouse is so great and that roads for part of the time are so bad that it would be unreasonable to require him to send his children, should be presented by proper petition to the state board of education, or by an appeal from the decision of school district in February, 1919, discontinuing the transportation of school children.

4. CRIMINAL LAW ⇨1189(10)—ADMISSION OF EVIDENCE HARMLESS WHERE ACCUSED SET UP NO DEFENSE.

In prosecution of a father under Education Law, § 624, for failure to send his children to school, where the only permissible defense was that they were not in proper physical and mental condition, admission of evidence for people in rebuttal as to what was done at a school meeting, against objection that minutes were the best evidence, and that other children living as far away as defendant's children attended, and as to transportation, etc., was harmless, under Code Cr. Proc. § 764, where defendant's evidence was immaterial, because constituting no defense; and, if defendant's evidence was material, the people's evidence was proper in rebuttal.

5. SCHOOLS AND SCHOOL DISTRICTS ⇨160—DEFENSE IN PROSECUTION UNDER COMPULSORY EDUCATION ACT INSUFFICIENT.

In prosecution of a father under Education Law, § 624, relating to compulsory education, for failure to send children to school, the fact that one child was under school age and that another had a crippled leg, did not relieve defendant as to other children, who were of school age, and

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with reference to whom no physical or mental defect was shown, though the charge was made in one information and one warrant for failure to send the four children to school.

Appeal from Justice Court.

Oscar Himmanen was convicted of a violation of the Education Law, after a trial before a justice of the peace of the town of Van Etten, Chemung county, and a jury, and was fined \$5, which he paid, and he appeals. Affirmed.

Frederick E. Hawkes, of Waverly, for appellant.

Ely W. Personius, Dist. Atty., of Elmira (Leo Waxman, of Elmira, of counsel), for the People.

SWARTWOOD, J. The defendant is the father of four children, of the ages of 12, 11, 10, and 7 years, respectively, and resides with his wife and children in the town of Van Etten, Chemung county. Prior to February, 1919, transportation was furnished by the school district for the defendant's children to and from school, but in that month the transportation was discontinued by the district. Thereafter the defendant failed to cause his children to attend school. The defendant's residence is $3\frac{1}{2}$ miles distant from the schoolhouse by one road, and 1 mile and 290 rods distant by a shorter road. The testimony given on the trial shows that the shorter road is muddy and has water standing on it in places during the rainy weather. The testimony also shows that one of the children (not the 7 year old one, who is under school age) is lame as a result of an injury to his leg. Nevertheless it is uncontradicted that two children were physically and mentally able to attend school.

[1, 2] Section 624 of the Education Law (Consol. Laws, c. 16), being part of article 23, which is headed "Compulsory Education," provides that—

"Every person in parental relation to a child within the compulsory school ages and in proper physical and mental condition to attend school, shall cause such child to attend upon instruction," etc.

In school districts such as the one in which the defendant resided the school ages are between 8 and 16 years. It will be noted that children between the ages of 8 and 16 years are within the "compulsory school ages." This section also lays the duty upon the parent to cause such children to attend upon instruction, if the children are in proper physical and mental condition to attend school. It is therefore apparent that this particular article is just what its title indicates—a compulsory education law—and when a parent fails in his duty to cause his children to attend school, his only defense under section 624 is to show that they are not in proper physical and mental condition.

The sole defenses set up by the defendant herein are that the distance from his house to the school is so great, and the roads a part of the time are so bad, that it is unreasonable to require him to send his children to school. Having decided that the only defense under section 624 of the Education Law is that the children are not in proper physical and mental condition to attend school, these defenses offered by the defendant become immaterial. Even assuming that they were

legal excuses, then a question of fact was raised for the jury, and the jury has found against the defendant on all the questions. The excuses offered by the defendant should have been presented by proper petition to the state department of education, or they should have been presented in the form of an appeal from the decision of the school district discontinuing the transportation of children in February, 1919, but, as said before, they are not defenses to the complaint herein.

The Education Law is not unreasonable. Section 623 provides that parents may cause their children to attend upon instruction other than in public schools. It also provides that:

"Occasional absences from such attendance, not amounting to irregular attendance in the fair meaning of the term, shall be allowed upon such excuses only as would be allowed in like cases by the general rules and practice of such public school."

But when a parent refuses to perform his duty of causing his children to attend upon such instruction of any sort, then he violates the law in both letter and spirit and incurs the penalty provided in section 625 thereof.

The general purpose and intent of the Education Law is very aptly stated in the case of *People v. Ekerold*, 211 N. Y. 386, 391, 105 N. E. 670, 671 (L. R. A. 1915D, 223, Ann. Cas. 1915C, 552), where the Court of Appeals said, in considering the vaccination statute, so called:

"It is obvious that a parent should not be allowed to escape his duty to send his children to school as provided by law on any excuse which is not an ample justification for such course. Our public school system has been developed with great pains and solicitude and its maintenance and support have been recognized as so important for the welfare of the state that they have been provided for and safeguarded in the Constitution itself. As a part of this system a statute has been passed requiring attendance at school of children within certain limits. If indifferent or selfish parents for ulterior purposes, such as the desire to place young children at labor instead of school, or from capricious or recalcitrant motives, may be allowed to manufacture easy excuses for not sending their children to school, a ready method will have been developed for evading the statute compelling such attendance, and if the statute which requires parents to see to it that their children attend and take advantage of this school system may be lightly and easily evaded, the purposes of the state in providing and insisting on education will be frustrated and impaired. Failure to comply with the statute ought not to be excused except for some good reason."

[3, 4] The defendant claims, however, that errors were made by the justice in the admission of evidence that prejudiced the jury to such an extent that he did not have a fair trial, and that the judgment of conviction should be reversed for the following reasons:

(1) That it was error to permit the school trustee to testify as to what was done at a school meeting, over the defendant's objection that the minutes of the meeting were the best evidence.

(2) That it was error to permit the trustee, over defendant's objection, to testify that other children in the same district lived as far away as the defendant's children and attended school.

(3) That it was error to permit the school trustee to testify, over the defendant's objection, that one rig would not be able to carry the children to this school from different directions.

From the record it appears that all of this testimony was offered by the people in rebuttal to meet and explain the testimony offered on the part of the defendant on what has already been decided herein as a collateral issue. It has been decided that the evidence offered by the defendant was immaterial, for the reason that it could not constitute a defense to the charge against him. If this view of the matter is correct, then the evidence offered in rebuttal of testimony immaterial to the only issue in the case could not prejudice the defendant, and consequently could not constitute a reversible error. In other words, if any errors were committed, they were harmless, and should be disregarded, under section 764 of the Code of Criminal Procedure. If, on the other hand, the evidence offered by the defendant were material, the evidence offered by the people in rebuttal to meet it was proper, and the defendant was not prejudiced, and its admission was not error.

[5] The defendant also claims that it was error to charge him in one information and one warrant with failure to send four children to school; that the failure to send each child to school constituted a separate crime, and that there should have been as many different informations laid and warrants issued. I do not believe that this point is well taken. Certainly the defendant was not harmed by it, because only one crime was proved against him and only one fine imposed; that is, he was charged with one violation of the statute and convicted of only one. The fact that it came out on the trial that one child was under school age and one child was crippled to some extent did not relieve the defendant of the charge of violating the statute with respect to the other two children, who were of school age, and with reference to whom no physical or mental defect was shown. The defendant was therefore clearly guilty of a violation of the section.

The judgment of conviction should be affirmed.

Judgment affirmed.

SALANT et al. v. PENNSYLVANIA R. CO.

(Municipal Court of City of New York, Borough of Manhattan, Ninth District.
March 15, 1917.)

REPLEVIN $\Leftrightarrow$ 4—WILL NOT LIE FOR GOODS DELIVERED TO CARRIER WITHOUT SURRENDER OF BILL OF LADING.

Under Act Cong. Aug. 29, 1916, § 23 (U. S. Comp. St. § 86041), *held*, goods delivered to a carrier, for which it had issued an order bill of lading, could not be replevied from it, without such bill of lading first being surrendered to it, or negotiation thereof enjoined.

Action by Gabriel Salant and others against the Pennsylvania Railroad Company. On order to show cause. Redelivery of goods replevied ordered.

See, also, 177 N. Y. Supp. 475, 188 App. Div. 851.

Aronson & Salant, of New York City, for petitioner.

Burlingham, Montgomery & Beecher, of New York City, for defendant.

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

WILSON, J. This order to show cause having come on to be heard before me this 15th day of March, 1917, requesting an order directing that the marshal redeliver to the defendant company the goods and chattels replevied under an order of replevin herein, and further directing that the order of replevin granted herein on March 9, 1917, be vacated, etc., is granted, for the following reasons:

That no bill of lading was first surrendered to the carrier, or its negotiation enjoined, in order to comply with the provisions of the act relating to bills of lading in interstate and foreign commerce, passed by the Sixty-Fourth Congress, approved August 29, 1916 (Act Aug. 29, 1916, c. 415, 39 Stat. 538 [U. S. Comp. St. §§ 8604aaa-8604w]), and going into effect on the 1st day of January, 1917. Section 23 thereof provides as follows:

"That if goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court."

Enter order.

In re CURTIS.

(Surrogate's Court, New York County. October 14, 1919.)

1. DOMICILE ¶2—"DOMICILE" AND "RESIDENCE" DISTINGUISHED.

There is a distinction between the meaning of the terms "domicile" and "residence"—"domicile" being a term which belongs particularly to the law of nations and to the interstate law, regulating a status in federal or confederated states, and relating to countries and states, not to localities within those countries or states; a once-acquired domicile not being affected by nonresidence, if the intent is to retain the old domicile.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Domicile.]

2. DOMICILE ¶6—INDEFINITE NONRESIDENCE DOES NOT AFFECT DOMICILE.

A person, intending to retain his old domicile, may reside almost indefinitely out of the locus of such domicile.

3. DOMICILE ¶4(1)—PERSON SUI JURIS MAY HAVE SEVERAL RESIDENCES.

A person sui juris may freely at any time change a residence from any place to another, or he may have several residences.

4. DOMICILE ¶9—DECEASED'S DECLARATIONS AS EVIDENCE OF DOMICILE.

While declarations of deceased persons, whose domicile or residence is indeterminate, are always competent to disclose their intention, they should always be taken to point to a particular moment.

In the matter of Harriet A. Curtis, deceased. On motion to confirm report of referee appointed to determine place of deceased's last residence. Confirmed.

See, also, 175 N. Y. Supp. 285, 288, 289, 735.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Elkus, Vogel, Gleason & Proskauer, of New York City, for temporary administrator.

Allen W. Corwin, of Middleton, for James E. Burr, individually and as executor.

FOWLER, S. The question involved in the hearing on the motion to confirm the report of Mr. Winthrop, the referee herein, is exclusively one of fact: Was Mrs. Curtis at the time of her death a resident of the county of Orange or of this county? Upon the determination of this question depends the jurisdiction of this court in this matter.

It is unfortunate that the Legislature of this state has not imitated France, and enacted some law which enables a person who has two or more residences in different counties of this state to file a certificate in the county clerk's office which shall show a final election of the citizen to abide by one residence (designated in such certificate) as a legal residence for all intrastate purposes, such as taxation, jurisdiction of courts, etc. This would put an end to such controversies as are here presented.

[1] In my judgment this matter brings up very sharply the distinction between the terms residence and domicile. It was not without reason that Lord Westbury, in *Bell v. Kennedy*, L. R. 1 Sc. App. 320, said: "Residence and domicile are two perfectly distinct things." I have often pointed out in this court the distinction. *Matter of Norton*, 96 Misc. Rep. 152, 159 N. Y. Supp. 619; *Matter of Morgan*, 95 Misc. Rep. 451, 159 N. Y. Supp. 105; *Matter of Martin*, 94 Misc. Rep. 81, 157 N. Y. Supp. 474; *In re Hetty Green*, 99 Misc. Rep. 582, 164 N. Y. Supp. 1068.

Domicile is a term which belongs particularly to the law of nations and to the interstate law regulating a status in federal or confederated states. Domicile relates to countries and states, not to localities within those countries or states. *Matter of Grant*, 83 Misc. Rep. at page 271, 144 N. Y. Supp. 567. The whole current of the highest authorities everywhere discloses the facts just stated, and I need not now particularize. The tests and analogies of domicile and residence are not, however, dissimilar, and the terms in America are therefore very often confused, while much less so in English law, and never at the present day. But, as I understand it, a "residence" may be more easily acquired and exchanged than a domicile. As the publicist Wheaton said:

"The character that is gained by residence ceases by nonresidence. It is an adventitious character, and no longer adheres to him from the moment he puts himself in motion * * * to quit the country *sine animo revertendi*" —cited by me, *Matter of Grant*, 83 Misc. Rep. at page 266, 144 N. Y. Supp. at page 573.

Judge O. W. Holmes, I remember, in a Massachusetts case¹ expressed great doubt whether a residence could legally continue to exist by intention alone when a person deliberately lived elsewhere. I do not

¹ *Dickinson v. Brookline*, 181 Mass. 195, 63 N. E. 331, 92 Am. St. Rep. 407.—Ed.

now remember the citation of this case, but I have given it in former opinions rendered in cases of this kind.

[2] Whether a residence in state law must not always be actual and de facto, and not a mere matter of intention or de animo alone, is a question which could be much elaborated had I the necessary time to devote to it. On the other hand, a domicile once acquired is not always affected by non-residence if the intent is to retain the old domicile. A person intending to retain his old domicile may reside almost indefinitely out of the locus of such domicile. See cases cited in *Matter of Wise*, 84 Misc. Rep. 663, 146 N. Y. Supp. 789; *Matter of Rutherford*, 88 Misc. Rep. 414, 150 N. Y. Supp. 734; *Matter of Martin*, 94 Misc. Rep. at page 84, 157 N. Y. Supp. 474; *Matter of Mesa y Hernandez*, 87 Misc. Rep. at page 252, 149 N. Y. Supp. 536. But whether he can retain a "residence" when he always lives elsewhere is another question. People domiciled in New York frequently reside the greater portion of their lives in Paris or London, but they are not then residents of New York.

[3, 4] A person sui juris may freely at any time change a residence from one place to another, or he may have several residences, in country or town, by the seaside or in forests, in favorite valleys or mountains. While declarations of deceased persons whose domicile or residence is indeterminate are always competent to disclose their intention, they should always be taken to point to a particular moment. It is for this reason that the last declarations of a deceased are always higher evidence of last residence than earlier declarations. But some proofs of declarations are better than others. A sworn statement is superior to the idle gossip or the "he says" or "she says" of indirect discourse repeated by third persons, such as servants or chance acquaintances.

While this undoubtedly is a close case, concerning a legal residence in one spot or another within the state of New York, the opinion of the learned and careful referee, a gentleman of the highest character and learning, who took the evidence, has much weight with me. He saw the witnesses, examined the documentary evidence, and reports the same with a careful opinion. I am not inclined to overrule him. I prefer to confirm his report, which I now do.

Settle decree on notice.

(109 Misc. Rep. 175)

VALENTINE v. GONZALEZ.*

(Supreme Court, Special Term, New York County. November 7, 1919.)

ARREST **§48**—**LIBEL AND SLANDER** **§74**—**RESPONSIBILITY FOR PUBLICATION OF LETTER IN NEWSPAPER ARTICLE.**

Defendant's motion to vacate order for his arrest in action for libel *held* properly granted, where it did not appear that defendant was chargeable with the publication complained of, his only act being the delivery to a newspaper reporter, at the latter's request, of a letter composed by himself, for the use of the reporter in preparing an article on the affairs of a South American republic of which defendant had been president; defendant not having requested or suggested publication of a portion of the letter reflecting on plaintiff.

Action by Lincoln G. Valentine against Alfredo Gonzalez. On defendant's motion to vacate order of arrest procured by plaintiff. Motion granted.

James L. Putnam, of New York City (James L. Putnam and Charles B. Brophy, both of New York City, of counsel), for the motion.

Jerome, Rand & Kresel, of New York City (William Rand and Samuel Ecker, both of New York City, of counsel), opposed.

GIEGERICH, J. The defendant makes this motion to vacate an order of arrest procured against him by the plaintiff. The plaintiff, although a resident of the city of New York, has large property interests in the republic of Costa Rica. The defendant is a resident of the republic of Costa Rica, and on or about the 8th day of May, 1914, he entered upon his term of office as president of that country, and continued in the exercise of his duties until on or about the 27th day of January, 1917, when the Costa Rica Minister of War started a revolution and expelled him, since which time he has sojourned in the United States. On November 18, 1918, an article was published in the New York Herald, a portion of which article the plaintiff claims is a libel against him, and which he further claims was written by the defendant and published as aforesaid at the defendant's request. The matter complained of was a portion of a letter written by the defendant to the chairman of the committee on foreign affairs of the United States Senate, which letter, in full, was set forth as a portion of the entire article printed in the Herald. It may further be added that the article appearing in the Herald on November 18, 1918, was only one of a series of six, which appeared successively on November 18, 19, 20, 21, 22, and 23.

The question is whether the defendant can be held responsible for the publication of the portion of the letter complained of. The fact that the defendant composed the letter in question is not disputed. Neither is it disputed that the newspaper article which incorporated the letter was composed by the reporter. The only fact in dispute is whether or not the defendant requested that the letter be published. The plaintiff says in his affidavit that the reporter stated to him that the defendant had made such a request. The reporter denies that he made such a statement. Whether he did or not is immaterial.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
178 N.Y.S.—19 *Order reversed — App. Div. —, 179 N. Y. Supp. 711.

except on an issue of veracity between him and the plaintiff, and perhaps there is really no such issue, and the plaintiff may have misunderstood what the reporter said. At any rate, the material issue is whether or not the defendant made such a request and the reporter swears that he did not, and he swears that he did not, and for the purposes of this motion I take it as established that he did not. This does not end the matter, however, but only brings us to the question whether the defendant's acts were tantamount to such a request, or otherwise make him chargeable with the publication. The facts with respect to his participation are set forth in the affidavit of the reporter and in his own affidavit, and are as follows:

The reporter, before he met the defendant, and because of what he had heard regarding Costa Rican affairs, had called the defendant up on the telephone and asked for an interview, which was accorded. The interview related to Costa Rican matters, and the defendant showed the reporter certain documents which the reporter told the defendant he he would like to use for an article or articles on Costa Rica. The documents were delivered to the reporter, who, after a conference with other persons, wrote the articles which were published. The reporter further states that all documents which he received from the defendant were given to him at his own request for use in obtaining true facts in reference to Costa Rica for the article or series of articles which he proposed to write, and that the defendant did not request or suggest, directly or indirectly, that he should publish any part of the alleged libelous statement, or any extracts from the material which the defendant furnished.

Whatever may be shown as a result of cross-examination upon the trial, I have reached the conclusion, although with some hesitation, that, upon the facts set forth in the affidavits, the defendant is not chargeable with the publication complained of. The rule on this point, as set forth in *Schoepflin v. Coffey*, 162 N. Y. 12, at page 17, 56 N. E. 502, at page 504, is as follows:

"It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person injured, and that such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander or libel. *Newell on Defamation*, 245; *Moak's Underhill on Torts*, 145; *McGregor v. Thwaites*, 3 B. & C. 35. The remedy in such a case would be against the party who printed and published the words thus spoken, and not against the one speaking them, as a person is not liable for the independent illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication."

In that case the complaint alleged that the defendant uttered the slanderous words complained of in the presence of certain newspaper reporters, "and thereby defendant caused said false and defamatory statement to be printed and published." The court held that the facts so set forth were neither sufficient as a matter of pleading nor of proof to charge the defendant with responsibility.

I think it must be conceded that the present case sets forth some-

what stronger grounds for holding the defendant responsible than did the case above cited, but nevertheless I think it should be held that the remedy of the plaintiff is against those who printed and published the words complained of, such publication being the independent act of those persons. There is nothing in this case to show that the defendant procured the matter complained of to be published, or performed any act which induced its publication, other than the mere act of giving the information to one known to be a reporter. Aside from the act of furnishing such information, there is nothing to show that the defendant did anything to procure or induce the publication complained of. It is true that in the present case the defendant did know of a definite purpose on the part of the reporter to prepare an article or series of articles on affairs in Costa Rica, whereas, in the Schoepflin Case it does not appear that the defendant had knowledge that the reporters intended to publish what he said. I cannot see that this fact sufficiently distinguishes the two cases, however, because it is the business of newspaper reporters to gather news and to publish information of public or general interest that comes to their ears.

Another case somewhat in point is *Gutkes v. N. Y. Produce Exchange*, 46 Misc. Rep. 133, 93 N. Y. Supp. 254, where it was sought to hold certain individual defendants who had given information to the New York Produce Exchange responsible for a written notice concerning the plaintiff which the Produce Exchange had posted on its bulletin board. The court said:

"There is no allegation that they requested or procured the notice to be posted. If the defendant corporation did it because of what the individual defendants stated to it, that does not make the posting their act, any more than any other action the corporation might have taken on such information would be theirs. Nor is the publisher of a slander or libel liable for its repetition by another."

For the reasons stated, I will grant the motion, with \$10 costs. Settle order on notice.

(100 Misc. Rep. 180)

PEOPLE v. SCOPAS et al.

(Supreme Court, Special Term, New York County. November 6, 1919.)

BAIL § 79(1)—RIGHT OF SURETY TO REFUND OF AMOUNT PAID IN SATISFACTION OF FORFEITURE OF UNDERTAKING.

Where defendant, who had been admitted to bail, was called for trial, and three witnesses were examined for the people, which completed their case, and motion was made for direction of acquittal on the ground the people had failed to make a case, which motion was denied, and defendant was continued on bail during recess to enable him to procure witnesses, and he failed to appear in court when it reconvened to continue trial, but was subsequently arrested in another state and acquitted on the testimony of the same witnesses at second trial, the people were put to the expense of a retrial, and the surety on the undertaking is not entitled to refund of the amount paid in satisfaction of judgment entered on forfeiture.

Proceeding by the People of the State of New York for forfeiture of an undertaking against James Scopas, principal, and the New Am-

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

sterdam Casualty Company, surety. On motion by the surety for an order directing the Comptroller of the City of New York to refund a sum paid to him in satisfaction of judgment entered on forfeiture of the undertaking. Motion denied.

William G. Keir, of New York City, for surety and the motion.

Edward Swann, Dist. Atty., of New York City (Robert S. Johnstone, Asst. Dist. Atty., and George A. Lavelle, Deputy Asst. Dist. Atty., both of New York City, of counsel), opposed.

GIEGERICH, J. The surety moves for an order to direct the comptroller to pay to it the sum of \$1,000, representing the amount of bail forfeited under the following circumstances:

The defendant's case was called for trial on January 16, 1919, and three witnesses were examined on behalf of the people, which completed the people's case. A motion was then made for the direction of a verdict of acquittal, on the ground that the people had failed to make out a case. This motion was denied. The defendant's attorney then requested a recess until 2:30 p. m., and that the defendant be continued on bail on the ground that he desired to go uptown to procure the attendance of some witnesses who were to testify in his behalf. The adjournment was granted, but when the court reconvened the defendant was not present. The court remained in session until 4 p. m., up to which time the defendant failed to appear. An adjournment was then taken until 10:30 a. m. the following morning, at which time the court reconvened for the purpose of continuing the trial. The defendant again failed to appear, whereupon the court ordered the bail forfeited, and later the money was paid over by the surety. On January 23, 1919, the defendant was arrested in Connecticut under a bench warrant, and brought back to this city and committed to the city prison, and on February 4, 1919, he was again placed on trial, but before another judge. The same witnesses were called and examined, and again a motion for the direction of an acquittal was made, and was granted by the judge then presiding. The district attorney subsequently refused to give a certificate that the people had lost no rights, and this motion was made.

I think the district attorney was right, and that the motion should be denied. Even assuming that the same witnesses testified in the same way on the second trial, and that the people lost no rights in that respect, the fact remains that they were put to the expense of a retrial. Moreover, it is not in the interests of justice and orderly and efficient procedure that a defendant be permitted thus to speculate on the action of the court. No reason or excuse whatever is given for the failure of the defendant to appear to go on with his trial, nor for his disappearance from the state.

Motion denied, with \$10 costs. Settle order on notice.

EISENSTEIN v. EISENSTEIN.

(Supreme Court, Special Term, New York County. November 5, 1919.)

DISCOVERY §58—DEFECTIVE ORDER FOR EXAMINATION BEFORE TRIAL.

Order for plaintiff's examination before trial, dated October 15th, returnable October 20th, and directing that service be made on or before October 18th, *held* defective, as failing to comply with Code Civ. Proc. § 873; neither it nor the affidavit on which it was granted stating any reason why the five-day minimum time for service before examination should be shortened.

Action by Ida Eisenstein against Peter Eisenstein. On motion to vacate an order for plaintiff's examination before trial. Motion granted in part, and in part denied.

Louis F. Perl, of New York City, for the motion.
Charles Goldsmith, of New York City, opposed.

GIEGERICH, J. It is conceded by the defendant that the order for the plaintiff's examination was served only four days before the return day thereof, viz., October 20, 1919. The order directs that service be made "on or before the day of 18 1919," and it is dated "New York 15 1919." It is assumed, from the prayer of the affidavit upon which the order for examination was made and the date of the verification of such affidavit, that the month of October was intended to be filled in the blank spaces in the order, but that through oversight it was omitted. But, even if the blanks were filled in as intended, the order is nevertheless defective, because it fails to comply with section 873 of the Code of Civil Procedure, which provides that—

"The order must also direct the time of service of a copy thereof, which must be made within the state, not more than twenty, nor less than five days, before the time fixed for the examination, unless special circumstances, making a different time of service necessary, are shown in the affidavit, and that fact is recited in the order."

Neither the order nor the affidavit upon which it was granted states any reason why the minimum time fixed by the statute should be shortened. Under these circumstances the order for examination should be vacated and set aside, and the stay therein contained vacated. *Miller v. Nevins*, 115 App. Div. 139, 100 N. Y. Supp. 703.

Motion granted, to the extent indicated, but in all other respects denied, without costs. Settle order on notice.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

(189 App. Div. 117)

MYERS v. CITY OF BEACON.

(Supreme Court, Appellate Division, Second Department. October 24, 1919.)

1. MUNICIPAL CORPORATIONS $\Leftrightarrow$ 821(7)—WHETHER NEGLIGENCE OF CITY CAUSED FALL ON ICY SIDEWALK QUESTION FOR JURY.

In an action against a city for personal injuries resulting from snow and ice that had accumulated upon a sidewalk on the day of the accident and the two preceding days, during which there was no thaw, and where plaintiff admitted it was snowing at the time she fell, and there was no evidence of any slope or defect in the walk, city's negligence was a question for the jury.

2. MUNICIPAL CORPORATIONS $\Leftrightarrow$ 773—FAILURE TO COVER SNOW AND ICE WITH SAND NOT NEGLIGENCE.

In an action against a city for personal injuries resulting from plaintiff's falling on a sidewalk on which snow and ice had accumulated during that and the preceding two days, the temperature being below freezing all the time, instructions which allowed the jury to impute negligence to the city authorities because of their failure to cover the icy surface with sand or ashes, or other protection, or remove the ice and snow, were erroneous; the city being under no legal obligation to remove the snow and ice until a subsequent thaw.

Appeal from Trial Term, Dutchess County.

Action by Veronica Myers against the City of Beacon for personal injuries. From a judgment of the Supreme Court on a verdict for \$2,500 damages, and from an order denying its motion for a new trial, defendant appeals. Judgment and order reversed, and new trial granted.

Argued before MILLS, RICH, PUTNAM, KELLY, and JAY-COX, JJ.

John T. Kelly, of Beacon, for appellant.

Morschauser & Mack, of Poughkeepsie, for respondent.

KELLY, J. [1] The plaintiff slipped and fell on ice covering the walk in one of the streets in the city of Beacon, receiving injuries for which she claims the city is responsible. The accident occurred between 9 and 10 o'clock at night on Christmas Eve. The negligence charged against the defendant is that it allowed a dangerous accumulation of ice and frozen snow to remain upon the walk for a long time, without action to compel its removal by the property owner or by the city itself. There was evidence in the case of the presence of rough uneven ice and snow at the point where the accident occurred, the result of several snowfalls, and frozen rain and slush packed hard by the use of the walk, while other walks in the vicinity were kept clean. The defendant offered evidence that the walk was regularly cleaned; that on the 21st day of December, three days before the plaintiff's mishap, the walk was free from ice and snow; that on the afternoon of the 21st there was rain and snow, accompanied by freezing temperature, leaving the sidewalks throughout the city in a slippery condition; that the temperature remained below freezing on the 22d and 23d and 24th; that snow began to fall on the afternoon of December 24th, and continued up to the hour of the plaintiff's accident. The plaintiff admitted

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that it was snowing when she fell; her claim being that the snow was thin and light, covering the icy deposit on the walk. There was no evidence of any slope or defect in the walk itself, but on the whole case we think the evidence presented a case for the jury.

[2] A more serious question is presented, however, by the exception taken by defendant to the charge of the learned trial justice, in which he defined the duty of the city. Upon the evidence at the trial the jury would have been justified in finding that this particular walk was free from snow and ice on December 21st, and that the ice and snow on which plaintiff fell came from snow and rain on the afternoon of the 21st, with freezing temperature; that the temperature continued below the freezing point to the time of the accident; and that it was snowing on the afternoon of the 24th and at the time the plaintiff fell. The learned trial judge correctly charged the jury that, if the slippery surface was caused by this rain and snow on the 21st and the continued freezing temperature, so that the surface could not be made safe by its removal, the defendant would not be liable; but he added:

"Unless you should find that it was careless and negligent not to cover over this slippery surface with some substance that would make it safe. But the city would not be liable for the presence of the snow and the ice that formed on the 21st, if the weather thereafter was of such a character that it could not be removed. * * * For the accumulation of snow and ice on the 21st of December the city is not liable, if the formation was such, and the weather was so cold, that it could not be removed, unless the city ought, in the exercise of reasonable care, to have covered over that surface with some substance that might have made it safe or less dangerous."

At the close of the charge the counsel for defendant excepted to the charge of the court, in so far as it allowed the jury to impute negligence to the defendant for failure to cover "the slippery walk with ashes, or some similar substance." The court replied:

"I did not say ashes, I said some substance to make it safe."

Counsel for defendant then asked the learned judge to charge that—

"If the sidewalk on the evening of the 21st was reasonably clear of ice and snow, and if a rain fell on the 21st, making all sidewalks slippery, and if the temperature from the time of the falling of the rain was always below freezing up to the time of the accident, so that the ice on the walk caused by the rain did not melt, the defendant would not be liable for any accident caused by such icy walk."

To which the court replied:

"I charge that, gentlemen, unless, as I said before, you should find that the city authorities were negligent in not making the place reasonably safe after the 21st of December, if they could have reasonably done so."

And the trial judge continued:

"In that connection, I think I had better charge you that the city would not be liable for a failure to cover the icy surface with something that would make it less dangerous, unless it had notice of the dangerous condition, or unless sufficient time elapsed after it became dangerous and the day of the accident to charge the city with notice—that is, unless you say that so much time elapsed that the city, in the exercise of reasonable care, ought to have known of this condition. If the city had actual notice of the dangerous condition by reason of the sleet and ice on the 21st of December, if it had ac-

tual notice, or if it could be charged with notice because of the lapse of sufficient time, then the city should have exercised reasonable care to cover that slippery place and make it reasonably safe. Otherwise, if they did not have notice of its dangerous condition, or if you should say sufficient time did not elapse to charge them with notice, then there was no obligation on the part of the city to cover the slippery place. This is all assuming that it was clear up to that time."

The following colloquy then took place between the learned court and counsel for defendant:

"Mr. Lown: I except to your qualification of my request to charge, and I ask that you charge that the municipality was not bound to put ashes, or any other similar substance, on the sidewalks generally throughout the city.

"The Court: I will leave it to the jury to say whether the city should have done it or not under all the circumstances. (Exception taken by Mr. Lown.)

"Mr. Lown: I ask your honor to charge that the city was not bound to put ashes or any similar substance on this particular sidewalk.

"The Court: I leave it to the jury to say. (Exception by Mr. Lown.)

"Mr. Lown: I ask your honor to charge the jury that, if any ice is formed on a sidewalk, the municipality, or the lot owner, may in the exercise of reasonable discretion wait for a thaw in order to remove it.

"The Court: Yes; wait a reasonable time. (Exception taken by Mr. Mack.)

"Mr. Lown: I ask your honor to charge that negligence on the part of the owner does not mean that the city is negligent, unless the property owner has had reasonable time to remove the accumulation.

"The Court: I so charge."

The trial judge thus allowed the jury to impute negligence to the city authorities because of their failure to cover the icy surface in some way between the evening of the 21st and the evening of the 24th; the temperature being below freezing during all the time. If there was any such obligation on the part of the city, it applied, not only to the place where the accident occurred, but to the sidewalks of the entire 40 miles of streets in the city of Beacon. If this liability attached to the city of Beacon, it is also upon every city and village in the state charged with the care of public highways. The record is silent as to the available force employed on and about the streets of the city of Beacon. Such liability is a very serious one, if it is to be imposed on municipal corporations generally. In *Taylor v. City of Yonkers*, 105 N. Y. 202-206, 11 N. E. 642, 643 (59 Am. Rep. 492), the Court of Appeals said:

"When the streets have been wholly or partially cleaned, it often happens that a fall of rain or the melting of adjoining snow is suddenly followed by severe cold, which covers everything with a film or layer of ice, and makes the walks slippery and dangerous. This frozen surface it is practically impossible to remove until a thaw comes which remedies the evil. The municipality is not negligent for awaiting that result. It may and should require householders, when the danger is great, to sprinkle upon the surface ashes or sand, or the like, as a measure of prudence and precaution, but is not responsible for their omission. It is no more bound to put upon the ice, which it cannot reasonably remove, such foreign material, than to cover it with boards. The emergency is one which is common to every street in the village or city, and which the corporation is powerless to combat. Usually it lasts but a few days, and the corporate authorities may await without negligence a change of temperature which will remove the danger."

We have found no case reported where any such stringent obligation is placed upon municipal corporations. Cities and villages should take notice of conditions created by snowfalls, but it is impracticable for the

municipality itself to at once undertake to remove the snow and ice from the sidewalks. The procedure followed by the defendant here, as shown by the evidence, is similar to that in all of the cities and villages in the state. Notice is given to the property owner to clear the snow from the sidewalk in front of his premises. If the owner fails to comply with the notice within 24 hours after the snowfall ceases, complaint is made, in this case by the city inspector, and the city sends out men to clean off the sidewalks, charging the expense to the delinquent property owner. The chief of police of the defendant city said that the working force was limited, but in such cases they sent out the men working for the city immediately, and if there were "tramps" available they were put to work assisting the regular force. But to say that the municipality was obliged to put sand or ashes or some other protection over the sidewalks, before it was under any legal obligation to remove the snow, is to make an unreasonable rule, impossible of performance, and never asserted in this state, so far as we have been able to ascertain. In the case at bar, the verdict of the jury may have been based entirely upon the failure of the city to undertake this unusual and unreasonable requirement.

The judgment and order should be reversed, and a new trial granted; costs to the appellant to abide the event. All concur.

(189 App. Div. 112)

POWERS v. POWERS et al.

(Supreme Court, Appellate Division, Second Department. October 24, 1919.)

TRUSTS **§ 169(1)**—**APPOINTMENT OF INDIVIDUAL SUBSTITUTE TRUSTEE NOT ABUSE OF DISCRETION.**

In trustee's action to pass his accounts and to be permitted to retire from the trusteeship, the appointment of an individual as substituted trustee, instead of the trust company which some of the defendant beneficiaries requested court to appoint in their admissions of service, was not an abuse of discretion, where beneficiaries did not appear, and did not present affidavit stating reasons for propriety of appointment of trust company, since, if important, attitude of all defendants should have been made matter of record.

Appeal from Special Term, Kings County.

Action by George A. Powers, individually and as trustee for William Powers, against William Powers and others. From the judgment, in so far as it appoints a successor or substituted trustee in the place and stead of the plaintiff, and directs the payment and delivery to such substituted trustee of the moneys and properties of the trust estate, the named defendant appeals. Affirmed.

Argued before MILLS, RICH, BLACKMAR, KELLY, and JAYCOX, JJ.

Charles A. Capron, of New York City (Henry C. Eldert, of New York City, on the brief), for appellant.

Meier Steinbrink, of Brooklyn (Frank E. Johnson, Jr., of Brooklyn, on the brief), for respondent substituted trustee.

Robert C. Moore, of New York City, guardian ad litem for infant defendants.

KELLY, J. The only question involved in this appeal by one of the defendants is the selection of the individual substituted or successor trustee named in the judgment to execute a trust created by the will and codicil of George A. Powers, deceased, proved before the Surrogate's Court of Kings County in the year 1900. By that will and codicil the testator constituted several separate trusts, one of which, involved in the present action, was for the benefit of his son, the defendant William Powers, and his descendants. The plaintiff, himself a successor or substituted trustee named in the will, brought this action to pass his accounts, and asked that he might be permitted to retire from the trusteeship. The defendant appellant is entitled to the income of the trust estate for life, at his death the trustee is directed to divide the trust estate into as many separate shares as shall equal the number of children of William living at his death, and to hold one of such shares during the life of such child, paying the income to the child. Upon the death of each child the property so held in trust shall become the property of his or her surviving descendants, if any, to whom the testator devises the same in and by the will and codicil, and if there are no such descendants the property is to go to the heirs at law of the testator.

In this action none of the adult defendants appeared by attorney or answered the complaint. A guardian ad litem was appointed for the infant defendants, who filed the usual guardian's answer. Application for final judgment was made on notice to the guardian ad litem alone, and when the matter came before the court the only appearance was by the attorney for the plaintiff. There was no opposition to the motion for final judgment, and plaintiff's attorney submitted the summons and complaint, an affidavit of regularity, affidavits of service, the answer interposed in behalf of the infant defendants, and admissions of service of the summons and complaint, signed and acknowledged by three of the defendants, viz. William Powers, the life beneficiary, Robert D. Powers, one of his sons, who is entitled to a life estate on the death of his father, and Georgianna Keep, a sister of the original testator, who had a remote contingent interest as heir at law. In these admissions of service the defendants William and his son stated that plaintiff's accounts as rendered were correct, and William consented to the entry of a decree forwith and without further notice to him, while each admission of service contained a request that the Farmers' Loan & Trust Company of the Borough of Manhattan, New York City, be appointed trustee to succeed the plaintiff upon his retirement.

It will be noted that the complaint contains no suggestion that the trust company be appointed successor trustee, it is not claimed that the plaintiff's attorney, who appears from the will and codicil to have been a witness to both instruments, made any request or suggestion, the infant defendants and five of the adult defendants made no suggestions or requests, nor is there anything in the papers presented to the Special Term to show that the trust company had any connection with the estate. The judge presiding at the Special Term granted the motion and appointed an individual trustee of his own selection. The judgment was duly entered upon the clerk's minutes and filed in the

county clerk's office. After the judgment was thus signed, entered, and filed, the defendant William Powers retained counsel, who are also counsel for the trust company, and counsel prepared a notice of appearance, which they forwarded by mail to the justice, requesting that the trust company be appointed, instead of the gentleman selected by the court, and upon the refusal of the justice to alter the judgment this appeal is taken.

Upon the argument of the appeal the guardian ad litem appeared and filed a brief, stating that in his opinion it is proper that the trust company should be appointed, and so far as it is within his province he urges that it be done. The counsel for the appellant expressly states in his points that it is not intended in any way to reflect upon the gentleman named by the court as successor trustee. The appeal is based upon the claim of the appellant that the appointment of the individual, instead of the trust company suggested by the appellant and one of his sons and his sister, was an abuse of the discretion vested in the court, and that appointment of an individual trustee involved the trust estate in expense for premiums on surety bond, if the individual trustee should give corporate surety, and for clerk hire and ordinary office expenses attendant upon the management of large trust estates by individuals. Counsel asserts that the appointment of the substituted trustee was made in disregard of the wishes of the three parties named, in an arbitrary and unauthorized manner. "They," he says, "are the beneficial owners of the property, and it is only reasonable that they should be authorized to nominate the agent or trustee who is to manage the property for them."

It is hardly exact to say that the three defendants who made the suggestion are the beneficial owners of the property, because the defendant William Harold Powers, a son of the appellant, did not join with his father and brother in suggesting the appointment of the trust company, and the infants and five of the adult defendants (including William Harold Powers) made no nomination. The appellant says, in his brief filed, that while the appointment of the substituted trustee was largely within the discretion of the court (citing 39 Cyc. p. 283, note 15, and cases cited; *Matter of Laing*, 59 App. Div. 612, 69 N. Y. Supp. 214, affirmed 170 N. Y. 621, 63 N. E. 1119; *Milbank v. Crane*, 25 How. Prac. 193), such discretion is not an arbitrary one, and the court will always give due weight to the wishes of those chiefly interested, except when there is some question of fitness of the suggested appointee or when the beneficiaries fail to agree (citing *Quackenboss v. Southwick*, 41 N. Y. 117; *In re Morgan*, 63 Barb. 621, affirmed 66 N. Y. 618; 39 Cyc. 282).

In all of this we can agree with the counsel for the appellant, but we must not lose sight of the record before the judge at Special Term when the application was presented to him. The responsibility for the selection of the new trustee was not assumed by the parties interested, but was put upon the court. The adult defendants had defaulted in answering, they were not represented by attorney or counsel, nor were the infants represented. If the matter was deemed important, the reasons for the propriety of the appointment of the trust company

should have been explained to the court by affidavit, and the request of the adult defendants should have been presented in a duly executed document signed by all of them, or, if any of them refused to sign, the reasons should have been given. The attitude of the infant defendants should have been placed before the court at the time, and all of these papers should have been recited in the judgment and filed with the judgment roll as matters of record. As it was, the judge at Special Term was asked to accede to an informal suggestion of but three of the defendants, without information or proof of the desires of the other parties interested, if they had any desire in the matter. And the only party appellant is defendant William Powers, represented by the counsel for the trust company, who frankly states in his points on appeal:

"We have never represented the defendant appellant, Mr. William Powers, before, although it is true that members of this firm had known Mr. Powers and other members of his family."

And counsel states that his firm did not know the action was pending until after the application for judgment had been made. Under these circumstances, while we do not agree with some of the reasons advanced by the learned counsel for the respondent for the appointment of the individual trustee, we cannot say on the record that there was any abuse of discretion on the part of the learned justice at Special Term, if, indeed, he had any power to alter without notice a judgment duly entered and filed in the clerk's office prior to the appearance of the appellant by counsel. It follows that the judgment should be affirmed, but without costs.

Judgment affirmed, without costs. All concur.

(189 App. Div. 104)

MAGER v. WUYTACK.

(Supreme Court, Appellate Division, Second Department. October 10, 1919.)

1. JUSTICES OF THE PEACE §190—SICKNESS OF ATTORNEY GROUND FOR VACATION OF DEFAULT.

Inability of counsel for defendant to be present on account of sickness was a valid excuse, within Code Civ. Proc. § 3064, authorizing opening by appellate court of default judgment rendered by a justice of the peace, on appeal by a defendant, who shows that manifest injustice has been done, and "renders a satisfactory excuse for his default."

2. JUSTICES OF THE PEACE §190—VACATION OF DEFAULT IN DISCRETION OF COUNTY JUDGE ON APPEAL.

Discretion given county judge by Code Civ. Proc. § 3064, to vacate default judgment rendered by justice of the peace, where manifest injustice has been done and a good excuse is given by defendant, is not an arbitrary discretion.

3. EVIDENCE §1—JUDICIAL NOTICE.

Courts and judges may take judicial notice of various matters in the progress of a litigation.

4. EVIDENCE §14—JUDICIAL NOTICE.

Court will not take judicial notice of fact that counsel's absence was due to sickness.

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5. JUSTICES OF THE PEACE §190—SUFFICIENCY OF SHOWING ON VACATION OF DEFAULT ON APPEAL.

Mere statement by attorney for defendant, on appeal to County Court from default judgment rendered by justice of the peace, under Code Civ. Proc. § 3064, that the attorney who was to have represented defendant before the justice had been unable to be present because of sickness, was insufficient to warrant opening of default; such statute requiring defendant on such appeal to show that manifest injustice has been done and to render a satisfactory excuse for his default, and legal evidence that the attorney had been sick being necessary thereunder.

6. APPEAL AND ERROR §1114—DISPOSITION OF CASE ON REVERSAL OF ORDER OPENING DEFAULT.

Supreme Court, on reversing order of County Court, opening default rendered by justice of the peace, and ordering new trial before the justice, will not affirm the original judgment, but will remit case to county judge for such further proceedings upon the appeal as he may deem proper.

Appeal from Nassau County Court.

Action by Marie Mager against Joseph A. Wuytack. From an order, under Code Civ. Proc. § 3064, opening defendant's default in appearance before a justice of the peace, setting aside judgment for plaintiff, and ordering new trial before the justice, plaintiff appeals. Reversed, and case remitted, with directions.

Argued before MILLS, RICH, BLACKMAR, KELLY, and JAY-COX, JJ.

Lincoln B. Haskin, of Hempstead, for appellant.

James N. Gehrig, of Hempstead, for respondent.

KELLY, J. The plaintiff brought an action against the defendant before a justice of the peace to recover \$106.10 for services rendered and money loaned. There was a written complaint, and defendant appeared by attorney and filed an answer, in effect a general denial. The case was set for trial, and on the day appointed plaintiff appeared with her lawyer; the defendant appearing and asking for an adjournment, alleging that his lawyer was ill. No proof of the fact was presented beyond defendant's statement, the plaintiff refused to consent to the adjournment, and the justice ordered the trial to proceed, and, witnesses having been sworn, rendered judgment for the plaintiff for \$109.86. The defendant thereupon retained new counsel, who appealed to the County Court, pursuant to Code Civ. Proc. § 3064. It is there provided that if an appeal is taken by a defendant, who failed to appear before the justice either upon the return of the summons, or at the time to which the trial of the action was adjourned, "and he shows, by affidavit or otherwise, that manifest injustice has been done, and renders a satisfactory excuse for his default, the appellate court may, in its discretion, set aside the judgment appealed from, or stay proceedings thereunder, and by order direct a new trial, before the same justice, or before another justice of the same county, designated in the order, at such a time and place, specified in the order, and upon such terms, as it deems proper." The learned county judge, on the hearing of the appeal, opened defendant's default and set aside the judgment, ordering

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a new trial of the action before the same justice, upon condition that defendant pay \$25 costs to the plaintiff.

[1] But no affidavits or proof were presented to the learned county judge showing that manifest injustice had been done the defendant or excusing his default. The order appealed from recites that, the new counsel for the defendant "having stated on the oral argument of the appeal why the defendant did not give any proof of his defense at the trial," the appellate court therefore opens the default and vacates the judgment appealed from. The reasons given by the new attorney are not stated, but the county judge, in his opinion filed with the order, says that the record shows a valid defense interposed by the answer, that the defendant asked for an adjournment because of the illness of his counsel, and he goes on to say that a reputable attorney has stated the facts as above narrated, and he is therefore convinced that manifest injustice has been done, and that a satisfactory excuse has been given. Now, without reflecting in any way upon the counsel who made these statements on the appeal, the trouble with the order is that they do not fulfill the requirements of the statute. The default was alleged to be due to the illness of the original attorney for the defendant. That was a matter of fact, requiring evidence of some kind, if it was to be the basis for judicial action. The court of the justice of the peace was in Nassau county; the attorney's office was in Brooklyn in Kings county. If he was sick and unable to be present, it was a valid excuse; but no proof of the fact was presented to the justice. Neither the justice nor the plaintiff was obliged to take the defendant's word for it, and when the appeal came before the County Court three months later no proof was submitted. New counsel, with offices in Nassau county, appeared, and it is said that the new attorney stated on the oral argument "why the defendant did not give any proof of his defense." This is not in conformity with the statute.

[2] It is true that the section of the Code referred to provides that the defendant must show "by affidavit or otherwise" that manifest injustice has been done and that he must render a satisfactory excuse for his default. But the discretion conferred upon the county judge is not an arbitrary discretion. The plaintiff stood before the court asserting her right to the judgment rendered in her favor, and she was not to be deprived of it upon the mere ipse dixit of the new attorney, no matter how reputable or distinguished he might be. Judgments of a court, duly rendered, whether it be a court of record or not of record, are serious matters. The persons in whose favor they are rendered are entitled to the benefits thereof until the judgment is regularly set aside or reversed; but judgments cannot be reversed on request of counsel, without evidence of some description, by affidavit or otherwise, entered upon the record. The plaintiff challenged the validity of the excuse offered before the justice, no proof was offered to substantiate it, and three months later it is again offered without proof to substantiate it, by a new attorney having no connection with the original counsel, whose alleged illness has caused all this trouble. If he was in fact ill, and unable to appear before the justice of the peace, it could easily have been proved by affidavit at the time. No legal evidence was offered of the fact then, or before the county judge.

[3-8] Courts and judges may take judicial notice of various matters in the progress of a litigation, but this was not one of them, and when a court or a judge is to be satisfied of the existence of a fact, it must be brought about by legal evidence. There was no proof before the learned county judge of excuse for the original default, or that injustice had been done defendant, and the plaintiff is therefore entitled to a reversal of the order. The appellant asks that the court shall not only reverse the order, but also affirm the original judgment. We think, however, that the proper procedure is to remit the case to the county judge for such further proceedings upon the appeal as he may deem proper.

Order reversed, with \$10 costs and disbursements, and the case remitted to the County Court of Nassau County for such further proceedings upon the appeal as may be proper. All concur.

(189 App. Div. 109)

Seizure of RUSSO'S LIQUORS.

Appeal of DEXTER.

(Supreme Court, Appellate Division, Second Department. October 17, 1919.)

1. INTOXICATING LIQUORS $\S$ 245—STRICT COMPLIANCE WITH STATUTE REQUIRED IN SEARCHES AND SEIZURES.

The proceeding in rem for search and seizure, leading to a forfeiture, provided for by the Liquor Tax Law, must be strictly followed.

2. INTOXICATING LIQUORS $\S$ 249—SERVICE OF WARRANT FOR SEARCH AND SEIZURE INVALID.

Under Liquor Tax Law, $\S$ 33, subd. 2, requiring a copy of the warrant for search and seizure to be delivered to the person apparently in possession of the liquors, and another copy to be posted in a conspicuous place, service is insufficient; the paper delivered as a copy having no date or signature.

3. INTOXICATING LIQUORS $\S$ 255—ON DEFECTIVE SERVICE OF WARRANT LIQUOR SEIZED RESTORED.

There having been an insufficient service, under Liquor Tax Law, $\S$ 33, subd. 2, of warrant for search and seizure, so that seizure was illegal, restoration of the liquor will be ordered.

Appeal from City Court of Mt. Vernon.

Proceeding on complaint of Charles H. Dexter for search for and seizure of liquors of Gennaro Russo, at No. 26 West Third Street, City of Mt. Vernon. From an order dismissing the proceeding, by reason of defective service of a warrant issued under Liquor Tax Law (Consol. Laws, c. 34) $\S$ 33, complainant appeals. Affirmed.

On May 20, 1918, Mr. Dexter, as special agent of the state commissioner of excise, complained or deposed that one Ferdinand Russo "keeps, stores and has deposited" liquors at the above place for the purpose of unlawful sale and distribution. He set out the sources of his information. On that day Judge Appell, judge of the City Court of Mt. Vernon, issued a search warrant for these liquors, returnable before him at the City Court of Mt. Vernon June 2, 1919, at 9:30 a. m. The search was had, and a quantity of wine and vermouth was seized and deposited by the liquor tax officials in the Yonkers Storage Warehouse.

The act requires, respecting service: "A copy of such warrant shall be delivered to the person so keeping such liquors, if he be present at the time of such seizure, and if he be not present, then to the person, if any, apparently in possession of such liquors or of the premises wherein the same are found, and another copy of such warrant shall be posted in a conspicuous place upon said premises." Section 33, subd. 2. This last requirement of *posting* a copy of the warrant was complied with. But the duty that a copy be delivered to the person apparently in possession was not complied with. The paper purporting to be a copy of the warrant did not have any date or signature, the blanks over the printed line "Judge of the City Court, Mt. Vernon, N. Y.," being left unfilled. The date of teste stood as "the ——— day of May, 1919."

Gennaro Russo appeared specially on the return day at the City Court of Mt. Vernon. Judge Appell was not there, but Acting Judge Cavanaugh sat in his stead. Objection was first made to proceeding before another judge than the one who had issued the warrant, which was overruled. Russo moved to dismiss, because a copy of the warrant had not been served as required. After taking the matter under advisement, Judge Cavanaugh on June 7, 1919, dismissed the proceedings and directed that the liquors be returned to Russo. On August 5th the complainant appealed to this court.

Argued before JENKS, P. J., and MILLS, PUTNAM, BLACKMAR, and KELLY, JJ.

William R. Dorman, of New York City, for appellant.
Jeremiah D. Toomey, of Mount Vernon, for respondent.

PUTNAM, J. [1, 2] The Liquor Tax Law (Consol. Laws, c. 34) provides for a proceeding in rem. Such proceedings leading to a forfeiture are to be strictly followed. No doubt the Legislature might provide simply for posting the notice on the premises with publication in a newspaper, as in the earlier statutes for registration of land titles. *Tyler v. Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433. Here there was to be personal service by "delivery" of a copy to the persons having possession of the seized goods, as a condition for a real dispossession of the articles taken.

Instead of such compliance, Russo received an imperfect paper, calling on all persons claiming any right, title, or interest in the seized liquors to appear before *me, the undersigned*, at City Court of Mt. Vernon on June 2d. There was no *undersigned*, and no date stated. In the *Matter of Ingalls*, 77 Misc. Rep. 447, 137 N. Y. Supp. 780, there was a personal service, but no posting. The court (Beekman, County Judge) held the service illegal, and vacated the warrant, saying (77 Misc. Rep. 452, 137 N. Y. Supp. 784):

"Where the property is to be taken, it seems to me that none of the safeguards provided by law should be disregarded."

The counsel for the prosecution has cited certain decisions from the courts of Massachusetts, where the requirement is the service of a "notice" to appear, quite different from enforcing delivery of a copy of the writ or warrant. In case of attachment of property, incapable of manual delivery, the Code of Procedure (section 649, sub. 3) requires that the copy of the warrant left with the garnishee shall be certified. It is held that the attachment fails, even if a true copy is thus left, unless the sheriff certifies that it is a copy. *Courtney v. Eighth Ward Bank*, 154 N. Y. 688, 49 N. E. 54.

The search for liquors is not confined to saloons. After July 1, 1908, they may be the subject of seizure "in any place in this state." Suppose they are in a large warehouse or place of public storage. The person in apparent possession of the premises might be a man at the entrance gate. The posting is to be "in a conspicuous place upon said premises." That may be in any hallway of the warehouse. The only safe rule is to follow the statute, and have a compliance with both statutory safeguards.

[3] Since this was not done, and the seizure was illegal, I see no course but to do what the judge did here—order the property restored. Appellant, however, argues that it was improper to award possession of the liquors and vessels to any party without a hearing. The statute provides for a trial. If the complaint be dismissed on a finding that the liquors were not for unlawful sale or distribution, the judge is empowered to have the liquors and vessels "returned to the place from which or to the person from whom they were taken." The determination here that the proceedings failed by noncompliance with the statute entitled the respondent to the same restitution, and did not sanction a retention of the goods illegally taken. Such was the judgment, also, in *Matter of Ingalls*, 77 Misc. Rep. 447, 453, 137 N. Y. Supp. 780.

Therefore I advise to affirm, with \$10 costs and disbursements. All concur.

(108 Misc. Rep. 354)

BENNET V. COMMERCIAL ADVERTISER ASS'N.

(Supreme Court, Special Term, New York County. August, 1919.)

LIBEL AND SLANDER ⇨10(2)—WORDS CHARACTERIZING ACTS OF PUBLIC OFFICIAL NOT LIBELOUS PER SE.

Newspaper publications, charging plaintiff's introduction of legislation while a member of Congress preventing consummation of recommendations by Immigration Commissioner for establishment of government commissary at Ellis Island, to supersede system under which a private contractor was given exclusive commissary privileges, by means of a "rider" or "joker" to an appropriation bill, and that plaintiff had been the contractor's attorney, and after his election had sought government favors for him, and questioning plaintiff's fitness for his office, etc., held not libelous per se.

Action by William S. Bennet against the Commercial Advertiser Association. Defendant's motion for judgment on the pleadings granted.

Bennet & Cooley, of New York City (A. M. Wattenberg, of New York City, of counsel), for plaintiff.

Engelhard, Pollak, Pitcher & Stern, of New York City (Walter H. Pollak and Maurice R. Roche, both of New York City, of counsel), for defendant.

GREENBAUM, J. The plaintiff alleges 15 causes of action for libel, based upon as many alleged publications in defendant's newspaper, the *Globe & Commercial Advertiser*. The defendant moves for

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judgment upon the pleadings, which consist of the complaint and answer. The motion assails the complaint for legal insufficiency. It would involve an unnecessary amount of labor to detail each of the separate causes of action, for the reason that in effect they involve substantially the same questions. It will suffice to state generally the character and nature of the several publications as set forth in the complaint, and of the other allegations therein contained.

It appears from the complaint that at the time of the publications the plaintiff was a member of the bar of the state of New York, a member of Congress from the Twenty-Third district of New York, and a candidate for re-election to Congress, excepting that as to one of the causes of the action the publication was after the plaintiff failed of re-election. The important legal question is whether the publications concerning plaintiff were only criticisms of him in his official capacity, and whether the articles thus published were what in law is described as "fair criticism." The publications are based upon the facts that the plaintiff, while a member of Congress, introduced legislation which prevented the consummation of a recommendation made by Immigration Commissioner Howe for the establishment of a government commissary at Ellis Island for supplying immigrants with food, to supersede the system which then prevailed of granting to a private contractor the exclusive privilege of supplying food to immigrants. The publications charge that the plaintiff defeated the proposal of the Immigration Commissioner by securing the passage of an amendment proposed by him to a congressional appropriation bill, by means of what was known as a "rider" or "joker," which forbade "the use of any public moneys towards the maintenance at any immigration station of the privileges now disposed of after public competition." The publications also stated that prior to the introduction and passage of the appropriation bill as amended the plaintiff had been the lawyer of the firm which held the commissary contract at Ellis Island. They also called attention to the plaintiff's personal attacks upon Commissioner Howe, charging the latter with immoralities in the conduct of his office, and otherwise assailing his character. The first publication complained of consisted of a letter purporting to have been written to the defendant, in which the writer referred to the case of United States Senator Burton, of Kansas, who had been criminally prosecuted and convicted "for using his official position in favor of a client," and asked, "Is not Mr. Bennet's action worthy of similar attention from the federal prosecuting attorneys?" The comment of the defendant in its newspaper upon this letter was that "it is doubtful if Congressman Bennet is open to legal prosecution," inasmuch as "the plaintiff was the lawyer of the Ellis Island food contractor" before the plaintiff took his seat in Congress. The complaint alleges that this article states:

"When in Congress Mr. Bennet acts as a statesman when he gets a 'rider' (meaning thereby a provision in an appropriation bill of a legislative character, which nominally had no proper place in such a bill) through, forbidding Commissioner Howe to end the food monopoly for private profit at Ellis Island. Mr. Bennet does not conceal the fact that he is an 'individualist.' According to him, it is merely a coincidence that the benefits of his labors

in behalf of individualism go to his former client. Whatever an average man may think of the sufficiency of this defensive explanation, Mr. Bennet seems to have full confidence that he is indictment proof, and is at full liberty to act in behalf of his former client, as he might be expected if his former client were his present client."

The rest of the article severely criticises the plaintiff in using his office in favor of a former client, and inquiringly asks:

"What do his constituents think of him? Do they want to be represented by a man who favors a system under which the poor arriving immigrant is forced, if he wants to eat, to buy a food package from a concern for which the Congressman was formerly an attorney, having received as his fee money presumptively extracted from the immigrants? Do they admire and trust this sort of man, or do they regard him as meanly contemptible."

The second article refers to information coming from Washington "that it is possible to undo the work of Representative William S. Bennet, who inserted a joker in the sundry bill requiring the continuance of the privately operated commissary system on Ellis Island." The next article is typical of other articles, which, after referring to the plaintiff's activities in procuring the passage of the amendment above referred to by means of a "rider," states that the plaintiff "is smarting under his exposure," and that, lacking originality, "he adopts the tactics of Congressman Buchanan when that statesman was indicted at the instance of District Attorney Marshall for alleged complicity in war plots." This article concludes as follows:

"Congressman Bennet, as the Globe has heretofore remarked, is a disgrace to his constituency. Having revealed what sort he is, he is not likely to soften adverse judgment by plunging into silly and childish abuse of those who have exposed him."

Succeeding articles contain attacks of the plaintiff of a character similar to those already mentioned, with references to the plaintiff's counter attacks upon Commissioner Howe. In one of the articles the following appeared:

"Mr. Bennet was their (contractors') attorney before he went to Congress and at least their friend thereafter. Unfortunately for him, Hudgins & Dumas (the contractors) have lost their concession and will have no use for his services after he quits Congress following the election next month. Three times after he was elected to Congress Mr. Bennet called at the Department of Labor on behalf of Hudgins & Dumas. Once, immediately after he was elected and before he took his seat, Mr. Bennet sought favors from the government for Hudgins & Dumas. Then twice after he took his seat he did the same thing. The last time he appeared before the Department of Labor in behalf of the Ellis Island food purveyors was after they had lost their concession. He then asked the government to be as liberal as possible in the purchase of their plant on Ellis Island. They wanted \$15,000 for it. They urged this amount. Mr. Bennet asked the government to be liberal, and then appraisers were appointed, men who knew the value of the plant and had no interest in the matter, one way or the other, and these appraisers gave Hudgins & Dumas about half what they wanted for their plant. This was after Mr. Bennet had asked the Department of Labor to be 'as liberal as possible' to Hudgins & Dumas, and this request was made while Mr. Bennet was a member of Congress, paid to represent the people of the Twenty-Third district, and not Hudgins & Dumas, food contractors at Ellis Island."

In short, so far as they relate to facts as distinguishable from comment, the articles of which the plaintiff complains refer to certain

lawful official acts of the plaintiff as a congressman; to the fact that he was a candidate for re-election to Congress; that before he had been elected to Congress he appeared as attorney for certain individuals in connection with a congressional investigation affecting the concessions which they held at Ellis Island as commissaries for the supplying of food to immigrants; that Mr. Howe, the United States Immigration Commissioner at Ellis Island, had advocated the passage of a law which sought to abolish private commissaries and to place the matter of furnishing food to immigrants under direct governmental management; that the plaintiff as congressman introduced a "rider" to an appropriation bill in Congress which forbade the expenditure of any moneys for the maintenance at any United States immigration station "of any privileges now derived after public competition"; that the plaintiff made personal attacks in Congress upon Commissioner Howe, who advocated the abolition of private commissaries.

There is, of course, nothing libelous in the publication of the series of lawful official and other acts of the plaintiff as detailed. The portions of the publications which plaintiff claims are libelous per se are those which comment upon the acts of the plaintiff such as that he is "meanly contemptible"; that he "favors a system under which the poor immigrant is forced, if he wants to eat, to buy a food package from a concern" for which he was formerly an attorney; that he is "a disgrace to his constituency." One of the articles contains a letter which compares the plaintiff's official actions with those of United States Senator Burton of Kansas, and makes the inquiry whether Mr. Bennet's action is not "worthy of similar attention on the part of the federal prosecuting authorities." The defendant, in commenting upon that letter, however, called attention to the statement made by a member of the firm who held the concessions at Ellis Island to the effect that Mr. Bennet was not their attorney during the term that he was a congressman.

It must be borne in mind that these comments or criticisms deal exclusively with the plaintiff's public official acts. Accusations against a public officer whether they be specific or general, are not libelous per se when they are solely based upon official acts which he may lawfully do. There is abundant authority for this proposition. *Foot v. Pitt*, 83 App. Div. 78, 79, 82 N. Y. Supp. 464; *Rossiter v. New York Press Co.*, 141 App. Div. 339, 344, 126 N. Y. Supp. 325; *Odgers, Lib. & Sland.* (8th Ed.) 203; *Homer v. Engelhardt*, 117 Mass. 539. The value and force of a representative democratic government would be most seriously impaired if its officials, who are merely the servants of the people, may not freely be criticized concerning their official acts by those who indirectly employ them. The comments at times may be extreme or unwarranted and unjust, but if they be limited to acts which do not involve illegal action or criminality they are permissible comments. As was forcefully said by Chief Justice Cockburn in *Wason v. Walter*, 4 Q. B. 73, 94:

"Though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties."

To the same effect see *Seymour v. Butterworth*, 3 F. & F. 372, 377, and *Howarth v. Barlow*, 113 App. Div. 510, 514, 99 N. Y. Supp. 457, 459, in which Gaynor, J., writing, said:

"The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government, but only in a despotism. On the contrary, they have a right to speak out in open discussion and criticism thereof, the only test being that they make no false statement; and this is the great safeguard of free government. * * * This is fundamental among us."

By becoming a candidate for election to public office one necessarily invites public scrutiny of his qualifications to discharge the public trust, which he professes to be ready to assume. The blessings of a democratic government can never be fully realized unless a vigilant, alert, and intelligent electorate feels it to be a duty of citizenship to inquire into the character and fitness of candidates for public office. Wide publicity of the official acts of a candidate for re-election is peculiarly desirable. The voters should be put in a position to determine whether the official conduct of their representative indicates good judgment and faithful service on his part or subserviency to private interests or self-seeking personal advantage. The law should encourage such criticisms and do naught which may tend to put a restraint thereon. It seems to the court that, as matter of law, the publications of defendant were not libelous per se.

The cases cited in behalf of the plaintiff deal with defamation of a private individual in his trade or profession, and have no bearing upon the state of facts alleged in the complaint. There is no attack here of the plaintiff upon his professional conduct as a lawyer. Defendant's motion for judgment upon the pleadings must be granted, with \$10 costs.

Motion granted, with \$10 costs.

(108 Misc. Rep. 368)

**STREB v. CHATHAM & PHENIX NAT. BANK OF THE CITY OF
NEW YORK.**

(Supreme Court, Special Term, New York County. August, 1919.)

1. WAR § 12, 29—SEIZURE AND CONFISCATION OF PROPERTY OF ALLEN ENEMIES.

All alien enemy property in the United States during the war, including choses in action as well as tangible property, is subject to seizure and confiscation when so directed by Congress, as in the Trading with the Enemy Act (U. S. Comp. St. 1918, §§ 3115½a-3115½j).

2. WAR § 12—PROCEDURE IN ACTION TO RECOVER BANK DEPOSITS OF ALLEN ENEMY.

The Allen Property Custodian, acting under the Trading with the Enemy Act (U. S. Comp. St. 1918, §§ 3115½a-3115½j), in adjudging that a corporation's property belonged to alien enemies and demanding possession, and in serving a copy of demand on defendant bank, holding a deposit made by individual plaintiff in name of corporation, which refused compliance therewith, was a part of prosecution, and where plaintiff sued to recover deposit pending a libel in the federal court by Allen Property Custodian to determine ownership of the fund in suit, defendant's

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motion under Banking Law, § 113, to interplead Alien Property Custodian would be denied, with leave to serve answer after determination of pending libel.

Action by Charles H. Streb against the Chatham & Phenix National Bank of the City of New York. On application by defendant for an order to interplead the Alien Property Custodian as defendant. Denied.

Samuel Bitterman, of New York City, for plaintiff.

Kaye, McDavitt & Scholer, of New York City, for defendant.

Francis G. Caffey, U. S. Atty., of New York City, for Francis P. Garvan, as Alien Property Custodian.

LUCE, J. In this action, brought to recover a sum of money on deposit, the defendant seeks, pursuant to section 113 of the Banking Law (Consol. Laws, c. 2), to interplead or have made a party defendant the Alien Property Custodian, who has "seized" the deposit under the claim it is the property of a corporation the entire stock of which is alien enemy owned. The plaintiff made the deposit in the defendant bank under the name of the New York Funchal Hand Embroidery Company. On May 22, 1919, the Alien Property Custodian adjudged that "all of the property and assets of every kind, character and description held by the New York Funchal Hand Embroidery Company, Charles H. Streb, Proprietor, in its name," belonged to alien enemies, and thereafter the Alien Property Custodian demanded possession of all the property of the New York Funchal Hand Embroidery Company, and served a copy of this demand upon the defendant. Compliance with this demand was refused by the defendant. The plaintiff opposes this application, alleging that he, and not the alien enemies, owns this fund; that the determination of the Alien Property Custodian is not sufficient to transfer the title to the fund to that official, and that there is no peril to the defendant in paying the fund to the plaintiff. The Alien Property Custodian opposes the application because, under the Trading with the Enemy Act, exclusive jurisdiction to determine the ownership of the fund is vested in the federal courts, and interpleading the Alien Property Custodian in this action is commencing against him an action in the Supreme Court.

[1, 2] All alien enemy owned property in the United States during war is subject to seizure and confiscation when so directed by Congress. *Brown v. United States*, 12 U. S. (8 Cranch) 110, 3 L. Ed. 504; *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.* (D. C.) 254 Fed. 852, 1 Kent's Com. (14th Ed.) 60. This included choses in action as well as tangible property. *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.*, supra. The Trading with the Enemy Act (Oct. 6, 1917, c. 106, 40 Stat. 416 [U. S. Comp. St. 1918, § 3115½d]), by section 7, requires the delivery or payment, after investigation and upon demand, to the Alien Property Custodian of money or other property owing or belonging to an alien enemy. The Trading with the Enemy Act is the congressional authority for the seizure of alien enemy property. The Constitution of the United States, the laws of Congress, and treaties are the supreme law of the land. Const. U. S. art. 6, § 2. The right to

levy war is an exclusively federal function (Const. U. S. art. 1, § 8), and the Trading with the Enemy Act is a war measure. The Alien Property Custodian, in seizing property of an alien enemy, is exercising a war power and function. Section 9 of the Trading with the Enemy Act (section 3115½ddd) provides for the filing of a claim by any person not an enemy with the Alien Property Custodian that property seized is his and not that of an enemy, and near the end reads:

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee process or execution, or subject to any order or decree of any court."

Section 17 of the act (section 3115½i) vests in the United States District Courts jurisdiction to make all such orders and decrees as may be necessary to enforce the provisions of the act. The war powers of the President, and therefore of the federal government, are all derived directly from the Constitution—(a) commander in chief of the army and navy; (b) implied powers possessed by the federal government and necessary to secure its existence in time of war. The Alien Property Custodian's seizure of this deposit was a part of the prosecution of the war; his powers are all federal and committed by the Constitution exclusively to federal officials; therefore neither state nor state courts can interfere in any manner with the Alien Property Custodian in the exercise of his official functions. Ample provision is made in section 17 of the Trading with the Enemy Act for the determination of title and ownership to this deposit. *Garvan v. \$50,000 Par Value Bonds* (D. C.) 262 Fed. —.

There is now pending in the United States District Court a libel brought by the Alien Property Custodian against this fund to determine its ownership, to which proceeding the parties to this action have been summoned. The very question sought to be litigated and determined in this action can be tried in that proceeding. The motion must therefore be denied. If the defendant be so advised, the order may provide for an extension of its time to answer until after the determination of the proceeding in the federal court.

Ordered accordingly.

(109 Misc. Rep. 155)

PEOPLE ex rel. PRESSLER v. WARDEN OF CITY PRISON.

(Supreme Court, Special Term, Kings County. October 31, 1919.)

1. BURGLARY ⇐87—ADMISSIBILITY OF EVIDENCE.

Evidence that tools sold to defendant two days before a burglary were found on the burglarized premises is admissible against defendant.

2. CRIMINAL LAW ⇐226—SUFFICIENCY OF FACTS TO SUPPORT A CONVICTION NOT MATTER FOR MAGISTRATE.

Whether the facts stated in an information would support a conviction is not the question for the magistrate to decide.

3. BURGLARY ⇐43—SUFFICIENCY OF EVIDENCE TO WARRANT CONVICTION.

Evidence that defendant had conscious and exclusive possession, shortly before a burglary, of articles found on the burglarized premises directly after the crime was committed, without further proof, warrants a conviction.

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4. BURGLARY — 42(1)—SUFFICIENCY OF EVIDENCE TO WARRANT CONVICTION.

Evidence that defendant, shortly after a burglary, is found in the conscious and exclusive possession of property shown to have been on the burglarized premises, without other proof, warrants a conviction.

Habeas corpus by the People, on the relation of Charles Pressler, against the Warden of the City Prison. Writ dismissed, and prisoner remanded.

Harry Kopp, of New York City, for relator.

Harry E. Lewis, of Brooklyn (Harry G. Anderson, Dist. Atty., of Brooklyn, on the brief), for respondent.

CROPSEY, J. The relator seeks discharge on a writ of habeas corpus. He is detained under a warrant issued by a city magistrate charging him with the crime of burglary. The contention is that the information is insufficient. This states, in substance, that shortly after a burglary had been committed certain tools were found in the burglarized premises, and that those identical tools were in the possession of the accused two days before the burglary, having been sold to him at that time.

[1, 2] It cannot be questioned that proof of the facts stated in the information would be admissible against the accused. *People v. Lagroppo*, 90 App. Div. 219, 227, 228, 86 N. Y. Supp. 116, affirmed 179 N. Y. 126, 71 N. E. 737; *People v. Del Vermo*, 192 N. Y. 470, 480, 481, 85 N. E. 690; *Commonwealth v. Scott*, 123 Mass. 222, 229, 237, 25 Am. Rep. 81; *Lawson's Law of Presumptive Evidence*, rule 106. In fact, relator's counsel does not contend that such proof would be inadmissible, but urges that it would be insufficient to justify a conviction. That, however, is not the question which the magistrate must decide.

[3] But, even if it were, such proof would be sufficient to warrant a finding of guilt. If an accused were shown to have had conscious and exclusive possession of certain articles shortly before a burglary was committed, and those identical articles were found in the burglarized premises directly after the crime was committed, and there was no further proof, a jury or the trier of the facts would be justified in inferring and finding that they had been left there by the person in whose possession they had previously been shown to be. See *People v. Giordano*, 213 N. Y. 575, 579, 582, 107 N. E. 1069. Wigmore, in his *Principles of Judicial Proof*, at pages 164 and 165, quotes from *Burrill's Treatise on Circumstantial Evidence* the following:

"The participation of the accused in the crime proved to have been committed is shown by those physical facts or appearances which connect him with it, affording so many natural coincidences harmonizing with the supposition of his guilt. They are, in other words, the traces, marks, or indications, more or less distinct and impressive, of the presence of a particular criminal agent, * * * and may be enumerated in the following order:

"4. Objects left at the scene of crime by the supposed offender, being identified as belonging to him or previously seen in his possession. Of this description of traces of the person are the instruments of the crime themselves, such as the pistol, razor, knife, or hatchet used in committing a murder; arti-

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cies of dress, such as a hat, a glove, a neckcloth, a cloak, and the like. These furnish obvious means of identifying the criminal."

In Lawson's Law of Presumptive Evidence the following rule (108) is laid down:

"Possession by the accused of the means for committing the crime charged against him may raise a presumption of his guilt."

And the author gives various illustrations in support of the rule. See, also, Underhill's Criminal Evidence (2d Ed.) § 423.

[4] Where property shown to have been in premises which were burglarized was, shortly after the commission of the crime, found in the conscious and exclusive possession of the accused, such proof justifies the inference, and hence the finding, that it was taken by him, and that he committed the crime in question, and no other proof is necessary. *Knickerbocker v. People*, 43 N. Y. 177; *Stover v. People of the State of N. Y.*, 56 N. Y. 315; *People v. Weldon*, 111 N. Y. 569, 19 N. E. 279; *People v. Wilson*, 151 N. Y. 403, 45 N. E. 862; *People v. Friedman*, 149 App. Div. 873, 134 N. Y. Supp. 153.

The facts alleged in the information in the present proceeding make out a stronger case against the accused than in the cases last cited. In those, the possession of something which had been taken from the scene of the crime was held to warrant the inference that the possessor had taken it. In the present case, the thing found at the scene of the crime was shown to have been in the possession of the accused shortly before the offense was committed; and the presumption that naturally follows that a situation shown to exist continues gives added weight to the proof here.

The writ is dismissed, and the prisoner is remanded.

(109 Misc. Rep. 183)

HELLWIG et al. v. SEELEY.

(Supreme Court, Special Term, New York County. November 3, 1919.)

1. ATTACHMENT $\S$ 293—MOTION TO VACATE PRIOR ATTACHMENT.

To succeed on motion, under Code Civ. Proc. § 682, by junior attaching creditor to vacate a senior warrant of attachment, it must appear that the papers upon which the subsequent attachment was issued were themselves sufficient.

2. ATTACHMENT $\S$ 293—SHOWING REQUIRED ON MOTION TO VACATE PRIOR ATTACHMENT.

Where subsequent attachment creditor fails to present the papers upon which his attachment was granted, and does not disclose the ground of such attachment in affidavit upon which motion, under Code Civ. Proc. § 682, to vacate prior warrant of attachment, is based, as required by sections 636, 641, the motion will be denied.

Action by Theodore A. Hellwig and others against Adrian Seeley. Motion by junior attaching creditor to vacate senior warrant of attachment. Denied.

Paskus, Gordon & Hyman, of New York City (Julian T. Abeles, of New York City, of counsel), for the motion.

Stapleton & Briggs, of New York City, opposed.

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GIEGERICH, J. This is a motion, under section 682 of the Code of Civil Procedure, by a junior attaching creditor to vacate a senior warrant of attachment.

[1, 2] It is a well-established rule that in order to succeed in such a motion it must appear that the papers upon which the subsequent attachment was issued were themselves sufficient. *Dayton v. McElwee Mfg. Co.* (two cases) 19 N. Y. Supp. 46;¹ *Ladenburg v. Commercial Bank*, 2 App. Div. 477, 37 N. Y. Supp. 1085; *Central National Bank of Troy v. Ft. Ann Woolen Co.* (Sup.) 24 N. Y. Supp. 640, affirmed on opinion below 76 Hun, 610, 27 N. Y. Supp. 1114; *Corn Exchange Bank v. Marckwald* (Sup.) 57 N. Y. Supp. 458. The subsequent attaching creditor has not presented, as he should have done, the papers upon which his attachment was granted. *Dayton v. McElwee Mfg. Co.*, supra. This is essential, for the reason, as stated in the case last cited, that—

"A junior attaching creditor, who seeks to destroy the lien of a prior attachment, because of jurisdictional defects, should come into court upon papers showing that every step in his own procedure was sufficient to confer jurisdiction."

Not only is there a failure to make the papers upon which the junior attaching creditor's attachment was granted a part of the papers on which this motion is made, but the affidavit upon which the motion is based fails to disclose the ground of such attachment. Section 641 of the Code of Civil Procedure, among other things, requires that the warrant "must briefly recite the ground of the attachment," and section 636 of the same enactment prescribes what facts must be shown by affidavit to procure a warrant of attachment. The moving papers in the case at bar do not contain any allegations whatever concerning these prerequisites, and there is thus a failure on the part of the junior attaching creditor to show compliance with the aforementioned provisions. In this situation the junior attaching creditor is in no position to attack the prior attachment, and his application to vacate it should be denied.

Motion denied, with \$10 costs. Settle order on notice.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 64 Hun, 635.

HEUMAN v. KAPPER.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

APPEAL AND ERROR $\S$ 1066—INSTRUCTION AS TO MATTERS NOT IN ISSUE REVERSIBLE ERROR.

In an action for the purchase price of bottles, where the only questions for the jury were whether there was a sale by sample and whether the goods delivered conformed to the contract, court committed reversible error by delivering an elaborate charge, in which he submitted question whether plaintiff had "substantially performed," and whether or not the contract was one "which simply called for the delivery of bottles of a certain manufacturer, or whether it called for a delivery in accordance with a sample displayed."

Appeal from City Court of New York, Trial Term.

Action by Birdie Heuman against Samuel Kapper. From a judgment in favor of plaintiff, defendant appeals. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Breitbart & Breitbart, of New York City (Bernard Breitbart, of New York City, of counsel), for appellant.

Neuman & Newgass, of New York City (Frederick F. Neuman, of New York City, of counsel), for respondent.

BIJUR, J. Plaintiff sued for the contract price of 500 gross of bottles delivered to the defendant. Defendant alleged that the goods were sold by sample, and that those delivered did not correspond with the sample, and that he had so notified the plaintiff immediately. A small counterclaim was interposed for some incidental expenses, which need not be discussed.

In this exceedingly simple case the learned judge below delivered an elaborate charge, in the course of which he submitted to the jury, in substance, the question whether plaintiff had "substantially performed" her contract, instructed them that plaintiff might recover if she satisfied them that "the vast majority of the bottles delivered were merchantable and usable," and also asked them to determine whether or not the contract was one "which simply called for the delivery of bottles of a certain manufacturer, or whether it called for a delivery in accordance with a sample displayed." Defendant excepted to the introduction of these foreign and immaterial matters in the case. Plaintiff's counsel conceded that there was no question about the goods coming from any particular manufacturer. Nevertheless the charge in that respect was not withdrawn.

In regard to the statement about "the vast majority," the learned judge below, after defendant's exception, remarked to the jury that, if the number of bottles which failed to comply with the contract "is not an unreasonable number, the law declares that to be a compliance," to which further exception was taken.

Since, apart from the amount of possible damages, the only ques-

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tions to be determined by the jury were whether there was a sale by sample or not, and whether the goods delivered conformed to the contract as found, the judgment must be reversed, and new trial granted, with costs to appellant to abide event.

DELEHANTY, J., concurs.

GUY, J., concurs in result.

(189 App. Div. 131)

PEOPLE ex rel. FEDERAL TERRA COTTA CO. v. PURDY et al., Com'rs of Taxes and Assessments.

(Supreme Court, Appellate Division, First Department. October 24, 1919.)

1. TAXATION ~~§~~382—ASSETS OF CORPORATION NOT SURPLUS PROFITS OR RESERVE FUNDS.

In determining the "surplus profits or reserve funds," under Tax Law, § 12, relating to taxation of corporate stock, the assets of the corporation which are not taxable in the state shall not be included.

2. TAXATION ~~§~~382—"EXEMPTION" AND "DEDUCTION" IN DETERMINING TAX OF CORPORATION DEFINED.

The intention of the Legislature by Tax Law, § 12, was to provide that the net assets not exempt of every company, including surplus exceeding 10 per cent. of the par value of the capital, should be assessed at its actual value, and that in determining whether there is a surplus all property exempt from taxation must first be eliminated, and then make the deductions mentioned in such section, thus leaving the net amount taxable, and in doing so it is to be remembered that there is a distinction between "exemptions" and "deductions"; property being "exempt" because the state cannot and does not tax it, and "deductions" being allowed to avoid double taxation, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deductions; Exemption.]

Appeal from Special Term, New York County.

Certiorari by the People, on the relation of the Federal Terra Cotta Company, against Lawson Purdy and others, as Commissioners of Taxes and Assessments, etc. From an order canceling assessment for taxes, the Commissioners appeal. Reversed, and writ of certiorari dismissed.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

William P. Burr, Corp. Counsel, of New York City (William H. King, of New York City, of counsel, and Jesse F. Orton, of New York City, on the brief), for appellants.

Madison Grant, of New York City (William O. Gantz, of New York City, of counsel), for respondent.

PHILBIN, J. The commissioners appeal from an order in certiorari proceedings canceling an assessment of \$132,000 for taxes upon the personal property of the relator for the year 1916. They determined the above amount upon disallowing a claimed exemption of \$133,449.65 on account of surplus. The relator contended that it was

~~§~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

entitled to such deduction under section 12 of the Tax Law (Consol. Laws, c. 60), as there was a surplus shown which exceeded 10 per centum of its capital. The section reads as follows:

"Sec. 12. *Taxation of Corporate Stock.* The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll or shall be exempt by law, together with its surplus profits or reserve funds exceeding ten per centum of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value."

[1] The point presented is whether, in determining the "surplus profits or reserve funds," the assets of the corporation which are not taxable in this State shall be included. I think this question should be answered in the negative.

[2] As I read section 12 in the light of the decisions (*People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762; *People ex rel. Twenty-Third St. Rd. Co. v. Commissioners*, 95 N. Y. 554), it appears that the intention of the Legislature was to provide that the net assets, not exempt, of every company, including surplus exceeding 10 per cent. of the par value of its capital, should be assessed at its actual value. After so providing, there are two deductions specified in the section, namely, the assessed value of its real estate and also all shares of stock in other corporations actually owned by the company which are taxable upon their capital stock under the laws of this state. The distinction between exemptions and deductions is not to be overlooked. Property is exempt because the state cannot or does not tax it; deductions are allowed, in this case, to avoid double taxation. In determining whether there is a surplus, within the meaning of the statute which refers to a taxable surplus, all property exempt from taxation must first be eliminated. In that way we arrive at the amount of taxable property. The next step is to make the two deductions above mentioned in section 12. Doing so, we ascertain the net amount taxable under the section. As an authority for this view we have the decision by the Appellate Division of the Second Department in the case of *People ex rel. Citizens' Illuminating Co. v. Neff*, 26 App. Div. 542, 50 N. Y. Supp. 680.

The following is a statement of the assets and liabilities of the re-lator:

Assets.	
Cash on hand.....	\$ 35,505.44
Debts due from solvent debtors.....	126,338.35
Real estate	193,326.94
Shares in other corporations.....	393,000.00
Machinery outside of state.....	101,875.55
Goods outside the state.....	62,549.85
Patents, good will, and franchise.....	693,500.00
Total	<u>\$1,605,896.13</u>
Liabilities.	
Accounts payable.....	29,709.51
Net assets.....	<u>\$1,576,186.62</u>

Applying the rule above set forth, we first subtract from the net assets the exempt items—machinery, goods, and patents—a total of \$857,725.40, leaving a balance of \$718,461.22 taxable assets. As this is less than the par value of the capital stock, there is no taxable surplus, and no allowance can be made on account thereof. Next we deduct real estate and shares in other corporations—a total of \$586,326.94—leaving a net balance taxable under section 12 of \$132,134.28. That was the result arrived at by the commissioners, and they were therefore justified in assessing at \$132,000.

The foregoing renders it unnecessary to pass upon the other points raised by the appellants.

It follows that the order canceling the assessment should be reversed, the writ of certiorari dismissed, and the assessment by the commissioners confirmed, with costs to the appellants. Order filed. All concur.

(189 App. Div. 184)

PEOPLE ex rel. SIMMS MAGNETO CO. v. PURDY et al., Com'rs. of Taxes and Assessments.

(Supreme Court, Appellate Division, First Department. October 24. 1918.)

Appeal from Special Term, New York County.

Proceedings by the People, on the relation of the Simms Magneto Company, against Lawson Purdy and others, Commissioners of Taxes and Assessments. From an order canceling an assessment for taxes, defendants appeal. Reversed.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

William P. Burr, Corp. Counsel, of New York City (William H. King, of New York City, of counsel, and Jesse F. Orton, of New York City, on the brief), for appellants.

Herman Goldman, of New York City (Curtis A. Peters, of New York City, of counsel), for respondent.

PHILBIN, J. Order reversed, writ of certiorari dismissed, and assessment of commissioners confirmed, with costs to the appellants. See *People ex rel. Federal Terra Cotta Co. v. Purdy et al.*, 178 N. Y. Supp. 316, 189 App. Div. 181, opinion in which is handed down herewith. Order filed. All concur.

(189 App. Div. 158)

BROWN v. LEACH et al.

(Supreme Court. Appellate Division, First Department. October 24, 1919.)

1. JOINT ADVENTURES §4(1)—ATTEMPT BY ONE ADVENTURER TO MONOPOLIZE PROFITS.

Where plaintiff, and the company formed from his partnership securities business by an individual defendant, became joint adventurers in the enterprise of securing credit for a Mexican oil-producing company, defendants' company could not exclude plaintiff from the enterprise, by refusing to exercise an option to finance the oil company further than had been done, for the purpose of securing the entire benefit of any profits to itself; a joint adventure being subject to the same rules as a technical partnership, and one adventurer being unable to terminate it and continue the enterprise for his own benefit, or to exclude the other.

2. JOINT ADVENTURES §4(1)—PARTNERSHIP §97.—PARTNER OR ADVENTURER MUST ACCOUNT FOR PROFITS.

Copartners and joint adventurers owe the duty of utmost good faith to one another, and until the enterprise is abandoned a copartner or joint adventurer cannot act for himself, and if he does so, and obtains profits, he must account to his copartner, or coadventurer.

Appeal from Special Term, New York County.

Action by Charles T. Brown against Arthur B. Leach and others. From a judgment for defendants, plaintiff appeals. Judgment reversed, and interlocutory judgment entered, requiring defendants to account.

Argued before CLARKE, P. J., and DOWLING, SMITH, PAGE, and PHILBIN, JJ.

Tomlinson, Coxe & Tomlinson, of New York City (John C. Tomlinson, of New York City, of counsel, and James B. Mackie, of New York City, on the brief), for appellant.

Hornblower, Miller, Garrison & Potter, of New York City (Henry M. Earle, of New York City, of counsel), for respondents.

PAGE, J. Richmond Levering & Co., Incorporated, prior to June 27, 1917, owned all the issued stock of the Island Oil & Transportation Corporation, of the par value of \$22,500,000. The latter corporation owned or controlled valuable oil properties in the republic of Mexico, including an oil well therein known as "Tepetate No. 9," and a concession for building a pipe line for the transportation of oil from the well to the seacoast for shipment. This well was of great intrinsic value, producing from 70,000 to 100,000 barrels of oil a day. The Island Oil & Transportation Corporation did not have the money necessary to properly develop its oil properties, build the pipe line and proper buildings and tanks for the storage of the oil, and also was obligated to make certain payments on the purchase of its property and for concessions held by it. Prior to June 1, 1917, Richmond Levering, the president of Richmond Levering & Co., Incorporated, called on the plaintiff and explained to him the situation of the company and its need for immediate financial assistance. The plaintiff loaned to Richmond Levering & Co. the sum of \$9,000, and a further sum of \$10,000 for the purpose of protecting its properties and rights, and

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

had secured a further sum of \$15,000 by indorsing and securing the discount of its note.

The plaintiff suggested a scheme for financing the Island Oil & Transportation Corporation, and secured from Levering the privilege of financing the corporation. Levering first authorized the plaintiff to secure loans of money for the use of the corporation, and the plaintiff made persistent, but futile, efforts to obtain the loans from trust companies with which he had business dealings. He then brought the matter to the attention of Arthur B. Leach, of the banking firm of A. B. Leach & Co., and made a proposition to him for the financing of the Island Oil & Transportation Corporation. He informed Leach of the properties, rights, and securities of the corporation and of their value, and later introduced him to Levering, and there was discussed between the three the financing of the corporation. Prior to that time Leach had never heard of the Island Oil & Transportation Corporation, or of its properties and securities, and had not met Levering. Plaintiff had suggested to Levering the plan of selling short-time obligations of the corporation, secured by its debentures, and repaying the loans out of the proceeds of the sale of its stock and bonds. The plaintiff endeavored to interest Leach, because his firm was able to finance enterprises in which it was interested, and sell to the public the obligations or securities of corporations of which it approved.

After several interviews, the parties arrived at an agreement, which was reduced to writing and signed on the 27th day of June, 1917. The agreement is quite lengthy, but may be summarized as follows: It was between Richmond Levering & Co., Incorporated, party of the first part, and A. B. Leach & Co. and the plaintiff, parties of the second part. The parties of the second part agreed to advance to the party of the first part \$50,000 upon receipt of a note of the Island Oil & Transportation Corporation for \$300,000 in favor of the party of the first part, and to be indorsed by it and Richmond Levering individually, payable in 60 days, with interest at 5 per cent., and to be secured by 51 per cent. of the stock of the Island Oil & Transportation Corporation and \$160,000 face value of the debentures of said corporation. Within 30 days the parties of the second part were to advance the further sum of \$250,000, or such part thereof as the directors of such corporation might require. The parties of the second part to have the privilege of sending to Mexico their representatives to investigate and test the oil well and the properties of the Island Oil & Transportation Corporation for the purpose of obtaining a full report of the same. To cover the expense of this investigation, and as compensation for the advance of the \$300,000, \$500,000 par value of the stock of the Island Oil & Transportation Corporation was to be delivered with the said note to the parties of the second part and retained by them. Within 60 days the parties of the second part agreed to notify the party of the first part, in writing, whether they elected to exercise the option, which was thereby granted to them, to advance to the Island Oil & Transportation Corporation \$1,000,000 in such amounts and at such times as the board of directors thereof might

require. In that event the Island Oil & Transportation Corporation was to issue notes in such denomination and to such payees as the parties of the second part might designate, all payable three years after their date, with interest at 6 per cent., aggregating \$1,300,000, secured by \$2,600,000 face value of the debentures of the said corporation, and thereupon the \$300,000 note was to be canceled. In the event that the parties of the second part gave notice that they would not exercise the option, thereafter the \$300,000 should become due and payable within 60 days. If, however, the parties of the second part decided to exercise the option, they would be entitled to receive \$11,500,000 par value of the stock of the Island Oil & Transportation Corporation.

The plaintiff and Leach agreed to indorse and discount the \$300,000 note. Leach was to sell the securities of the corporation, and thus secure the money to pay the note and furnish the \$1,000,000 called for by the contract. The profits of the transaction were to be divided between them; A. B. Leach & Co. receiving two-thirds and the plaintiff one-third. It was thus contemplated that the corporation could be financed without the furnishing of cash by the Leach firm or the plaintiff in excess of the initial payments made by each of them. Plaintiff experienced difficulty in arranging the discounting of the \$300,000 note. Leach proposed that, instead of one note for \$300,000, there should be two notes, one for \$200,000, which he would take and advance the money, and the other for \$100,000, which plaintiff could get discounted; Leach agreeing to indorse the note and furnish from the common fund such collateral as might be necessary. Plaintiff thereupon arranged to have the note discounted by a trust company, but when he called upon Leach to indorse the note, as he had agreed, Leach declined, but, having recently incorporated his copartnership, offered to indorse the note in the name of the corporation. The president of the trust company refused to accept such indorsement, as a corporation would have no power to become an accommodation indorser. Leach thereafter, although refusing to indorse the note, demanded that the plaintiff should advance the \$100,000, which plaintiff could not do.

In the meantime an expert engineer had been sent to examine the property of the Island Oil & Transportation Corporation in Mexico. To the expense of this examination the plaintiff and A. B. Leach & Co. contributed. On August 14, 1917, Leach received the report of this engineer, which was favorable, except that it stated that the cost of the pipe line would be greater than estimated. On the 15th of August Leach had an interview with plaintiff, in which he demanded that plaintiff decrease his share of the compensation from $33\frac{1}{3}$ to 5 per cent. Upon plaintiff's refusal of this offer, Leach offered to go on with the enterprise, if plaintiff would accept $7\frac{1}{2}$ per cent. as his share. The plaintiff refused, and Leach then gave notice that he would not exercise the option to further finance the Island Oil and Transportation Corporation, and immediately thereafter so notified Richmond Levering. Leach wrote plaintiff on August 17th, informing him that he would not exercise the option, and closing with the statement:

"It is the understanding that we are each free to take such further steps in the matter as we may elect without prejudice."

Plaintiff in response wrote that it had been brought to his attention that Leach was contemplating dealing with Levering and ignoring his rights in the premises, and protested that they were not free to act separately. Again on the 20th of August plaintiff wrote Leach:

"The termination of this option, I am advised, will not leave you free to take such further steps in the matter as you may elect. You cannot use the incident of terminating the option to eliminate me from the situation and then avail yourself of the information, introductions, and suggestions I have given you for your sole profit."

Leach knew before the end of August that there was a payment of \$90,000 due from the Island Oil & Transportation Corporation upon its Mexican properties. Richmond Levering represented to plaintiff that A. B. Leach & Co. was definitely out of the negotiations, and that it would be necessary for him to secure money from other parties in order to save the property to the Island Oil & Transportation Corporation. Believing this representation, the plaintiff was induced to release Richmond Levering & Co. from all obligation to him under the contract between Richmond Levering & Co., A. B. Leach & Co., and himself. This release was evidenced by a letter dated August 24, 1917. On Sunday, August 26, 1917, Levering made by telephone an appointment to, and did, meet Leach at a golf club on Long Island, and then showed him the letter which he had obtained from plaintiff, and made an appointment to meet Leach at his office in New York the next day. Negotiations were then carried on between Levering and Leach on the 27th and 28th of August, which resulted in a contract dated August 30, 1917, for the financing of the Island Oil & Transportation Corporation on substantially the same lines and for the same compensation as theretofore provided in the contract of June 27, 1917, except that the plaintiff was eliminated therefrom and A. B. Leach & Co., Incorporated, was to receive all the profits of the transaction.

[1] A. B. Leach & Co. became joint adventurers with the plaintiff in the enterprise, and A. B. Leach & Co. could not exclude the plaintiff from the enterprise for the purpose of securing the entire benefit of the profits to itself. A joint adventure is subject to the same rules as a technical partnership. Where the partnership has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished. Until that time arrives one partner cannot terminate the partnership and continue the enterprise for his own benefit, nor can one partner exclude the other without his consent. It may be terminated at any time by consent, but the consent must be mutual. *Hardin v. Robinson*, 178 App. Div. 724, 729, 162 N. Y. Supp. 531, affirmed 223 N. Y. 651, 119 N. E. 1047. When A. B. Leach notified the plaintiff that he had elected to terminate the adventure, and that either party was free to go on with the enterprise, plaintiff protested, and specifically and repeatedly notified A. B. Leach that he could not use the incident of the termination of the

option to eliminate the plaintiff from the situation and proceed with the matter for his sole profit.

Leach first attempted to put the plaintiff in default by refusing to indorse the note for \$100,000, and then demanding that plaintiff advance the \$100,000, then notifying the plaintiff that he refused to exercise the option, and significantly stating that either party could continue the matter; then Levering, by representing that Leach was definitely out of the matter, and that he must take up the matter with other parties, which was impossible while the agreement with plaintiff was outstanding, obtained from plaintiff a release therefrom. We find Levering, as soon as he could locate Leach, resuming negotiations. Not content to await Leach's return to the city, Levering follows him to his golf club, on Sunday, and exhibits to him the release that he has induced the plaintiff to sign, and then resumes the enterprise, with the understanding that Leach alone should receive the profit.

[2] It is a well-settled rule that copartners and joint adventurers owe the duty of utmost good faith to their copartners and coadventurers, and that until the copartnership is terminated or joint adventure is abandoned a copartner or joint adventurer cannot act for himself. If he does, and thereby obtains for himself the benefits that otherwise would accrue to the partnership or joint adventurers, he will be held liable in equity to account to his copartner or coadventurers. *May v. Hettrick Brothers Co.*, 181 App. Div. 3, 13, 167 N. Y. Supp. 966; *Stem v. Warren*, 185 App. Div. 823, 831, 174 N. Y. Supp. 30.

It is my opinion that A. B. Leach did not observe that good faith with the plaintiff that the law requires of coadventurers, and that with full knowledge of the conditions, and with the sole design of excluding the plaintiff from participation in the profits of the enterprise, which the report of the engineer showed to be reasonably certain, he ostensibly withdrew from the enterprise, knowing full well, not alone that without his assistance the plaintiff could not carry out the contract of June 27, 1917, but also that, in the limited time between the notification of his withdrawal and the day when large payments must be made upon the properties of the Island Oil & Transportation Corporation, Levering would be unable to arrange with others to finance the corporation; that his refusal to go on with the enterprise was for the purpose of eliminating plaintiff from participation in the profits and securing them for himself. The defendants should be required to account to the plaintiff for one-third of the profits of the transaction.

Therefore the judgment and the findings inconsistent with this opinion will be reversed, with costs to the appellant, and an interlocutory judgment entered, requiring the defendants to account for one-third of the net profits received by them, or either or any of them, from the transactions set forth in the complaint, and appointing a referee to take such account and to report to the court at Special Term, with his opinion. Order containing findings and interlocutory judgment to be settled on notice. All concur.

STADLER v. SAMUELS.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

1. CONTRACTS ⇐10(2)—UNILATERAL CONTRACT NOT NECESSARILY VOID WHERE CONSIDERATION EXPRESSED.

Agreements not under seal, in which the promises are unilateral, are void; but, where there is a consideration expressed in the agreement, it may be implied that plaintiff was to render the services for the consideration in question.

2. MASTER AND SERVANT ⇐3(1)—CONTRACT OF HIRE NOT VOID FOR WANT OF MUTUALITY.

Agreement whereby employer agreed to hire employé for a year, until a certain date, as designer, at \$70 per week, and to give him 10 per cent. of the net profits of the year's business, held not void as unilateral and wanting mutuality, being for the employé to serve for a year and for the employer to pay.

Appeal from City Court of New York, Trial Term.

Action by Samuel Stadler against Ralph Samuels. From judgment for plaintiff for \$140, and from an order denying his motion to set aside the verdict and for a new trial, he appeals. Judgment and order reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Jacob Manheim, of New York City, for appellant.

A. Bertram Samuels, of New York City, for respondent.

DELEHANTY, J. On November 15, 1917, plaintiff and defendant entered into the following written agreement:

"Agreement between Ralph Samuels and Samuel Stadler. Ralph Samuels, party of the first part, does hereby agree to hire Samuel Stadler, party of the second part, for a term of one year, commencing November 15, 1917, until November 15, 1918, as designer of cloaks and suits, at the salary of seventy (\$70.00) dollars per week. In addition to the above, Ralph Samuels agrees to give Samuel Stadler 10 per cent. of the net profits of the one year business.

"Ralph Samuels.

"Sam Stadler.

"Kate Bram."

The complaint seeks to recover for two weeks' wages, which it is claimed were due to plaintiff at the time of his alleged discharge, and for damages for breach of the alleged contract of employment, which was to run until November 15, 1918. As to the two weeks' salary claimed by plaintiff to be due for services rendered by him, the issue was submitted by the learned trial judge to the jury, which found in plaintiff's favor, and on this appeal there is no controversy between the parties on that proposition. As to the portion of the agreement remaining unperformed, and for which damages for its alleged breach were sought, the complaint was dismissed on the ground that the contract was unilateral and without mutuality. From the judgment entered on said dismissal, and from the order denying the motion to set aside the verdict, plaintiff appeals.

[1, 2] The judgment and order should be reversed. While it is true

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that agreements not under seal, in which the promises are unilateral, are void, where there is a consideration expressed in the agreement, it may be implied that the plaintiff was to render the services for the consideration in question. *Crossman v. Schenker*, 206 N. Y. 466, 100 N. E. 39. Both the plaintiff and the defendant signed the instrument herein, and I think the contract was for the plaintiff to serve as a designer of cloaks and suits for the term of one year, and the defendant was to pay him \$70 a week and 10 per cent. of the profits for the services for the year. *Moran v. Standard Oil Co.*, 211 N. Y. 197, 105 N. E. 217.

Judgment and order accordingly reversed, and new trial granted, with costs to appellant to abide the event. All concur.

(108 Misc. Rep. 294)

GOLDSTEIN v. HIRSH et al.

(Supreme Court, Trial Term, Kings County. July, 1919.)

1. COVENANTS $\S$ 103(2)—ERECTION OF GARAGE AS BREACH OF BUILDING RESTRICTION.

A restrictive covenant, prohibiting any "omnibus, livery, or cow stable, * * * or other dangerous, noxious, unwholesome, or offensive establishment, trade, calling, or business offensive to the neighborhood," being made in 1850, and repeated in subsequent deeds in 1852 and 1853, and referred to in deeds down to 1896, is not, in view of changed conditions, violated by erecting a garage; it not being a "stable," nor a "dangerous, noxious, unwholesome, or offensive establishment, trade, calling, or business offensive to the neighborhood."

[Ed. Note.—For other definitions, see Words and Phrases, Dangerous Business; First and Second Series, Stable.]

2. COVENANTS $\S$ 100(1)—TITLE DOUBTFUL BECAUSE OF RESTRICTIVE COVENANTS.

The rule that purchaser is not compelled to accept a title in doubt because of the questionable effect of a restrictive covenant, does not apply to a case where purchaser sues to recover for breach of warranty money paid under a contract referring to restrictive covenants and warranting that they do have the effect of preventing the maintaining of a certain kind of building on the premises, for in such case the only question is whether the warranty is breached.

3. COVENANTS $\S$ 100(1)—RECOVERY OF PURCHASE MONEY PAID IN RELIANCE ON INEFFECTIVE RESTRICTIVE COVENANT.

Where contract for sale of realty referred to restrictive covenants, which intending vendor warranted did not prevent a garage on the premises, the intending purchaser, it being conceded that erection of a garage may be lawfully permitted under Zoning Ordinance, § 7, subd. (c), may not maintain action for money paid under contract, on ground of breach of warranty.

Action by Israel Goldstein against Hugo Hirsh, Emanuel Newman, and Benjamin Reass, copartners doing business under the firm name and style of Hirsh, Newman & Reass, to recover money paid under a contract for the purchase of real estate. Judgment for defendants, dismissing the complaint on the merits.

Samuel H. Hellinger, of New York City, for the motion.

Hirsh, Newman & Reass, of Brooklyn (Benjamin Reass, of Brooklyn, of counsel), opposed.

LAZANSKY, J. Action at law to recover money paid under a contract for the sale and purchase of real estate.

[1] The only question that need be considered here is whether or not the present defendant, at the time of closing, was able to deliver a title which did not violate the clause of the contract which provides that the title was to be—

"subject to restrictions contained in former deeds and those imposed by the Zoning Ordinance, all of which do not prevent the maintenance of a garage on said premises."

I shall find that, in all other respects, said defendant was ready to perform in accordance with the terms of the contract. It appears in the chain of title that there was a restrictive covenant which provided among other things that there was not to be erected or carried on or upon the premises any—

*"omnibus, livery, or cow stable * * * or other dangerous, noxious, unwholesome, or offensive establishment, trade, calling, or business whatsoever offensive to the neighborhood."*

Surely when this covenant was made in 1850, and repeated in subsequent deeds in 1852 and 1853, and referred to in deeds down to 1896, the parties interested did not have in contemplation a garage. They undoubtedly were seeking to avoid the offensive odors which came from the maintenance of horses and cows. The covenant should not be extended beyond the intent of the parties. Later-day conditions, not coming within the limitations of the intent of the parties, cannot be included within it. A garage is not a stable within the meaning of the words of this covenant. Although the Century Dictionary defines a garage as "a stable for motor cars" (*Beach v. Jenkins*, 174 App. Div. 813, 824, 159 N. Y. Supp. 652, 657), no such stable was within the contemplation of the parties to this covenant or their successors in title. I therefore hold that the maintenance of a public garage on the premises in question is not prevented by that part of the clause which provides against omnibus, livery, or cow stables.

It is my opinion that a public garage is not a dangerous, noxious, unwholesome, or offensive establishment, trade, calling, or business offensive to this neighborhood, the character of which is shown by the testimony. I therefore hold that this part of the covenant does not prevent the maintenance of a public garage in this neighborhood.

[2] But it is contended by plaintiff that at the closing the situation developed a serious question of fact as to whether or not the operation and maintenance of a garage in this neighborhood may not be offensive to it, and a settlement of the question might involve him in litigation. It is also claimed that there was raised at the time of the closing a doubtful question of law as to whether or not a garage is a stable which some day may bring a lawsuit to plaintiff, if he took title. It is urged that for these reasons plaintiff was justified in refusing to accept title, and is entitled to recover back the money deposited, even if the court should assume to resolve the doubtful question of law and the disputed question of fact in favor of the defendant. *Irving v. Campbell*. 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620.

It seems to me, however, the rule has no application to the case at bar. If no reference had been made in the contract to the restrictive covenant, and the title was to be delivered free and clear thereof, it might be said that plaintiff, offered a doubtful title, to sustain which might involve him in litigation, would be justified in rejecting the title and be entitled to recover the purchase money. But here reference is made in the contract to the restrictive covenants, which defendant practically warrants do not prevent the maintenance of a garage on the premises. Plaintiff claims that this warranty is broken. Defendant says it is not. It therefore becomes necessary for the court to decide whether or not it is broken. The court finds that this warranty has not been breached.

[3] Even if, as claimed, the board of appeals had no jurisdiction, because the necessary facts required by the ordinance were not before it, to issue a permit to erect a garage, the Zoning Ordinance did not prevent the maintenance of a garage on the premises. Plaintiff concedes the board had the power to permit a garage to be erected. Zoning Ordinance, § 7, subd. (c). Defendant is therefore entitled to judgment dismissing the complaint upon the merits.

Judgment accordingly.

(189 App. Div. 122)

PEOPLE ex rel. SHEA v. GILBERT, Town Clerk.

SAME v. KERWIN et al., Commissioners of Elections.

(Supreme Court, Appellate Division, Second Department. October 24, 1919.)

ELECTIONS $\Leftrightarrow$ 166—SEPARATE BALLOTS AT ELECTION OF TOWN OFFICERS.

Under Town Law, § 68, Election Law, § 316, as amended by Laws 1913, c. 821, and Laws 1917, c. 703, section 318, as amended by Laws 1901, c. 95, section 331, as amended by Laws 1909, c. 22, and section 366, as amended by Laws 1913, c. 821, there should be no separate ballot for candidates for town offices, at a general election notwithstanding section 341, as amended by Laws, 1913, c. 821.

Jenks, P. J., dissenting.

Appeals from Special Term, Nassau County.

Separate proceedings by the People, on the relation of Timothy Shea, against Franklin C. Gilbert, as Town Clerk of the Town of Hempstead, Nassau County, and against Lawrence E. Kerwin and Charles W. Stowe, as Commissioners of Elections of Nassau County. From the judgments rendered, relator appeals. Affirmed.

Argued before JENKS, P. J., and MILLS, PUTNAM, and KELLY, JJ.

Jackson A. Dykman, of Brooklyn, for appellant.

H. Stewart McKnight, of New York City, for respondents.

MILLS, J. The question presented by these appeals is whether or not, at a coming general election in the town of Hempstead, Nassau county, there shall be a separate ballot for candidates for town offices. The court at Special Term took the negative view, while the appellant relator contends for the affirmative.

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Section 341 of the Election Law (Consol. Laws, c. 17), as amended by chapter 821, Laws of 1913, provides that—

"If the town meeting is held on general election day, * * * official and sample general ballots on which town officers only are to be voted for shall be provided by the town clerk."

Before that, section 341 (see chapter 22, Laws of 1909) had provided for such a separate ballot only at elections held in even-numbered years. That provision had existed by and since chapter 733, Laws of 1904. The amendment of 1913 thus apparently extended the provision for such separate ballot to all general elections at which town officers are elected. If other material statutory provisions were harmonious, there could be no doubt but that the legislation of 1913 had effected that change, and the contention of the appellant would have to be upheld. The difficulty arises from the fact that such other provisions are not so harmonious, and that difficulty led to the decision at Special Term, as the opinion there indicates.

Section 68 of the Town Law (Consol. Laws c. 62), since and by chapter 363 of the Laws of 1898, has provided that "candidates for town offices shall be voted for in the same manner and on the same ballot as candidates for other offices," and therefore that provision existed during the period, 1904-1913, when there was in said section 341 the above definite requirement of a separate ballot in even-numbered years.

Again, section 316 of the Election Law, by the act of 1909 (chapter 22), provided expressly for a separate box for town office ballots in the even years, and that provision continued until said amendment of 1913. As so amended, that section provided for only one box for "Ballots for General Officers."

Section 318 of the Election Law as to election expenses has, at least since 1901, provided that, in case a town election be held at the same time as a general election, certain specified election expenses shall be divided between the county and town, in proportion of the number of town candidates to the whole number of candidates on the ballots. This apparently considered that all candidates would be on one ballot.

Again, section 331 of the Election Law, has, at least since 1909, provided for "one form of ballot for all the candidates for public office"; but the amendment of 1913 changed the phraseology to "there shall be five kinds of ballots, called respectively * * * ballots for general officers. * * * Ballots for general officers shall contain the names of all candidates except presidential electors."

Moreover, section 366 of that law has, at least since 1909, provided, as to the order of canvassing, that the boxes shall be opened and the ballots canvassed in this order, namely, "first the box containing general ballots." The amendment of 1913, adding a provision as to presidential elections, provided thus: "First. The box, if any, containing presidential ballots. Second. The box, if any, containing general ballots."

All the above-cited provisions may perhaps be fairly reconciled with the 1913 amendment of section 341, providing for a separate ballot, except section 68 of the Town Law and section 316 of the Election

Law. It looks to me very much as though the Legislature, in making that amendment to section 341, had really intended to make that change, and so to provide for a separate ballot for town officers, but had somehow, perhaps in the haste of the extraordinary session, overlooked making harmonious changes in the other material statutes.

The situation is this: The act of 1913 amended section 341 so as to extend to all general elections the provision for a separate ballot for candidates for town offices which before had been limited to elections in even-numbered years, and the same act also amended section 316, so as to strike out entirely the provision for a separate box for such separate ballots. Of course it is self-evident that if there be such separate ballots there must be a corresponding separate box. Moreover, before and since the amending act of 1913, section 68 of the Town Law has distinctly provided that there shall be no such separate ballot. If the inconsistency existed only between the act of 1913 and that section of the Town Law, I would conclude that the former, as the later enactment, must prevail and be deemed, by implication, to have modified the latter, the earlier statute. The chief difficulty is with the inconsistency between the two sections of the same act of 1913, the one providing distinctly for the separate ballot and the other as clearly, in effect, that there shall be none; and the latter section was in that respect re-enacted by chapter 703 of the Laws of 1917.

The question here presented is by no means free from difficulty; but upon the whole I think that we should affirm.

I advise, therefore, that the judgments appealed from be affirmed, without costs.

PUTNAM and KELLY, JJ., concur.
JENKS, P. J., dissents.

(108 Misc. Rep. 362)

MAYNARD et al. v. MAYNARD et al.

(Supreme Court, Special Term, New York County. August, 1919.)

1. TRUSTS ⇐305—IN ACTION FOR ACCOUNTING AND INSTRUCTIONS, ULTIMATE RIGHTS OF DEFENDANTS DETERMINABLE.

In action by surviving trustees for an accounting and instructions as to who are distributees of funds created by two trust deeds, wherein a defendant, as trustee under will of one who had a power of appointment conferred by such deeds, served an answer under Code Civ. Proc. § 521, asking affirmative relief against all other defendants, and where all parties interested in trust deeds and will were before court, ultimate rights of those defendants interested among themselves in estate may be determined.

2. WILLS ⇐732(1)—BEQUESTS PAYABLE FROM TRUST FUNDS WHERE "PRIVATE ESTATE" IS INSUFFICIENT.

Where a bequest explicitly provided for its payment from testator's "private estate," or, if insufficient, from principal of any trust funds of which he had power of disposition or appointment by will, the term "private estate" indicated an intention that, so far as it was sufficient, the legacy was to be paid out of property of which testator died seized and

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possessed in his own right, and that any deficiency was to be paid out of such trust funds.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Private Estates.]

3. WILLS §732(1)—MARSHALING ASSETS FOR PAYMENT OF LEGACIES.

Where it is clear that will of one dying without issue, providing for legacies in excess of his individual estate, intended that provisions of will should be made effective, not only by use of such estate, but also by use of trust funds of which he had power of appointment, his intention may be accomplished by marshaling of funds created under the trust deeds and from his individual estate, without injustice to his beneficiaries, though he intended to create a trust fund under the will exclusively from funds set apart under trust deeds, which in terms illegally suspended alienation.

4. WILLS §811—GENERAL BEQUESTS SATISFIED BEFORE RESIDUARY LEGACIES.
The general bequests may be satisfied before payments are made to residuary legatees.

5. PERPETUITIES §4(22)—WILLS §853—EFFECT OF VIOLATION OF RULE AGAINST PERPETUITIES.

Where separate trusts attempted to be created by the residuary clause of a will are void under the statute against perpetuities, such illegality does not destroy a legacy given to infants, as the court may disregard the illegal antecedent trust provisions by accelerating the remainders vested in such infants under the residuary clause.

Action by Walter E. Maynard and others, as sole surviving trustees under two deeds of trust executed by Effingham Maynard, Sr., dated June 20, 1898, etc., against Walter E. Maynard, individually, the Farmers' Loan & Trust Company, as trustee of a trust created by the will of Effingham Maynard, Jr., and others, for an accounting and for instructions as to those entitled to participate in the distribution of trust funds created for Effingham Maynard, Jr., etc. Interlocutory judgment to be entered according to opinion.

E. J. Dimock, of New York City, for Walter E. Maynard, as executor of Effingham Maynard, Jr., deceased.

Spoor & Russell, of New York City, for defendant Nellie Corey Mix Taylor.

Leonidas Dennis, of New York City, for defendant United States Fidelity & Guaranty Co.

Henry W. Baird, of New York City, for defendant Katharine Reinhart Taylor.

Geller, Rolston & Horan, of New York City, for defendant Farmers' Loan & Trust Co., as trustee for Edward G. Burgess, 3d, and others.

Reginald H. Schenck, of New York City, for defendant Elizabeth Goffe Burgess, individually and as guardian ad litem for Edward G. Burgess, 3d.

Samuel H. Ordway, of New York City, guardian ad litem for infant defendants Walter and Audrey Maynard.

Middlebrook & Borland, of New York City, for defendants Robert Graves and others, as trustees under the will of Margaret J. P. Graves, deceased.

, GREENBAUM, J. The surviving trustees under two deeds of trust, each dated June 20, 1898, executed by Effingham Maynard, the

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elder, since deceased, bring this action for an accounting and the court's instructions as to the persons entitled to participate in the distribution of the trust funds created for Effingham Maynard, Jr., now deceased, under each of said deeds of trust. The doubts which have arisen with respect to the distribution of the two funds in question necessitate the construction of the trust deeds and the last will and testament of Effingham Maynard, Jr. The defendant Farmers' Loan & Trust Company, as trustee of a trust created under the will of Effingham Maynard, Jr., prays in its answer for an accounting on the part of the executor of the latter's estate, and for a final determination as to the persons who are entitled to share in the distribution thereof, and to what extent.

[1] At the outset it may be well to pass upon the doubt expressed by the plaintiffs as to whether, under the present state of the pleadings, the court is in a position to order an accounting and distribution of the estate of Effingham Maynard, Jr., in this action. It appears that the defendant Farmers' Loan & Trust Company, availing itself of the provisions of section 521 of the Code of Civil Procedure, served its answer, asking for affirmative relief upon all the defendants, and that all persons entitled to share in the estate of Effingham Maynard, Jr., are before the court in this action. Under these circumstances the court is not limited by the allegations and the prayer of the complaint, and is in a position to determine the ultimate rights of those defendants who, as between themselves, are interested in the estate. It is not apparent how the plaintiffs' rights can be prejudiced by such a course. Since the necessity for bringing an independent action, with its incidental delays and expenses, will be thereby obviated, it becomes particularly desirable to pass upon the rights of all the parties now before the court interested in both the trust deeds and the last will and testament of Effingham Maynard, Jr.

[2, 3] A study of the will in question and the conditions of the estate of the testator at the time it was executed convinces me that in executing the will the testator intended to exercise the power of appointment conferred upon him by the elder Maynard under the two deeds of trust. A circumstance of great significance, both under the statute law and the decisions, is that there is not the slightest evidence that the testator did not intend that the execution of his will shall not operate as an execution of the power of appointment conferred upon him under the deeds of trust. Personal Property Law (Consol. Laws, c. 41) § 18; *Lockwood v. Mildeberger*, 159 N. Y. 181, 53 N. E. 803. The latter case is also authority for the proposition that the same rule is applicable to both real and personal property. Then the provisions of the will, read in connection with the circumstances attendant upon its execution and the condition of his "private estate," as it is termed in the will, establish affirmatively that it was his intention by the execution of his will to exercise his power as donee.

We may now consider the provisions of the will which have provoked the controversy in this action. The "fourth" paragraph thereof, which bequeathes \$25,000 to Nellie Corey Mix Taylor, requires but slight discussion. It explicitly provides for its payment "from my

private estate, or if that should not be sufficient, from the principal of any trust funds of which I may have the power of disposition or appointment by will." This legacy must in any event be paid in full, and it is merely a question as to the source or sources from which it is to be paid. The phrase "private estate," employed by the testator, evidently indicates an intention that, so far as it was sufficient for the purpose, this legacy was to be paid out of the property of which the testator died seized and possessed in his own right, and that the deficiency, if any, was to be paid out of the trust funds of which he had the power of disposition.

As to the "eighth" paragraph of the will, which relates to the Burgess trust fund, its illegality cannot be doubted, if it be held that the testator thereby intended that it should be created exclusively from the funds set apart under the trust deeds, since they contain express provisions which in themselves have the effect of suspending the right of alienation for two lives. But the testator's intention would not be defeated if the provisions of the will, read in connection with each other, show that it was his intention that his individual property, as well as the funds derived from the trust deeds, were to be available to all the dispositions made in his will. That the equitable powers of this court may be exercised by the marshaling of the several funds is admirably and tersely expressed in the headnote of *Fargo v. Squiers*, 154 N. Y. 250, 48 N. E. 509:

"When the subject-matter of a will which creates a trust consists of two estates or funds, one of which is an individual estate which can be lawfully devoted to the purposes of the trust and the other is an appointive estate which cannot be so devoted, and the will contains specific legacies with no direction as to the fund out of which they shall be paid and discloses an intention to devote the whole of the residuary estate to the use of the beneficiaries of the trust, equity can, for the purpose of carrying out such intention so far as lawful, require the specific bequests to be paid out of the appointive estate and thus save the individual estate unimpaired to continue the trust."

It is clear that the testator, Effingham Maynard, Jr., who died without issue, leaving a will with bountiful legacies far in excess of his meager individual estate, must have had in his mind when he executed his last will that all its provisions, including the payment of his debts and the distribution of the residuary estate, should be made effective, not only by the use of his individual estate, but also of the estate or funds of which he had the power of appointment. *Lockwood v. Mildeberger*, *supra*. The effectuation of this intention may readily be accomplished by the marshaling of the two trust funds created under the trust deeds and the funds derivable from his individual estate, without doing any injustice to any persons who were the objects of the testator's bounty. Thus, by marshaling these funds, the trust fund in favor of the Burgess children may be taken out of the individual estate of the deceased, and the legality of the trust will be upheld. There would therefore be no objection to the payment of the debt of the testator incurred by his execution of the bond of \$40,000, for the securing of which he also executed a mortgage on his property No. 53 East Sixty-First street with the funds derivable under the trust deeds. This is in conformity with a long-recognized

rule of will construction. *Searles v. Brace*, 19 Abb. N. C. 10; *Matter of Hopkins*, 57 Hun, 9, 10 N. Y. Supp. 264.

[4] The general bequests may be satisfied before payments are made to residuary legatees. *Matter of Title Guarantee & Trust Co.*, 195 N. Y. 339, 88 N. E. 375. It would follow, if this course be pursued, that the real estate of which the testator died seized would be chargeable with the payment of the moneys necessary to create the trust fund under article 8 of the will. *Irwin v. Teller*, 188 N. Y. 25, 80 N. E. 375; *Briggs v. Carroll*, 117 N. Y. 288, 22 N. E. 1054; *Brill v. Wright*, 112 N. Y. 129, 19 N. E. 628, 8 Am. St. Rep. 717; *McCorn v. McCorn*, 100 N. Y. 511, 3 N. E. 480.

[5] With respect to the ninth paragraph, which is the residuary clause of the will, the court is in complete accord with the reasoning of the learned counsel of the plaintiff and of the special guardian of the infant defendants *Walter Maynard and Andrew Maynard*. There can be no doubt that the separate trusts therein attempted to be created are void under the statute of perpetuities, for the reasons already mentioned in discussing the eighth article of the will. This illegality, however, is not destructive of the legacy intended to be given to these infants, since the court may disregard the illegal antecedent trust provisions, by accelerating the remainders which are vested in them under this article. As pointed out by the counsel, there is ample authority for such a holding. *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917; *Smith v. Chesebrough*, 176 N. Y. 317, 68 N. E. 625; *Matter of Colegrove*, 221 N. Y. 455, 117 N. E. 813; *Matter of Hitchcock*, 222 N. Y. 57, 118 N. E. 220; *Matter of Berry*, 154 App. Div. 509, 139 N. Y. Supp. 186, affirmed 209 N. Y. 540, 102 N. E. 1099, without opinion.

An interlocutory judgment will be entered in accordance with the foregoing views.

Judgment accordingly.

ISAACSON et al. v. J. L. BLUM CO., Inc.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

1. FRAUDS, STATUTE OF §89(3)—EVIDENCE SHOWING ACCEPTANCE OF GOODS.

Where it was shown that receipt was given for goods delivered and that part of the goods were used in making up hats, acceptance of the goods was conclusively shown.

2. EVIDENCE §244(7)—STATEMENTS MADE BY AGENT INADMISSIBLE.

In an action for the purchase price of goods, where defense was that goods were not according to sample, it was error to permit witness to detail conversations had with defendant's salesman in regard to the quality of the goods; defendant corporation not being bound by his statement.

Appeal from City Court of New York, Trial Term.

Action by Louis Isaacson and others against the J. L. Blum Company, Incorporated. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHAN-TY, JJ.

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Burnstine & Geist, of New York City (Abraham A. Hoffman, of New York City, of counsel), for appellant.

Lewis A. Rosen, of New York City, for respondents.

DELEHANTY, J. [1] The first defense is the statute of frauds, in that the goods were never accepted. Concededly there was a delivery and receipt for the goods, and it even appears that a number of hats were made up from the merchandise in question. The court dismissed this defense, and held as a matter of law that there was an acceptance. The act of the defendant in exercising control and ownership was so conclusive as to admit of no other decision.

[2] The second defense, that the goods were not equal to sample, presents a different aspect. There the witness Rathkoff, an expert, was allowed upon the stand to detail conversations had with defendant's salesman in regard to the quality of the goods. This was obviously not binding upon the defendants, nor were the goods about which the testimony was offered properly identified as the goods in the litigation.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

S. ROSENFELD CO. v. SCHECHTER et al.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

PARTNERSHIP ¶55—SUFFICIENCY OF EVIDENCE TO ESTABLISH PARTNERSHIP.

In seller's action for price, evidence held insufficient to show that the defendants were partners.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the S. Rosenfeld Company against Jacob Schechter and another. Judgment for plaintiff, after trial by the judge without a jury, and the named defendant appeals. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Nathan D. Leiman, of New York City, for appellant.

Jacob M. Leibner, of New York City, for respondent.

BIJUR, J. Plaintiff sued defendant for the purchase price of certain eggs. It was conceded that the sole question at issue was whether defendant Schechter was in partnership with defendant Tobias Weissman. The only proof of that fact was a statement alleged to have been made by Schechter and Weissman when they first called to purchase eggs at plaintiff's place of business.

Plaintiff's officer testified that, although he knew both Schechter and Weissman before they called, they said to him on that occasion that they were brothers-in-law and partners. Plaintiff's bookkeeper, the last witness' nephew, testified to the same effect.

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Defendants' contention was that Schechter was the proprietor of a store in Brooklyn, and Tobias Weissman of a store in New York. The bills for the goods purchased were charged, and sent separately and individually to Schechter and Weissman. Although plaintiff made an attempt to explain this palpable inconsistency with the notion that defendants were known by plaintiff to be partners and treated as such, the record is not one upon which a judgment in plaintiff's favor can properly be sustained. On a new trial facts may be developed from which an appropriate inference one way or the other may be drawn.

Judgment reversed, and new trial granted, with \$30 costs to appellant to abide the event. All concur.

**HECKER-JONES-JEWELL MILLING CO. v. MURRAY, Property Clerk,
etc., et al.**

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. REPLEVIN §12—EFFECT OF GRAND JURY'S REFUSAL TO INDICT DEFENDANT FOR THEFT.

Grand jury's failure to indict employé, who, employer claimed, had stolen money, does not relieve employé from liability for such money in employer's action in replevin.

2. REPLEVIN §72—PLAINTIFF MUST PROVE CASE BY FAIR PREPONDERANCE OF EVIDENCE.

In action in replevin to recover money in the hands of property clerk of police department, claimed to have been stolen from plaintiff by its employé, and which had been taken from employé by police officer, where employé denied that money had been stolen, and claimed that the money taken from him was his own, plaintiff had burden of proving his case by a fair preponderance of evidence, and was not required to sustain burden beyond a reasonable doubt.

3. REPLEVIN §72—SUFFICIENCY OF EVIDENCE TO PROVE OWNERSHIP.

In replevin action to recover money in hands of property clerk of police department, claimed to have been stolen from plaintiff by an employé, and taken from employé by police officer, wherein employé denied having stolen money, and claimed the money so taken from him was his own, plaintiff *held* to have sustained burden of proving ownership of money by fair preponderance of evidence.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by the Hecker-Jones-Jewell Milling Company against James E. Murray, Property Clerk of the Police Department of the City of New York, and John Markel. Judgment for defendant, after a trial without a jury, and plaintiff appeals. Reversed, and judgment directed for plaintiff against defendant Markel.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Sullivan & Cromwell, of New York City (Hjalmar H. Boyesen, of New York City, of counsel), for appellant.

Leonard McGee, of New York City (Stephen Crick, of New York City, of counsel), for respondents.

DELEHANTY, J. This action in replevin was instituted to recover money in the hands of the property clerk of the police department of the city of New York. It appears that at about half past 5 o'clock in the evening of December 22, 1918, one Starbuck, an employé of the plaintiff, went to the sixth floor of the plaintiff's mill and there obtained some 15 envelopes containing various sums of money, the total amount thereof being \$254.75, to be paid to plaintiff's workmen as their weekly wages. These envelopes he put in a drawer of his desk in his office, and then went to the third floor of the building. When he came back, having, as he says, been gone 5 or 6 minutes, he unlocked his drawer and discovered that the money was gone. He then spoke to one Elliott, the watchman, and asked if anybody had been near the office, and Elliott said two men had passed in the vicinity, one of whom was Markel, the defendant. This was about half past 6.

A detective was called in, who advised Starbuck to go and look his men over, which he did, and he testifies that Markel struck him as acting strangely, and that he accordingly took a special watch on him. When Markel went down to change his clothes about 6 o'clock the following morning, Starbuck watched him through a small crack, and noticed that Markel did not put his shoe laces on. Markel then went to the washroom and upon returning laced his shoes. As he was about to leave the building, Starbuck called him into the office and accused him of stealing the money. Markel was told to take his shoes off and \$247 in bills was found in them, not in one roll, but in 14 or 15 separate packages. The money was taken out of the shoes by a police officer, who had been sent for. Markel also had 80 cents in his pocket.

Starbuck claims that, when he accused Markel of stealing the money, the latter said: "Lock me up. I did it." Markel denies this. Elliott, the watchman, testified that he was present after Markel was called into the office, that other employés of the plant had gathered outside, and that Markel said: "I done it. I done it. Take me to the judge." Markel denies this also, and says that what he did say was: "I told them to lock me up; they have no business to hit me, and I will go to the judge and tell my story." He further says he went to work at 7 minutes to 7, went to the cellar to change his clothes, but did not remove his shoes, and that he loaded trucks until 6 o'clock the next morning. He testifies that the money found was his own money, and that he kept it in his shoes, as he did not believe in banks. One hundred dollars he says he earned in 1912 and \$147 in 1917.

Markel does not contradict the statement of the watchman to the effect that Markel passed in the vicinity of Starbuck's office and that it was not usual for Markel to pass that way. Markel testified that many people outside of the plaintiff's mill knew he was in the habit of carrying money in his shoes, and that he had brought one man to court who had seen him on the night of December 21st, the day before the incident herein, with \$250. The man referred to was not called to the stand, nor was any one else, to corroborate the defendant's statements.

[1-3] It is true that the grand jury failed to indict the defendant on the plaintiff's complaint, but it does not follow that he is thereby

relieved from liability herein. The plaintiff in this case was obliged to sustain the burden of proof, not beyond a reasonable doubt, but by a fair preponderance of evidence. This I believe the plaintiff has done. Its witnesses, one of whom was totally disinterested, told a straightforward story, which, with the circumstances of the case, presented ample ground for a verdict requiring the return of the money to the plaintiff.

Judgment reversed, with \$30 costs, and judgment directed in favor of the plaintiff, with costs against the defendant Markel. All concur.

LAWSON v. NOLL.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

JUDGMENT **§**158—OPENING DEFAULT IMPROPER WITHOUT AFFIDAVIT OF MERITS AND SHOWING OF DEFENSE.

Where the moving papers on defendant's motion for order opening his default after inquest and setting the case for trial present good excuse for the default, but there is no affidavit of merits, nor statement of facts presented from which the court can determine whether defendant has a meritorious defense, there is no warrant for granting motion.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Edgar P. Lawson against Mary A. Noll. From an order opening defendant's default after inquest and setting the case for trial, plaintiff appeals. Order reversed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Clarence M. Davis, of New York City (Leonard Klein, of New York City, of counsel), for appellant.

James B. Henney, of New York City, for respondent.

PER CURIAM. This is an appeal from an order opening defendant's default after inquest and setting the case for trial. The pleadings were oral. While defendant presented a good and sufficient excuse for his default in appearing, the moving papers otherwise are wholly lacking in the essentials of such an application. There was no affidavit of merits, nor statements of facts presented from which the court could determine whether defendant had a meritorious defense. There was therefore no warrant for the granting of the motion.

Order accordingly reversed, with \$10 costs, and motion denied, with \$10 costs.

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GOBES v. CUTTING LARSEN CO., Inc.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. MUNICIPAL CORPORATIONS §=705(10)—NEGLIGENCE CONTRIBUTING TO INJURY BY AUTOMOBILE.

Plaintiff, who attempted to cross a street ahead of a coal truck, and was struck by an automobile plainly visible and approaching from a distance and at a rate rendering the attempt palpably dangerous, was negligent, and cannot recover from the owner of the automobile.

2. MUNICIPAL CORPORATIONS §=705(1)—INJURY BY AUTOMOBILE NOT DUE TO NEGLIGENCE.

The owner of an automobile, proceeding along the street in the same direction as a fleet of coal trucks, which, after passing one of such trucks, struck plaintiff, who had attempted to cross the street before the truck, in disregard of the automobile, which was in plain view, was not guilty of any negligence rendering it liable, though it did not sound horn.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Catherine Gobes against the Cutting Larsen Company, Incorporated. From a judgment for plaintiff, entered upon verdict of a jury, defendant appeals. Judgment reversed, and complaint dismissed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Bertrand L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for appellant.

Jerome Wilzin, of New York City (A. L. Geilich, of New York City, of counsel), for respondent.

BIJUR, J. Plaintiff sued for personal injuries received under the following circumstances: As she was crossing Ninth avenue from east to west at Fifty-Sixth street, there was a line of coal trucks proceeding north on the east side of the street; one truck lagged behind the others and was about a half a block away. She looked, and, feeling that she had time to cross before that truck, proceeded toward the middle of the avenue. She then looked again, and did not see defendant's automobile, which was coming north on the easterly (north-bound) car track, and was struck by the automobile and injured. Substantially the same facts are testified to by a woman witness on her behalf and by a young boy, the son of the last witness, who, however, did see the automobile about the time that plaintiff left the sidewalk, at which time he says it was about a block and a half away.

[1, 2] On this state of facts it is difficult to avoid the conclusion that plaintiff was guilty of contributory negligence in not seeing the automobile, which was evidently plainly visible and approaching from a distance and at a rate that rendered her attempt to cross palpably dangerous. The plaintiff evidently realized the weakness of her own case, because she volunteered the statement (subsequently stricken out), "The automobile was coming on the wrong side, see," which

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is directly contrary to all the evidence, including her own. Moreover, I find on this state of facts no negligence attributable to the defendant, nor is respondent's counsel able to point to any such negligence. No claim is made that the automobile was proceeding at an unlawful speed, but counsel adds:

"They did not blow a horn as they should have done, as according to their own testimony the coal truck was in the middle of the street when they were passing, so as to give notice to pedestrians that they were coming."

I am unable to understand what relation the coal truck had to the necessity of blowing a horn, or why the defendant's chauffeur should have sounded the horn to give notice to pedestrians generally. Such an obligation would, in substance, amount to a requirement that the horn be blown incessantly. Defendant's driver had no reason to apprehend that plaintiff would suddenly cross in front of an approaching automobile.

I am of opinion, therefore, that the complaint should have been dismissed on both grounds on which the motion to dismiss was made, and that the judgment should be reversed, and complaint dismissed, with \$30 costs of this appeal and the costs of the court below to appellant. All concur.

(189 App. Div. 904; 108 Misc. Rep. 732)

CHERRIE v. REYNOLDS.

(Supreme Court, Appellate Division, Second Department. October 17, 1919.)

TRUSTS $\Leftarrow$ 283(1)—FRAUDULENT AGREEMENT TO DIVIDE TRUST FUND.

Where a savings bank deposit was an account in absolute trust for plaintiff for the balance on hand at depositor's death, the defendant, depositor's brother, and executor of depositor's last will, had no claim to or against said account, and an agreement by and between plaintiff and defendant, individually and as executor to divide equally such balance, defendant having had the savings bank book in his possession for some time, and plaintiff not having been notified of its discovery, was not just, fair, and equitable, and amounted to a fraud, and should be set aside.

Appeal from Special Term, Kings County.

Action by Susan Reynolds Cherrie against Frank Reynolds. Judgment for plaintiff, and defendant appeals. Judgment affirmed, upon the opinion of the Special Term.

The following is the opinion of Van Siclen, J., at Special Term:

The court finds no difficulty in holding that the savings bank deposit or account in trust for plaintiff created an absolute trust for the balance on hand at the death of the depositor in her favor and that plaintiff was thereupon entitled to the same. *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900. The defendant herein is the brother of the decedent depositor and the executor of his last will and testament, and the plaintiff is the granddaughter of decedent, who brings this action to set aside as fraudulent an agreement entered into by and between plaintiff and defendant, individually and as executor of decedent, made some four years after said decedent's death, whereby the plaintiff and defendant agreed to equally divide the balance of said savings bank account. The evidence discloses that the defendant had the savings bank book in his possession for at least two years, and

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although he swears that plaintiff and her attorney had mentioned or made claim to a savings bank account, neither he nor his attorney had notified plaintiff or her attorney of the discovery thereof until on or about the execution of the said agreement, which was accomplished under circumstances and conditions at least suspicious and peculiar and without notice to plaintiff's attorney. Obviously, the defendant, either individually or as executor, had no claim to or against said savings bank account, and said agreement thus obtained by him for the defendant was not only without consideration, but was not just, fair, and equitable, and amounted to a fraud, which a court of equity should not enforce.

Judgment is therefore directed in favor of the plaintiff. Plaintiff's findings and judgment signed.

Argued before MILLS, RICH, BLACKMAR, KELLY, and JAY-COX, JJ.

John A. Mullen, of New York City (Mullen & Bloch, of New York City, on the brief), for appellant.

Edmund F. Driggs, of Brooklyn, for respondent.

PER CURIAM. Judgment unanimously affirmed, with costs, upon the opinion of Mr. Justice Van Sicken at Special Term.

(100 Misc. Rep. 173)

KERN v. CALEDONIAN INS. CO. OF SCOTLAND.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. COURTS ~~§~~190(2)—ORDER OF MUNICIPAL COURT REQUIRING FILING OF REPLY APPEALABLE.

Order of Municipal Court, requiring plaintiff to file a reply to several defenses set up in answer, is appealable, under Municipal Court Code, § 154, subd. 8; the Municipal Court having no power to make such an order.

2. COURTS ~~§~~189(7)—MUNICIPAL COURT'S POWER TO ORDER REPLIES TO DEFENSES IN ANSWER.

Under Municipal Court Code, § 78, providing that "pleadings shall consist of a complaint and answer, and, when ordered, a reply," and section 87, authorizing court to order written reply to a counterclaim, the Municipal Court has no power to order a reply to several defenses set up in answer; the ordering of replies being limited to counterclaims only, notwithstanding section 15.

3. PLEADING ~~§~~129(1)—RULE AS TO ADMISSIONS BY FAILURE TO DENY NOT APPLICABLE TO COURTS OF INFERIOR JURISDICTION.

The general rule that allegations in a pleading that are not denied are to be deemed admitted is not applicable to courts of inferior jurisdiction, and where no provision is made in the statute for the serving of replies to such pleadings, the allegations in pleadings in such courts setting up defenses must be deemed to be denied.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Marie L. Kern against the Caledonian Insurance Company of Scotland. From an order requiring plaintiff to file a reply to several defenses set up in answer, plaintiff appeals. Reversed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

~~§~~ For other cases see same topic & KEY-NUMBER, in all Key-Numbered Digests & Indexes

Ely Rosenberg, of New York City, for appellant.
William C. Foster, of New York City, for respondent.

DELEHANTY, J. The plaintiff appeals from an order of the Municipal Court requiring him to file a reply to several defenses set up in the defendant's answer. The appeal raises the simple question whether a justice of the Municipal Court has power to make such an order. If he has such power, the appeal must be dismissed, as there is no authority for appealing from such an order. Section 154, Municipal Court Code (Laws 1915, c. 279). If he has no such power, then an appeal will lie (section 154, subd. 8, Municipal Court Code) and the order must be reversed.

[1] Section 78, Municipal Court Code, contains the general provision applicable to the practice in the Municipal Court, as regards pleadings, and declares: "Pleadings shall consist of a complaint and answer and, when ordered, a reply." The only provision of the Municipal Court Code which specifies when a reply may be "ordered" is section 87, which reads as follows:

"A reply to a counterclaim is not necessary, but the court may order a written reply, verified or unverified, at any time before judgment. When no reply is filed, the allegations of the counterclaim shall be deemed denied, except as otherwise provided in this act."

[2] This section clearly limits the ordering of a reply to counterclaims only. The general provisions regarding the ordering of replies must be held to be limited by the particular provisions of section 87. The respondent is not aided by the provisions of section 15 of the Municipal Court Code, for the reason that recourse can only be had to that section where, as regards the "practice, pleadings," etc., the Municipal Court Code is silent. *Mitchell v. Schroeder*, 94 Misc. Rep. 279, 158 N. Y. Supp. 31; *Junk v. Moore*, 88 Misc. Rep. 551-553, 151 N. Y. Supp. 53.

[3] The general rule that allegations in a pleading that are not denied are to be deemed admitted is not applicable to courts of inferior jurisdiction, and where no provision is made in the statute for the serving of replies to such pleadings, the allegations in pleadings in such courts setting up defenses must be deemed to be denied. *Conklin v. Field*, 37 How. Prac. 455; *Mundler v. Palmer*, 165 N. Y. Supp. 987.

Order reversed, with \$10 costs. All concur.

GROND v. WARD.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. PLEADING $\S$ 237(8)—AMENDMENT OF PLEADINGS TO CONFORM TO PROOF.

Where evidence failed to make out a cause of action in fraud as pleaded, but established cause of action for breach of contract, amendment of complaint, so as to make it conform to the proof, was proper.

2. APPEAL AND ERROR $\S$ 888(2)—AMENDMENT OF PLEADINGS.

Where evidence established cause of action for breach of contract, but failed to make out cause of action in fraud as alleged, and where amend-

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ment to pleadings making them conform to proof, was made in lower court, but was not permitted to stand, appellate court, on appeal from judgment for plaintiff, should order amendment of pleadings so as to make them conform to proof.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Julius B. Grond against Francis R. Ward. Judgment for plaintiff, and defendant appeals. Amendment to pleadings ordered, and judgment affirmed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Riehle & Moxley, of New York City (F. Wright Moxley, of New York City, of counsel), for appellant.

Charles A. Oberwager, of New York City, for respondent.

PER CURIAM. [1, 2] While the plaintiff failed to make out a cause of action in fraud, the evidence fully establishes a cause of action for breach of contract. A motion was made and granted to conform the pleadings to the proof, but later, on the suggestion of the trial court, it was withdrawn. We think the amendment should have been allowed to stand, and that this is a case where the appellate court should order such amendment.

Amendment so ordered, and judgment affirmed, with \$25 costs.

**LICHTENSTEIN & LIEBERMAN, Inc., v. GREATER NEW YORK
FEATHER CO., Inc.**

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

LANDLORD AND TENANT ¶169(11)—**EXCLUSIVE CONTROL OF PREMISES QUESTION FOR JURY.**

In action by plaintiff, in control of one floor of a building, for damages due to water coming through the ceiling from the floor above, for which defendant had a lease, *held*, it was a question for the jury whether defendant was in exclusive control of the floor above, and whether a sublease of part of the floor above to another concern was bona fide.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Lichtenstein & Lieberman, Incorporated, against the Greater New York Feather Company, Incorporated. From a judgment dismissing complaint, plaintiff appeals. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Celler & Kraushaar, of New York City (Meyer Kraushaar, of New York City, of counsel), for appellant.

I. Gainsburg, of New York City (Henry Danziger, of New York City, of counsel), for respondent.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

DELEHANTY, J. This is an action brought to recover damages for injury to property as a result of the overflow of water. Plaintiff was in possession of the seventh floor of the premises No. 625 Broadway, New York City, and defendant had a lease of the eighth floor. It is shown that water came through the ceiling from defendant's premises, damaging the property of the plaintiff. Freedom from liability herein is claimed on the ground that plaintiff failed to show that defendant was in exclusive possession of the eighth floor.

It was testified upon the trial that a concern known as the Famous Feather Company was in occupancy of an undivided one-half of the eighth floor. The record discloses that this corporation was controlled by the brothers of the president of defendant corporation, who were both absent from the business at the time of the happening of the accident, and that defendant's president was manager of both the defendant and the Famous Feather Corporation. It further appears that the lease from the defendant to the Famous Feather Company was executed by the defendant's president and his wife as secretary of the Famous Feather Company. The lease under which defendant occupied the premises had a provision to the effect that defendant could not sublet the premises without the written consent of the landlord, and it is admitted that no such consent was obtained. Defendant further claims that the accident was caused by an employé of the Famous Feather Company, who spilled a bucket of water. There was ample evidence to show that the damage was caused by a more serious overflow, and that the water which rained down through plaintiff's ceiling was sufficient to reach above the soles of the shoes of one of its witnesses. Plaintiff offered testimony from which a jury might have reasonably inferred that the boiler or vats of the defendant had overflowed.

Under the facts presented, it was error to dismiss the complaint. It was a question for the jury to determine whether the defendant was in exclusive control of the premises, and whether the lease to the Famous Feather Company was bona fide. It appears that both concerns were controlled by members of the same family in such a manner as to warrant a possible finding by the jury that defendant was liable, especially in view of the failure to put either the brothers of the defendant's president or his wife upon the stand or to account for their absence. There was also substantial evidence from which the jury might have inferred that the negligence complained of was attributable to the defendant.

Judgment reversed, and new trial granted, with \$30 costs to appellant to abide the event. All concur.

ARISTO HOSIERY CO., Inc., v. MOORE et al.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

INJUNCTION ~~§~~ 251—EVIDENCE OF DAMAGES IN SUIT ON BOND.

Evidence as to memorandum of decision in injunction suit as to damages of defendant therein, which contained no direction, and hence was not an order assessing damages under Code Civ. Proc. § 767, held insufficient to sustain judgment for such defendant in suit on the injunction bond.

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by the Aristo Hosiery Company, Incorporated, against Frederick W. Moore and another. From an order denying a motion to set aside a judgment for plaintiff and grant a new trial, defendants appeal. Order reversed, judgment vacated, and new trial ordered.

See, also, 189 App. Div. 902, 178 N. Y. Supp. 904.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Lyman W. Redington, of Flushing, for appellants.

Henry A. Blumenthal, of New York City, for respondent.

PER CURIAM. The defendants appeal from an order denying their motion to set aside the judgment and grant a new trial. The judgment was entered on June 17, 1919, upon an inquest. This action was brought against the defendant as sureties on an undertaking given by them in an action in the Supreme Court, New York County, brought by the F. W. Moore Company against the present plaintiff and one Kahn. The complaint in this action was indorsed upon the summons as: "On undertaking for damages sustained by injunction."

The only evidence given upon the inquest of damages sustained by the plaintiff by reason of the granting of the injunction was that of the plaintiff's attorney to the effect that under an order made by a justice of the Supreme Court in the former action the damages had been assessed at the sum of \$250. This so-called order is contained in the record, and is a mere memorandum of decision, and is so marked by the justice. It contains no direction as required by section 767 Code of Civil Procedure, and is therefore not an order. This memorandum was dated May 27, 1919. This action was begun about June 2, 1919, and, as appears by the certificate of the clerk of the county of New York, no order was entered thereon between May 25 and July 1, 1919. The defendants, under the belief that an order assessing damages had been entered in the clerk's office, appealed therefrom, but were allowed to withdraw the appeal by the Appellate Division, First Department, upon ascertaining that no order had actually been entered. Under such circumstances, this judgment should not be allowed to stand.

Order reversed, judgment vacated, and new trial ordered, with \$10 costs to appellant to abide the event.

~~§~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

COCHEO v. DEGNON CONTRACTING CO.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. MUNICIPAL CORPORATIONS ~~§~~819(6)—PROOF INSUFFICIENT TO ESTABLISH IMPLIED NOTICE OF DEFECT IN SIDEWALK.

In action against subway contractor for injuries from defect in sidewalk of which it was in charge, *held*, that there was no proof of the existence of the defect for a sufficient length of time to charge contractor with implied notice of existence thereof.

2. MUNICIPAL CORPORATIONS ~~§~~809(2)—CONTRACTOR'S LIABILITY FOR DEFECTIVE SIDEWALK IN ABSENCE OF NOTICE.

Contractor in charge of sidewalk over which it was constructing subway was not liable for injuries from defect in sidewalk, in absence of notice of defect, either direct or implied from existence of defect for a sufficient length of time to charge it with implied notice.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Blaise Cocheo, an infant, etc., against the Degnon Contracting Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Frederick J. Flynn, of New York City, for appellant.

O. Silas Allacchi, for respondent.

GUY, J. The action was for damages for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, by reason of defendant having left a piece of wood sticking up from the public sidewalk, at the place where the accident occurred, over which plaintiff stumbled and fell.

Defendant admits that it was in charge of the sidewalk for some time prior to and including the day of the accident, and was engaged in constructing a subway under the street where the accident occurred. The only proof introduced by plaintiff tending to charge the defendant with negligence causing the defect in question was testimony to the effect that about a week before the happening of the accident the defendant placed planking on the sidewalk, which was there on the morning of the accident. Plaintiff and plaintiff's witness testified to the non-existence of the defect up to 2 p. m. on Sunday afternoon preceding the accident, which occurred about 8:45 o'clock on Monday morning. Defendant's numerous witnesses, several of whom were disinterested, also testified positively to the nonexistence of the defect on Sunday, and on the morning preceding the time of the accident.

[1, 2] There is an entire absence of proof of the existence of the defect for a sufficient length of time to charge the defendant with implied notice of the existence thereof. In the absence of such notice, direct or implied, defendant would not be liable. *Fithian v. Degnon Contracting Co.*, 175 App. Div. 386, 161 N. Y. Supp. 888; *Conklin v.*

~~§~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

N. Y., O. & West. R. Co., 102 N. Y. 107, 113, 6 N. E. 663; Babbage v. Powers, 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 398.

The judgment must be reversed, and a new trial ordered, with \$30 costs to appellant to abide the event. All concur.

(108 Misc. Rep. 280)

GRAY v. HARDENBERGH.

(Sullivan County Court. July, 1919.)

1. SCHOOLS AND SCHOOL DISTRICTS §=106—LIABILITY OF TAX COLLECTOR FOR CONVERSION ON FAILURE TO GIVE BONDS.

Where defendant was appointed school collector for a district by the trustee thereof, and his appointment was duly filed according to law, but he failed to execute the bond required by Education Law, § 252, he had no authority to collect a tax, and hence was liable in conversion for seizing and selling under the tax roll, with the trustee's warrant attached, certain personal property of one who refused to pay his school tax.

2. SCHOOLS AND SCHOOL DISTRICTS §=106—DISTRICT TAX COLLECTOR, FAILING TO GIVE BOND, LIABLE ON SALE FOR TAXES.

Where a duly appointed school district tax collector failed to qualify by giving bond required by Education Law, § 252, and was without authority to collect a tax, and liable in conversion for seizing and selling personal property of one who refused to pay his school tax, the fact that owner, after the sale under the tax warrant pursuant to notice duly posted, delivered some of property to purchaser, would not preclude his action against the collector for a conversion.

Action by Neal Gray against Milton Hardenbergh, brought in a Justice Court, for damages for a conversion of personal property. Judgment for plaintiff, and defendant appeals upon questions of law. Affirmed.

George H. Carpenter, of Liberty, for appellant.

Arthur E. Conner, of Walton, for respondent.

SMITH, J. This action was brought in a Justice Court to recover damages for a conversion of personal property. The defendant admitted, in his answer, the taking of the property, and set up in justification that he was the collector of school district No. 12, in the town of Rockland, Sullivan county, that a tax roll and warrant for the collection thereof had been placed in his hands by the trustee of said district, and that he had seized and sold the property of the plaintiff for the purpose of collecting the tax assessed against him on such list. The trial before the justice resulted in a judgment in favor of the plaintiff, from which this appeal is taken upon questions of law.

[1] The proof shows that the defendant was appointed school collector for district No. 12 by the trustee of said district; that his appointment was duly filed according to law; that the tax roll, with the warrant of the trustee attached thereto, was put in his hands for collection; and that he advertised the property and sold the same at public sale, under such warrant and pursuant to notice duly posted for that purpose. It is conceded, however, that the defendant failed to

§= For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

execute the bond required by section 252 of the Education Law (Consol. Laws, c. 16), and the question to be determined here is whether or not he can justify the taking of plaintiff's property as such collector under his tax warrant, when he has failed to qualify by executing and delivering such bond.

I have endeavored to find authority in the law that would justify me in reversing this judgment and sustaining the proceedings of the school district collector in levying upon and selling plaintiff's property upon his refusal to pay his school tax. The plaintiff was a property owner in the district, and as such was liable for his share of the expenses of maintaining the public school. No possible injury or injustice could be occasioned to him on account of the collector's failure to execute a bond.

Public policy requires that public officers, acting in good faith and by virtue of their election or appointment, should be protected in their acts performed within the regular scope of their duties. In rural communities, far distant from men familiar with the preparation and execution of legal documents or papers, officers are necessarily selected and are compelled under the law to serve, who are unaccustomed to such duties and unfamiliar with the formalities and requirements prescribed by the statute to qualify them to discharge the same.

It would seem that the rules governing *de facto* officers and holding their acts valid should in the interest of justice and public policy control in such cases. I feel, however, that the weight of authority, especially in this department, is against such a course in this case, and that the acts of this defendant in seizing the plaintiff's property, when he had not qualified by executing and delivering the bond required by the law, cannot be upheld.

Section 252 of the Education Law requires a collector of a school district to execute to the trustees a bond before receiving the first warrant for the collection of taxes. Subdivision 2 of section 232 provides that:

"The collector * * * *vacates* his office by not executing a bond to the trustees, as herein required."

The language of the statute providing for the collector's bond is substantially the same now as it was under the old law. Laws 1864, c. 555, tit. 7, § 83, as amended by Laws 1875, c. 567, § 24.

Under these acts the General Term in this department in the case of *Duntley v. Davis*, 42 Hun, 229, has held that, while the subsequent filing of a bond by a school collector would relate back, so as to validate his acts previously performed, such as posting of notices of sale and receiving the warrant, yet he would not be protected in seizing or selling property, even if such bond were subsequently executed, that the giving of the bond was mandatory, and that the collector could not enforce a warrant before it was executed. In the case of *Woodhull v. Bohenblost*, 4 Hun, 399, the court says:

"It would seem * * * that it was the intention of the Legislature that the collector should have no power to execute a warrant for the collection of a tax until such bond is given."

And in that case, Presiding Justice Mullin, writing the opinion, further says:

"It seems to me that this provision of the statute is mandatory, and, as no bond has ever been given, the collector has never had authority to collect the tax."

[2] These decisions are binding upon this court, and require me, although reluctantly, to affirm this judgment. Under the pleadings and the proofs, I think there was shown sufficient interference with the property of the plaintiff to authorize him to maintain an action for replevin. The defendant levied upon the animal, advertised it for sale, sold it at public auction, received the money upon the sale, and the plaintiff forbade him selling it. The fact that plaintiff, after such proceedings, drove the calf out and delivered it to the purchaser, would not bar him from maintaining an action for its conversion. The judgment of the justice, therefore, must be affirmed.

Judgment affirmed, with costs.

In re HILLIS.

(Surrogate's Court, Delaware County. October 20, 1919.)

1. WILLS $\S$ 439—CONTROLLING EFFECT OF MANIFEST INTENT.

It is a primary canon in the construction of wills that, if the provisions are subject to construction, the manifest intent of testator, and not any rule of construction, governs when they come in conflict.

2. WILLS $\S$ 440—GUESSES AT INTENT NOT PERMISSIBLE IN CONSTRUCTION.

In construing a will, guesses at testator's intent will not be indulged, but the intention must be clear from the words of the will.

3. WILLS $\S$ 449—PRESUMPTION AND CONSTRUCTION AGAINST INTESTACY.

There is a presumption of law that testator did not intend to die intestate as to any portion of his property, and that construction which will prevent total or partial intestacy is to be preferred.

4. WILLS $\S$ 450—CONSTRUCTION TO GIVE EFFECT TO EVERY EXPRESSION.

The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.

5. WILLS $\S$ 610(1)—CLAUSE GIVING POLICY, BALANCE OF ESTATE, AND USE OF HOUSEHOLD GOODS.

A will reading, "I also give and bequeath to my wife * * * my life insurance policy, and the ballance of my whole estate, and the use of all of my household goods during her lifetime," held to give the widow the life insurance policy and the balance of the estate remaining after payment of preceding legacies, and then to give her the use of the household goods for life, and not merely to give her a life estate in all three items.

6. EXECUTORS AND ADMINISTRATORS $\S$ 513(10)—DECREE SETTLING ACCOUNTS OF EXECUTORS RES JUDICATA.

Surrogate's decree, settling the accounts of executors under Code Civ. Proc. $\S$ 2743 (now $\S$ 2735), held conclusive on each party to the proceeding, including an executor who subsequently, in a proceeding for construction of the will, seeks to make out that testator's widow is not entitled to a life policy and the residuary estate outright, as established by the prior decree.

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

7. EXECUTORS AND ADMINISTRATORS ~~§~~ 298—No PAYMENT TO LIFE TENANT WITHOUT SECURITY.

Residuary funds, if given for life only, should not be paid without security.

In the matter of the petition of Arthur W. Hillis, individually and as one of the executors of the last will and testament of George M. Hillis, deceased, to obtain determination as to the validity, construction, and effect of the will of decedent. Decree directed in conformity to the opinion.

Proceeding under section 2615 of the Code of Civil Procedure for the construction of the seventeenth paragraph of the last will and testament of George M. Hillis, deceased. George M. Hillis, a resident of the town of Davenport, county of Delaware, died on the 9th day of June, 1911, leaving a last will and testament, dated the 17th day of February, 1906, which was duly admitted to probate by the surrogate of the county of Delaware on the 19th day of June, 1911. The executors therein named, of whom the petitioner was one, duly qualified. The estate was administered upon, and on the 15th day of July, 1912, a decree of the Surrogate's Court of Delaware County, finally judicially settling the account of the executors, was duly made and entered. Subsequently satisfactions of the decree showing that payment had been made as therein directed were duly filed in the office of the surrogate of the county of Delaware. The final decree, after directing the payment of commissions, expenses of administration, and certain legacies and bequests, directed the payment of the residuary estate remaining in the hands of the executors to the widow of the testator, Mary E. Hillis. No question was raised upon the judicial settlement of the account of the executors, so far as appears by the record, to the payment of the residuary estate to the widow, and the decree does not in any manner qualify such payment. The amount directed to be paid to the widow by such decree is the sum of \$1,845.90.

Mary E. Hillis, the widow, died on or about the 26th day of April, 1919. The will of the testator was of considerable length, and specifically disposed of various articles of personal property, such as one-wine colored chair, one new green chair, one old green chair, "my best bed quilt," large Bible, gold watch and chain, "my best easy chair," and certain pictures. The will in the third paragraph bequeathed to testator's daughter Emma Rosilla Hillis certain land, and "also all the household goods contained in the dwelling house occupied by me at the time of my death, excepting and reserving therefrom all such other household goods that may be willed by me to others," made other provisions for the children of the testator, and in the seventeenth paragraph provided as follows, including the spelling and punctuation:

"*Seventeenth* I also give and bequeath to my wife Mary E. Hillis my life insurance policy, and the ballance of my whole estate, and the use of all of my household goods during her lifetime."

A codicil was subsequently executed, altering some of the provisions of the original will, which do not affect this proceeding, and which provided for unborn grandchildren.

It appears from the evidence that the testator was a man of substantial means at the time of his death. He was 78 years of age when he died, and about 72 years of age when the will in question was executed. It also appears that at the time of the death of the testator his widow, Mary E. Hillis, was approximately 74 years of age.

The court is asked to construe the effect of the seventeenth paragraph of the will of the testator above quoted. The petitioner claims the language of paragraph 17 vested in the wife of the testator, Mary E. Hillis, a life use only of the residuary estate.

Gibbs, Holmes & Holmes, of Oneonta (Geo. M. Palmer, of Cobleskill, of counsel), for petitioner.

Walter Scott, of Davenport (Chas. R. O'Connor, of Hobart, of

counsel), for Fayette H. Hillis, Emma Rosilla Hillis, and Spencer A. Hillis, and also for Fayette H. Hillis and Spencer A. Hillis as temporary administrators of the estate of Mary E. Hillis.

McNAUGHT, S. This proceeding is instituted under the provisions of section 2615 of the Code of Civil Procedure for a judicial construction of the seventeenth paragraph of the will of George M. Hillis, deceased. It is contended by the petitioner that the seventeenth paragraph of such will, which reads as follows:

"*Seventeenth* I also give and bequeath to my wife Mary E. Hillis my life insurance policy, and the balance of my whole estate, and the use of all of my household goods during her lifetime"

—vested in Mary E. Hillis, the widow of the testator, only a life use of the whole residuary estate. The respondents contend that by the paragraph in question Mary E. Hillis became vested absolutely with the residuary estate, except as to the household goods, of which she was given the use during her lifetime.

[1] It is a primary canon of construction that, if the provisions of the will are subject to construction, the manifest intention of the testator, and not any rule of construction, govern when they come in conflict. *Delany v. Van Aulen*, 84 N. Y. 16; *Miller v. Gilbert*, 144 N. Y. 68, 38 N. E. 979; *Matter of James*, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774.

[2] It is an inflexible rule that guesses at testator's intention will not be indulged in. The intention must be clear from the words of the will. *Williams v. Freeman*, 83 N. Y. 561; *Wager v. Wager*, 96 N. Y. 164; *Sweet v. Burnett*, 136 N. Y. 204, 32 N. E. 628.

[3] It is the presumption of the law that the testator did not intend to die intestate as to any portion of his property, and that construction is to be preferred which will prevent total or partial intestacy. *Schult v. Moll*, 132 N. Y. 122, 30 N. E. 377; *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917; *Mills v. Tompkins*, 110 App. Div. 212, 97 N. Y. Supp. 9; *Matter of Goldmark*, 186 App. Div. 447, 174 N. Y. Supp. 595.

[4] The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative. *Tyndall v. Fleming*, 123 App. Div. 837, 839, 108 N. Y. Supp. 239; *Matter of Tamargo*, 170 App. Div. 10, 155 N. Y. Supp. 845; *Schult v. Moll*, 132 N. Y. 122, 30 N. E. 377.

Bearing these primary principles as to the construction of wills in mind, the question arises: What was the meaning of the testator in the seventeenth paragraph of his will? The testator gave his life insurance policy and the balance of his whole estate to his wife, and then follows the clause which the petitioner claims relates back to and governs the absolute bequest of the insurance policy and the balance of the whole estate, namely: "and the use of all my household goods during her lifetime."

There is no ambiguity about any other provision of the will. While the instrument is not scientifically drawn, yet every provision in it is

clear, and not obscure, excepting only the clause in question. The testator, however, when he desired to give the widow the use of all his household goods during her lifetime, expressly says so in plain language. If the contention on the part of the petitioner is correct, the words "use of," before "all my household goods," have absolutely no effect, thus violating one of the cardinal principles for interpreting wills. If the testator intended to limit the right of the widow to the life insurance policy and the balance of his whole estate in the same manner as he limited it as to the household goods, namely, during her lifetime, it is difficult to furnish a reason why the expression "the use of" should be used in one particular and omitted in the other.

If it were permissible to guess at the circumstances when the will was executed, it might reasonably be said that the last clause in the seventeenth paragraph was an afterthought; that, upon reading the will over, the testator, and the justice of the peace who prepared it, found the specific provision of the third paragraph in regard to household goods, and, realizing that the testator had disposed by specific bequest of the household effects, it was sought to correct what might appear as an injustice to the wife by adding at the end of the seventeenth paragraph the clause to the effect the widow should have the use of the household goods during her lifetime.

[5] Taking the will as a whole, ascertaining as well as we can the testamentary scheme and the manifest intention of the testator, and bearing in mind that all expressions of the will must be given effect, it seems to this court that the seventeenth paragraph of the will of the testator must be construed to mean exactly what it says, namely, that it gave to the widow, Mary E. Hillis, the life insurance policy and the balance of the whole estate remaining after the payment of the legacies preceding it, and then gave to the widow "the use of" the household goods during her lifetime. Any other construction must necessarily result in the testator dying intestate as to a large portion of his property, and the court must indulge in the assumption he intended to die intestate as to such portion.

Such a construction would be strained, to say the least. It would be contrary to what is clearly apparent from the will itself that it was the intention of the testator to dispose of his entire estate. Unless it clearly appears from the instrument that the testator did intend to die intestate, the presumption that he did not is conclusive, and that construction is to be preferred which will prevent intestacy. Cases cited *supra*. The construction contended for by the petitioner cannot be sustained.

[6] It is a serious question whether the petitioner is not concluded and estopped in this proceeding from seeking the construction which is contended for by him. The executors of the will of George M. Hillis instituted a proceeding for the judicial settlement of their accounts. All of the parties to this proceeding were parties to such judicial settlement, and the petitioner herein was one of the executors and accounting parties. Upon such accounting a decree of the Surrogate's Court was made and entered, which judicially settled the accounts of the executors, and by specific direction disposed of the

funds remaining in their hands, and ordered the executors to pay them to the persons entitled thereto. By the provisions of this decree the residuary estate remaining in the hands of the executors, amounting to the sum of \$1,845.90, was directed to be paid to Mary E. Hillis, and, as appears from the satisfaction of the decree subsequently filed in the surrogate's office, was so paid.

The account of the executors, of whom petitioner was one, was introduced in evidence by the petitioner. (Exhibit C.) In Exhibit C, in schedule B, referring to debts uncollected, amounting to \$1,453.78, it is stated:

"All of the above have been assigned to the residuary legatee, Mary E. Hillis."

Again, in schedule H of Exhibit C it is stated:

"The will bequeathed various articles of household goods and furniture to the various legatees hereinbefore named, but as we have construed the will, subject to the life use of the widow, and we have delivered all such goods to the widow and residuary legatee, Mary E. Hillis."

The petitioner, therefore, as an executor of the will of the testator, interested also as a legatee and one of the heirs at law and next of kin, himself, in a judicial proceeding, construed and specifically acted upon a construction of the will exactly opposite to that for which he now contends. Is he in a position to do so? It is doubtful at least.

The provision of the Code of Civil Procedure in effect when the decree settling the accounts of the executors was made and filed is to be found in what was then section 2743 (now § 2735), which read as follows:

"Where an account is judicially settled as prescribed in this article, and any part of the estate remains and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled according to their respective rights. * * * Where the validity of the debt, claim or distributive share is admitted or has been established upon the accounting or other proceeding in the Surrogate's Court or other court of competent jurisdiction, the decree must determine to whom it is payable, the sum to be paid by reason thereof and all other questions concerning the same. With respect to the matters enumerated in this section the decree is conclusive as a judgment upon each party to the special proceeding who was duly cited or appeared and upon every person deriving title from such party."

Upon the judicial settlement of the accounts, the then surrogate must necessarily have determined under the provision of the Code cited, the rights of the respective parties in relation to the funds remaining in the hands of the executors, and the validity of the claim of the parties interested must have been admitted or deemed to have been established upon the accounting. This being true, the decree under the provision cited was conclusive, and is still conclusive as a judgment, upon each party to the proceeding. In the case of *Williams v. Barkley*, 165 N. Y. 48, 54, 58 N. E. 765, 766, the Court of Appeals said:

"A former adjudication is binding upon parties and their privies and prevents them from litigating over again such matters as were previously at issue between them and were finally decided by a competent court. If the record of the former proceeding, although made upon a motion, but after an

investigation through witnesses examined and cross-examined, shows that the decision could not have been made without deciding the particular matter now in controversy, the latter must be regarded as settled by the previous action of the court, for to litigate the fact anew would impeach the first decision. *Dwight v. St. John*, 25 N. Y. 203; *Demarest v. Darg*, 32 N. Y. 281; *Brown v. Mayor, etc.*, 66 N. Y. 385; *Smith v. Zailnski*, 94 N. Y. 519; *Culross v. Gibbons*, 130 N. Y. 447 [29 N. E. 839]; *Wells, Res Adjudicata*, § 2; *Freeman on Judgments*, § 325.

There are many other decisions to the same effect, and the principle is well established. *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570; *Pray v. Hegeman*, 98 N. Y. 351; *Everett v. Everett*, 180 N. Y. 452, 73 N. E. 231. It is therefore apparent that the petitioner is estopped from seeking a construction of the testator's will in this proceeding different from the construction upon which he acted during the administration of the estate for which he contended upon the judicial settlement of his accounts, and which was adopted by the court in the decree settling such accounts.

[7] It is apparent no party to the proceeding understood that the right of Mary E. Hillis to the residuary estate was in any manner qualified. The decree did not direct payment of the residuary fund to her for her use during lifetime only. The payment was absolute. If the residuary estate was to be paid to Mary E. Hillis for her life only, it should not have been paid without security. *Matter of McDougall*, 141 N. Y. 21, 35 N. E. 961.

The conclusion is irresistible that the petitioner is concluded and estopped from seeking the construction of the seventeenth paragraph of the will of the testator now claimed by him. All of the parties interested being in court, however, the court has construed the seventeenth paragraph of the will of the testator as above stated, so the determination of the court is based upon other than so-called technical grounds.

A decree may be prepared in conformity to this opinion, and may be settled before the surrogate on any Monday.

(109 Misc. Rep. 112)

In re GREEN'S ESTATE.

(Surrogate's Court, New York County. October 17, 1919.)

1. JUDGMENT ¶750—FINDING OF NONRESIDENCE OF DECEDENT RES JUDICATA.

A finding of the surrogate in a transfer tax proceeding, affirmed by the Appellate Division, that decedent was not domiciled in the state, is res judicata on subsequent review of a finding of the appraiser that she was not doing business in the state.

2. TAXATION ¶867(1)—WHAT CONSTITUTES "DOING BUSINESS" UNDER INHERITANCE TAX LAW.

The investment and reinvestment of a person's own money did not constitute "doing business," within Tax Law, § 220, subd. 2, imposing a tax on transfers of capital invested in business in the state by a nonresident doing business in the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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3. WORDS AND PHRASES—"BUSINESS."

The word "business" is not a technical term of the common law, and, standing alone, has no established legal meaning.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

4. COURTS ⇨92—DICTA IN FORMER DECISIONS NOT ADJUDICATIONS.

Dicta of either foreign or domestic courts, however respectable, are not adjudications.

5. TAXATION ⇨867(1)—"BUSINESS" WITHIN INHERITANCE TAX LAW.

The "business" intended by Tax Law, § 220, subd. 2, is some common-law business carried on by a recognized trader, mechanic, shopkeeper, etc., or by some person other than an owner of an estate for its benefit.

6. TAXATION ⇨867(1)—"DOING BUSINESS" WITHIN INHERITANCE TAX LAW.

The maintenance of an elaborate office organization for the investment and reinvestment of one's own money, and the collection of rents and dividends, does not constitute "doing business," within Tax Law, § 220, subd. 2.

7. WORDS AND PHRASES—"CAPITALIST."

The word "capitalist" has no legal meaning.

8. TAXATION ⇨867(1)—NONRESIDENT "DOING BUSINESS" IN THE STATE WITHIN TAX LAW.

A corporation organized to take over decedent's active investments was not her agent, and its transactions did not constitute the doing of business by her, within Tax Law, § 220, subd. 2, where the value of securities transferred to it was credited to her on its books, and the company debited with a corresponding amount, and interest or dividends thereon were distributed by it as dividends.

9. TAXATION ⇨58—TAX LAWS CONSTRUED AGAINST STATE.

Taxing acts are construed strictly against the state, and if a tax law does not expressly include property, it cannot be taxed by implication.

Proceeding to assess a transfer tax on the estate of Hetty H. R. Green, deceased. From an order assessing the tax, the State Comptroller appeals. Affirmed.

See, also, 102 Misc. Rep. 45, 168 N. Y. Supp. 364; 184 App. Div. 376, 171 N. Y. Supp. 494.

Lafayette B. Gleason, of New York City (John B. Gleason, of New York City, of counsel), for the state comptroller.

Alexander & Green, of New York City (Charles W. Pierson, of New York City, of counsel), for executor.

FOWLER, S. [1] The appeal of the state comptroller from the order assessing a tax upon the estate of the late Mrs. Hetty Green brings up for review the finding of the appraiser, that she was "not doing business in this state," within the meaning of that phrase in the last clause of subdivision 2 of section 220 of the Tax Law (Consol. Laws, c. 60). The notice of appeal contains also a statement that the state comptroller wishes to have reviewed in the Court of Appeals the order of this court and that of the Appellate Division confirming the order of this court to the effect that the deceased did not have her domicile in this state at the time of her death. As the issue of domicile is *res adjudicata*, in so far as this court and the court of the Appellate Division are concerned, it cannot be further considered on this appeal.

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The history of the taxation of this estate is somewhat peculiar. The deceased happened to be a woman of large estate, familiarly known to the public and the authorities, and there is some reason to suppose that the latter counted on her succession to augment the resources of the public treasury. Had Mrs. Green's estate in her lifetime been managed by agents or attorneys, as is the custom with most women of her condition, the present substituted contention of the state comptroller—that she was engaged in business in this city—would, in all probability, not have been made.

When Mrs. Green came to die, at the outset of the contention over death duties, due to the state on her succession, the taxing authorities first claimed that she had died a resident of this state, and that her estate was taxable as that of a nonbusiness resident. I found that she was not a resident of this state, but of Vermont, and therefore not taxable on the ground of residency. My judgment was affirmed on appeal. 99 Misc. Rep. 582, 164 N. Y. Supp. 1063; 179 App. Div. 890, 165 N. Y. Supp. 1088. Defeated in their claim as to Mrs. Green's last domicile, the state next turned about, and asserted that her capital was employed in "business" in this state, and was for that reason taxable. This point, after due deliberation, I also decided adversely to the state of New York. 102 Misc. Rep. 45, 168 N. Y. Supp. 364. The Appellate Division, however, reversed my judgment on that last point (184 App. Div. 376, 171 N. Y. Supp. 494), and remitted the taxation for further inquiry, on very general principles, I think, with due deference, of an administrative, rather than a legal, nature. Under the authorities no legal error by me was specified by the Appellate Division, nor could be, for no evidence had been excluded by the appraiser except under the authority of the Supreme Court of the United States.

As the Appellate Division did not specifically indicate the particular questions which they deemed improperly excluded by the appraiser, the appraiser to whom the matter was again remitted, in accordance with the direction of the Appellate Division, thought it best on the rehearing to admit all the evidence of any kind submitted by the state comptroller. Thus the last inquisition conducted by the appraiser in relation to the "business" of the deceased in this state prior to her death is now very full, and the appraiser's report contains all the facts which a painstaking and thorough investigation on the part of the attorney for the state comptroller could by any ingenuity develop. The second inquisition, so directed as aforesaid by the Appellate Division, was, in other words, so conducted as to enable the state comptroller to submit all the evidence in his possession tending to prove, either inferentially or otherwise, that the deceased at the time of her death was doing business in this state. And again the appraiser has found that Mrs. Green was not doing business in this state within the meaning of subdivision 2 of section 220 of the Tax Law.

It is important, I think, to notice that in the conclusion of the opinion by Mr. Justice Shearn (184 App. Div. 376, 171 N. Y. Supp. 494) it was said:

"Such an inquisition should not be made oppressive or vexatious, but, being prosecuted in good faith, should be sanctioned in so far as it tends to

develop relevant facts. This amendment of the statute may result in an enormous gain for the state in taxable property, and save for the state great sums in taxes which have hitherto been lost by the practice of persons who, having great fortunes invested as capital in this state, escape their just share of taxation for the protection that the state affords to their capital by maintaining a domicile in some other state. Respecting the inquisition which the law authorizes the comptroller to make in order to determine whether the estate of a decedent is subject to taxation, the policy of the court should be one of encouragement and not of repression. The order appealed from should be reversed and the taxing order modified, by directing that the report be remitted to an appraiser for the purpose of ascertaining the amount of capital invested by the decedent in the state, and whether the decedent was doing business in the state, with costs to appellant."

It is obvious that the portion of the opinion just quoted refers to both economic matters and matters purely of public polity. There was nothing in the evidence to warrant any implication that in this state any rich escaped taxation, or that Mrs. Green was among those who so did escape. It may be so, but such an inference was de hors the proofs in this case. Consequently I feel at liberty, but for strictly juridical and ethical purposes, to consider the same economic matters and matters of public polity outside of the case, but at greater length. In democratic republics, with universal suffrage, the growing danger of injustice is not to the poor, but to people of property. We should remember that other great states have failed in the past when the country swarmed with a consuming hierarchy of extortion, and the receivers of taxes outnumbered the taxed, who were destroyed under forms of law.

Before proceeding, let me refer first to the several inconsistent positions before mentioned of the state taxing agents. Formerly in all legal proceedings a party public or private, having relied on an express state of facts as the basis of legal relief, was not permitted afterwards to shift his ground by a subsequent assertion of other matter, absolutely contradictory of the first state of facts set forth in the earlier position or pleading. It was then held in law, as it is still maintained in logic, that inconsistent assertions are mutually destructive. There was manifestly great good sense in this conclusion, for in logic no proper argument can be carried on when the premises are contradictory, and in law no relief ought to be obtainable where the plaintiff relies on contradictory facts. Although in modern times inconsistent defenses are freely tolerated, inconsistent causes of action, I am happy to say, are not yet regarded with much favor by the courts. *United States V. Co. v. Schlegel*, 143 N. Y. at page 541, 38 N. E. 729; *Societa Italiana v. Sulzer*, 138 N. Y. 468, 34 N. E. 193. In tax inquiries of this kind the growing judicial tendency seems to be to allow the state authorities the greatest latitude, whether their positions or claims against citizens are consistent or inconsistent. Many courts seem to think that in mixed controversies, partly legal and partly economic or political, the state authorities stand in a different position from other claimants. As a tax proceeding is a quasi litigation, this deference to the sovereign people may be, perhaps, politically and morally justifiable on that ground, although personally I venture to think not.

It is common knowledge that the scope and objects of taxation by

the state are being greatly extended in modern times. It is claimed by people of property that they are being more and more placed at a relative disadvantage in the state and nation, with the growing danger that both private right and private property as hitherto understood may be subverted. That the modern processes of taxation are being subtly misapplied to the ends of the socialistic movement is generally admitted by professional economists. All sorts of social reforms, to be brought about through processes of taxation, are in the political air, with the result that to many deep-thinking men the economic future is full of dubious signs. Some, indeed, profess that a political and social strife has already been declared in the regions of taxation, and people of property are beginning to claim that taxation in aid of social reform is a clear usurpation and unconstitutional. It is in such a moral and political atmosphere, whether we like it or not, that this simple case, and hundreds like it, come on at the present time to be heard by the courts. When taxation enters on a phase of social and political strife between the taxing authorities of the people and the taxed, it is obvious that nothing connected with the history of taxation is likely to be ignored even in courts of justice.

But if wholly irrelevant in courts of justice it is useful in argument to notice the character of some of the objections now being urged by taxpayers to modern schemes of taxation. They say, for example, that an examination of the budget of most states discloses that the annual tax levies are devoted, first, to the improvident funded, or interest-bearing, debts, and next to public improvements or social betterments, and only lastly to the purpose of carrying on the business of government. This they assert is unjust and unconstitutional, and many claim that there ought not to be a state funded debt, or taxation for any other object than carrying on the expenses of actual government. No good citizen objects to taxation, I take it, when the tax is levied for the actual purposes of government itself. Many taxpayers do object to the new and more extended purposes and objects of modern taxation. Some object to a funded public debt because it engenders extravagance and waste and war.

The existence of a public debt came very late in the history of European states, and in England it does not antedate the reign of William and Mary. The doubtful honor of inaugurating deferred public debts in England is due to Charles Montague, Earl of Halifax, who on December 15, 1692, proposed to raise a million of money by way of a loan and thus decrease the taxes. Soon after 1692, and the inauguration of a permanent public debt in England, the distinguished philosopher and historian, David Hume—no mean economist—denounced the new expedient of a national debt as unsound, and he prophesied that debts incurred on the public credit would ultimately destroy the state. There is now a disposition in some quarters to regard Hume's conclusion as not devoid of foundation. Economists are beginning to be extremely apprehensive about the results of modern democratic theories of both taxation and permanent public debts.

We have now noticed, but only rapidly and cursorily, some of the great economic and philosophic claims, now being made, concerning

schemes of modern taxation. It has not been thought necessary to detail the socialistic claims. The leveling principles of the Socialists and collectivists are, in regard to taxation of the rich, already only too familiar. The public discussion concerning constitutional taxation would not have been noticed at this time had it not been for the reason mentioned at the outset. To every public question, including taxation, there are two sides. One is apt to be as right as the other. The truth is generally to be found in *via media*.

The foregoing recital of the public controversy, now being waged in regard to taxation, is somewhat unusual, and it may be thought to have no proper place in an orthodox legal opinion—which is traditionally a dry, formal syllogism, too often logically defective, but usually more or less condensed, according to the superior skill in that line of the particular judge. While a long discussion of the moral atmosphere of the subject-matter of litigation may not be relevant to points of law raised in a particular litigation, it may, nevertheless, be important to the result. This fact was recognized by the great leaders of the bar in classical times, and is still recognized on the continent of Europe. It has been well said:

"That the ancient legal arguments, so familiar as standards of forensic skill to modern scholars, were always irrelevant according to the rules of modern Anglo-American procedure."

But we must remember that nevertheless it has been also said that such arguments reflected great credit on the standards of ancient civilization.

The question thus presented to me for determination is whether the additional evidence submitted to the appraiser upon the new hearing warrants a conclusion contrary to that at which I arrived in my prior decision. 102 Misc. Rep. 45, 168 N. Y. Supp. 364. I have given careful consideration to the opinion of the Appellate Division directing a reversal of the order entered on my previous decision, but have been unable to discover there the enunciation of any principle determinative of the question presented by the facts upon which the conclusion of the appraiser is based. That court in the course of its opinion did state (184 App. Div. 380, 171 N. Y. Supp. 496):

"The evidence taken before the appraiser is insufficient to determine whether Mrs. Green was merely making investments of surplus income from time to time, and, if so, whether this was done in such a manner, in such volume, and so regularly and frequently as to present the question whether the course of dealing constituted doing business; or, on the other hand, whether she was engaged in the business of money lending."

[2] The sentence quoted would seem to indicate that the learned justice who wrote the opinion of the Appellate Division was inclined to think that money lending by a capitalist, or the making of investments of surplus income from time to time in this state, when done regularly and frequently by a non-resident, a citizen of another state, would constitute doing "business" in this state within the meaning of the last clause of subdivision 2 of section 220 of the Tax Law. If such intimation were established law, the evidence in this matter might possibly justify a finding that the intangible property of the decedent

invested here was subject to a tax under subdivision 2 of section 220 of the Tax Law, if it is shown that the late Mrs. Green loaned her own money, and invested considerable sums of money in securities in this state, and not only reinvested the interest or dividends on such investments, but frequently changed the form of such investments. In the absence, however, of a formal, jurisdictional and authoritative statement of the law by any court to that effect, I am inclined to adhere to the opinion expressed by me when the matter was first before me for consideration, viz., that the investment and reinvestment of a person's own money does not constitute doing business within the meaning of subdivision 2 of section 220 of the Tax Law.

Precisely what the Tax Law (subdivision 2 of section 220, "or when the transfer is by will or intestate law of capital invested in business in this state by a non-resident of the state doing business in the state * * *") intends by doing "business" is ambiguous. The use of an equivocal term such as "business," in a statute is certainly unfortunate. Equivocal terms should never be employed in drafting statutes. Such words as "trade," "commerce," or "brokerage," on the other hand, have a settled and definite common-law meaning, and could, I think, with advantage have been substituted for the word "business" in section 220 of the Tax Law. To ascertain the meaning of words we must not hesitate to resort to any source of information, even that furnished by intelligent pedantry.

In all languages the word "business" standing alone, is equivocal, or one which depends on context for its definition; e. g., private business is not public business. For this reason the definitions of "business," contained in English dictionaries, are not regarded by courts as adequate for legal conclusions. *Parker Mills v. Com'r of Taxes*, 23 N. Y. at page 244. Although the lexicographers fail us, in this instance, there are certain settled grammatical and logical principles which logicians and the grammarians employ in order to determine when a vocable is absolute or relative in meaning, complete in itself or of an adjective character. These principles can aid us. All words are either equivocal or without equivocation; that is to say, relative or absolute in meaning. So all verbs are either of complete or incomplete predication. *Res* and *negotium* in Latin, *pragma* in Greek, chose in French, "thing" and "business" in English, are specimens of equivocal words which require to be complemented, as the grammarians say, by amplification and qualification or locution, before an accurate logical or legal definition is possible. They are words of compound significance, not simple terms. Now, the noun "business" is the correlative abstract of the neuter verb "to be busy." This particular verb is used only in the middle voice in Greek or French, and it is so used logically in English. Verbs used only in the middle voice are incomplete in significance and predication. Such are the tests, I believe, by which the scientists, logicians, and grammarians determine whether terms are or are not definable of themselves. By the tests indicated the noun "business" and the verb "to be busy" have no definite meaning standing alone.

[3] It is also obvious, as the cases hold, that the word "business," standing alone, has not an established legal meaning. For this reason

courts in affixing a complement, in order to arrive at a legal definition in a particular instance, should never supply the complement by a resort to political or economic theories, always transitory, unless in a few instances when a priori. Otherwise economic or political bias of individuals composing courts may attach opposite meanings to ambiguous terms in tax laws, according, for example, as the politics or the political economy of the moment favors the poor or condemns the rich of the community. Definition in courts of justice should depend on the law and the law alone, which knows neither poor nor rich except in actions in forma pauperis. In law every individual is persona. It was for this reason that I have given a short history of some indeterminate principles of taxation in order to rebut the implication that the rich should be condemned or the poor favored in tax cases by a judicial definition.

I have stated that the word "business" is not a technical term of the common law. Every science has its appropriate terminology. In drafting statutes it is highly desirable to employ such terms as "trade," "commerce," etc., which have a settled meaning by the common law, for at each repetition of such terms they retain the common-law significance. *Despard v. Churchill*, 53 N. Y. 192, 199; *Perkins v. Smith*, 116 N. Y. 441, 23 N. E. 21; *Waters & Co. v. Gerard*, 189 N. Y. 302, 82 N. E. 143, 24 L. R. A. (N. S.) 958, 12 Am. St. Rep. 886, 12 Ann. Cas. 397; *South Carolina v. United States*, 199 U. S. 437, 449, 450, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737.

How equivocal the noun "business" really is will be readily perceived by trite examples. If a master is engaged in playing a game, his servant may reply to a visitor, "You cannot see the master now, he is busy;" the business being a game of whist. A gentleman gone out to a church vestry meeting is sometimes said to have gone "out on business," or to be engaged on business. If I go a-fishing in this state, I am not a-doing business there; but if a fishmonger goes a-fishing to replenish his stall in this city he is doing business within the Tax Law. It is because of the ambiguity denoted that the courts properly say that the colloquial word "business" if used in statutes is among the most indefinite in the English language. *Parker Mills v. Commissioner of Taxes*, 23 N. Y. 242; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; *Smith v. Anderson*, 15 Ch. Div. 247, 258.

[4] No adjudication in the courts of this state or in the federal courts which is decisive of this appeal has been cited to me. Dicta of either foreign or domestic courts, however respectable, are not adjudications. It must be obvious that a repetition of the same character of transactions is not, as sometimes said in the cases, the true test of "business," as contradistinguished from investment or employment of capital by a non-business person. It is easy to conceive of an organized speculative "business," conducted by a firm regularly organized for trade, where every successive transaction is entirely different from all its predecessors. That firm ought to be held to be engaged in business notwithstanding its transactions all differ and are never repeated.

[5, 6] No matter how often repeated or continuous transactions

may be, if conducted by persons not in trade or commerce for purposes of investment of capital and income, they do not, I think, constitute "business" within the meaning of the Tax Law. *Smith v. Anderson*, 15 Ch. Div. 247. Investments, for example, even the most speculative, if made by executors or trustees of an estate, even though often repeated and continuous, would clearly not constitute doing "business" within the meaning of the Tax Law. It is not, then, as sometimes said in the cases, the repetition of transactions, or even their continuity, which is the legal test of doing business. The business intended by the Tax Law is some common-law business, carried on by a recognized trader, mechanic, shopkeeper, merchant, banker, broker, manufacturer, or by some person other than an owner of a private estate for the benefit of that estate alone.

[7] Nor is an elaborate office organization the legal test of doing business. Large private estates often require clerks, bookkeepers, and sometimes an extensive office. They constantly reinvest surplus monies, collect rents and dividends, often buy shares or other securities and resell them, and yet the management of the estate is not, I think, to be regarded as engaged in business in the sense in which a trader, a merchant, or a broker is engaged in business. The management of an estate is not the doing of business within the meaning of the law. A person living on his rents and the profits of capital is not "doing business" at common law, because he reinvests his surplus or loans his capital wherever he can to his advantage.

I have been able to find no adjudications decisive of this matter and none have been cited to me. When our own law furnishes no precise authority for the solution of legal problems it is always well to look into that great fountain of modern rights and legal principles, the civil law, and see what illustration, if any, it offers. While such an illustration would not in our system be authoritative on such a point as this now before me, it will be instructive, because it discloses the best and most highly scientific legal thought of all the ages known to us.

In Rome, in the days of the republic, certain kinds of money transactions were already divided into public and private, *publicum vel privatum negotium*. Business men were then classed in law as *negotiatores* and *publicani*. The business of a public character was conducted by those called "publicani," organized in joint-stock associations known as "*societates publicanorum*." See *Cic. de provinciis consularibus* V. 12. There is little doubt now entertained I think by the best scholars, that shareholders in the Roman *societates publicanorum*, although not *publicani*, were not *negotiatores*. In other words, although interested in the profits of the public undertaking, they were not personally engaged in that business. In this respect our modern law conforms precisely with the Roman law. *People, etc., v. Tax Commissioners*, 23 N. Y. 242; *McCoach v. Minehill Ry.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842.

It is a curious parallel, worth mentioning, that the dealings of these Roman shareholders, 2,000 years ago, in shares of the public companies were ordinarily conducted in the forum which is only lately beginning to be recognized as having been among many other things a sort of

Roman stock exchange or bourse. Cicero himself, as well as most of his friends, were much mixed up in the forum, as shareholders with these public companies, of one of which he admits that he was also counsel. But nowhere are Cicero or his friends classed among the negotiatores. They were simply what in modern times in America are popularly known as "capitalists" or investors.

[8] "Capitalist" has no legal meaning and it is used colloquially often in a wrong sense. In some provincial cities of this country it is not unusual to see gentlemen of inherited fortunes, never engaged in business of any kind, described in the city directories and local journals as "capitalists." I know of such instances. This classification of the directories seems to be in deference to some extreme democratic conception that every possessor of capital is "in business." Popularly every one in America is presumed to have some sort of occupation and consequently, men of fortune, of no precise calling, are, by directory makers, sometimes described according to the imaginary business, roughly presumed in some sort to be carried on by all men of means.

That inexhaustible reservoir of juridical conceptions, the Roman law, recognized 2,000 years ago a distinction between "capitalists," who loaned their own money for their private account, and bankers and other "argentarii," who acted as middlemen in making loans, keeping what were called "tabernæ argentariæ," or "money shops," where the public resorted, whereas the Roman capitalists kept no such shops and were not classed among the "negotiatores," or people of business. The people who kept tabernæ argentariæ, or money shops, were negotiatores, or engaged in business. It is very clear that in Roman law a rich Roman 2,000 years ago might have loaned and invested and re-invested her billions of sesterces at her private chambers, or private office, if you please, without any danger of being classed by the public authorities with the negotiatores, and accused of carrying on "business," provided she had not opened a taberna argentaria, or money shop, where the public could resort for transactions of their own. Now this the evidence before the New York appraiser shows that Mrs. Green never did. She kept no "open shop" or place of resort for the public. She made no transactions but her own, and in a legal sense such transactions were not her "business," but her private affairs, of no actual or lawful concern to the state.

[9] The appraiser's report shows that Mrs. Green's investments in the state of New York consisted of deposits in banks, mortgages on New York real estate, purchases of New York City bonds and corporate stock, and certificates of deposit. It also shows that she invested in similar securities or deposited in banks to her credit the income derived from these investments, and that a substantial part of the deposits in banks consisted of income from her various investments. There is, however, no proof that she maintained an office in New York for the transaction of business, or that she held herself out to the public as a banker or a broker or a money lender. Her business consisted in caring for her own property. The Westminster Company, which was incorporated under the laws of New Jersey, with a capital stock of 1,250 shares, of which 630 belonged to the decedent, was organized

for the purpose of taking over her active investments or those which required a frequent signing of papers. The books of the company show that at the time of Mrs. Green's death it owed her about \$26,000,000. Her son was the president and active head of the company. When her securities were transferred to the company, their value was credited to her account on the books of the company, and the company was debited with a corresponding amount. When, however, the interest or dividends on such securities were received by the company, they were distributed to the stockholders in the form of dividends, and not credited to the personal account of the decedent. The company, therefore, was not an agent of the decedent in the transaction of her business but a corporation transacting its own business of investing and reinvesting securities. It seems to me, therefore, that, as stated in my previous opinion (102 Misc. Rep. 45, 168 N. Y. Supp. 364), the business conducted by the Westminster Company was not the business of the deceased, and that the transactions of the company did not constitute the doing of business by the decedent in this state within the meaning of subdivision 2 of section 220 of the Tax Law (Parker Mills v. Com'rs, etc., 23 N. Y. 242; McCoach v. Minehill Ry., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842).

If a tax law does not expressly include property it cannot be taxed by implication. Taxing acts are construed strictly and when dubious against the state. Should this appeal be decided in favor of the state comptroller, I cannot see why citizens of other states who systematically speculate in brokers' offices in the city of New York, or who loan their foreign money regularly to banks in this city, do not also come within section 220 of the Tax Law. If so, the tax law will either have to be amended or New York will soon cease to be the monetary center of the United States. It may be that Mrs. Green selected a domicile where succession taxes would not molest her succession unduly; but that is no reason for subjecting her estate to a law which was not intended to cover operations like hers in the money center of the United States. Should her succession be condemned in this instance it would be one of those unfortunate errors which the feebleness of humanity commits on occasions, and it would be disastrous to the well-being of the state.

The additional evidence submitted to the appraiser does not for the reasons stated, in my opinion, warrant a finding by the court that Mrs. Green at the time of her death was engaged in business in this state within the meaning of subdivision 2 of section 220 of the Tax Law.

The order fixing tax will therefore be affirmed.

(109 Misc. Rep. 167)

In re LOEB'S ESTATE.

(Surrogate's Court, New York County. October 27, 1919.)

EXECUTORS AND ADMINISTRATORS §472—ISSUES AS TO LIABILITY OF ESTATE DETERMINABLE IN PROCEEDINGS FOR ACCOUNTING.

Where ordinary application is made by creditors to compel executors to account, an answer of an executor, asking the court, before directing any accounting, to construe an agreement of guaranty entered into by the deceased and the executor, and to determine the extent of the separate liability of the estate and its interest in certain security, will be denied, as all the issues may be raised by objections and heard and determined at the same time.

In the matter of the estate of Louis Loeb. Application by creditor to compel accounting by executors. Application by executor that the court primarily determine certain questions of law denied.

Henry Escher, Jr., of New York City (Cecile Iselin, of New York City, of counsel), for petitioner.

Wolf & Kohn, of New York City (Sol. Kohn, of New York City, of counsel), for executor Loeb.

Alexander, Cohn & Sondheim, of New York City (Henry W. Jessup, of New York City, of counsel), for executor Reis.

FOWLER, S. This is a regular and ordinary application by a creditor to compel the two executors of the above-named testator to account.

One of the executors in an answer, and not by objections in the usual way, appears and alleges that an agreement of guaranty was entered into by the testator, the said executor, and a third party, and asks the court, before directing any accounting, to construe said agreement of guaranty and to determine the extent of the separate liability of the estate and its interest in certain securities.

It seems to me that such practice should not be encouraged or sanctioned. All the issues may be raised by objections and heard and determined at the same time. To determine certain issues of law and fact in advance would in my mind be open to criticism.

The application that the court primarily determine the above questions or order a preliminary reference is therefore denied. Submit order directing the filing of account in the usual way within 40 days.

(109 Misc. Rep. 205)

In re SIELCKEN'S ESTATE.

(Surrogate's Court, New York County. November 4, 1919.)

TAXATION §895(6)—DEDUCTION FROM TRANSFER TAX APPRAISAL OF SUMS TO LIQUIDATE CLAIMS.

The transfer tax appraiser, in reporting the value of decedent's estate, should have deducted from value of assets as found a sum sufficient to liquidate claims for \$900,000 and for \$50,000, on both of which suit had been brought, and on the smaller of which judgment for the full amount had been recovered; if the recovery on the larger claim is less than the amount set apart by the executor to pay it, the state comptroller may move to fix the tax on the sum thus saved the estate, with interest.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In the matter of the estate of Herman Sielcken. From the report of the transfer tax appraiser, and an order fixing the tax, the executor appeals. Report of the appraiser remitted, for deduction of a certain sum, or, in the alternative, an order directed to be entered providing for assessment of the tax after making an allowance provided for.

Smith & Agate, of New York City (Leonard B. Smith, of New York City, of counsel), for executor.

Lafayette B. Gleason, of New York City (Schuyler C. Carlton, of New York City, of counsel), for state comptroller.

FOWLER, S. This appeal is taken by the executor of the estate of the decedent from the report of the transfer tax appraiser and the order fixing the tax on the ground that the appraiser has determined the net value of the estate without deduction or allowance for two claims aggregating, without interest, the sum of \$981,520.84.

The gross value of the estate as found by the appraiser was \$4,253,337.07. Two suits have been brought against the executor by reason of decedent's alleged liability, one by the Woolson Spice Company for \$931,520.84, and the other by Agnes McF. Roberts for \$50,000. In the latter case judgment for the full amount was recovered by the plaintiff, which, with interest and the expense of defending the action, will amount to more than \$60,000. No determination of the suit involving the large amount has been reached.

The transfer tax appraiser reports that the executor of the estate of decedent has retained the sum of \$1,000,000 in cash to meet the contested claims above set forth. He, however, fixes the value of the net estate, without regard to the sum so reserved, although in his report and in the order assessing tax provision is made for the "suspension" of the two claims.

The executor contends that the appraiser should have deducted from the value of the assets of the estate as found by him a sum sufficient to provide for the liquidation of the claims. I think his contention is correct. This was held to be the proper procedure in *Matter of Westurn*, 152 N. Y. 93, 103, 46 N. E. 315.

The attorney for the state comptroller expresses doubt as to the probability of the recovery against the estate of the amount which is the subject of controversy in the larger claim. It is not possible to determine on this appeal the merits of the issues involved in the suit. In the event that the recovery is less than the amount set apart the state comptroller may move to fix the tax on the sum thus saved to the estate, with interest.

The order fixing tax is reversed. The report of the appraiser will be remitted to him, for the purpose of deducting the sum of \$1,000,000 from the net estate as valued by him in his report, or an order may be entered on notice providing for the assessment of the tax after making the allowance herein provided for, with proper reservations to either party for subsequent modification when the amounts in controversy have been definitely fixed.

Settle order on notice.

(109 Misc. Rep. 202)

In re CASSIDY'S ESTATE.

(Surrogate's Court, New York County. November 4, 1919.)

1. BIGAMY ⚡1—DEATH ⚡2(1)—PRESUMPTION OF DEATH FROM ABSENCE.

Under Domestic Relations Law, §§ 6, 7, a wife has a right to marry again after absence of her husband, unheard of, for a period of five years, and after seven years the husband is presumed to be dead, and bigamy cannot be predicated of any subsequent marriage of the wife.

2. BASTARDS ⚡3—MARRIAGE ⚡40(5)—PRESUMPTIONS OF VALIDITY AND LEGITIMACY.

The presumptions favor the validity of a last marriage, of which children were born, and their legitimacy.

3. MARRIAGE ⚡50(1)—VALID COMMON-LAW MARRIAGE.

Valid common-law marriage *held* to have existed between decedent and his administratrix, whose letters an aunt of decedent seeks to revoke to get possession of the small estate of approximately \$600; the administratrix, though previously married, having left her former husband in Australia in 1894, and never having seen or heard from him since, while decedent and the administratrix have a son, who should not be bastardized, if it can be avoided.

In the matter of the estate of James Cassidy. On application by an aunt to revoke letters of administration issued to the widow. Application denied.

Cornelius J. Earley, of New York City, for petitioner.

James D. Merriman, of New York City, for administratrix.

FOWLER, S. This is an application by an aunt to revoke letters of administration, issued to the widow of the intestate, on the ground that she is not his widow. The allegations in the petition were denied by the administratrix, and a hearing took place before me. The widow claims to be such, not by reason of any ceremonial marriage, but under the common law.

The testimony as to whether or not she was known to neighbors and friends as the wife of the intestate during his lifetime is somewhat conflicting. Several witnesses were produced for the petitioner, and they swore that they never knew or regarded administratrix as Mrs. Cassidy. On the other hand, the widow produced witnesses who swore that they knew her as the wife of the intestate. The doctor who attended the intestate in his last illness testified that the intestate held out to him as his wife the administratrix in this case, expressing his solicitude for her and the two children. Cassidy regretted the work that she had to do in caring for him in his sickness and expressed anxiety concerning what she was going to do after he was dead. He died of influenza, as did also one of the children. Affirmative evidence is of higher weight than negative testimony.

By intestate administratrix had two children. It is shown by two witnesses that she took good care of these children, and it was believed by these witnesses that she was the wife of the father of the two children. In opposition to the claim that there was a valid common-law marriage, it has been proved, and it is not denied by the woman,

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that she was married before in 1892 to one McGuire; that she had obtained no divorce from McGuire, but had left him in 1894, and has not seen him since. At that time McGuire was in Australia, and he stated to administratrix that he was going into the interior of Australia, and that was the last she had ever seen or heard of him. Believing McGuire to be dead, and on the strength of that belief, she entered in the common-law marriage arrangement with the intestate.

[1] Under the Domestic Relations Law (sections 6 and 7 of chapter 19 of the Laws of 1909 [Consol. Laws, c. 14]) she would have a perfect right to enter into a marriage ceremony after an absence of McGuire, unheard of, for a period of five years. After seven years McGuire would be presumed to be dead, and bigamy could not be predicated of any subsequent marriage of the administratrix. No proof has been submitted in this case as to whether or not McGuire is dead, but administratrix has not seen him or heard of him since 1894. She had no children of the marriage with McGuire.

[2] It might be difficult to determine the issue of this common-law marriage with Cassidy, but the administratrix had two children while living with intestate, one of whom is dead; the other, a boy, is living. If the marriage is not sustained, the boy will be made illegitimate. The presumptions favor the validity of the last marriage and legitimacy; *omnia præsuntur pro matrimonio*.

[3] The only object the aunt has in attempting to revoke the letters issued to the alleged widow, on the ground that she was not married to intestate, is to secure administration of the little estate. The estate amounts, at the outside, after the payment of debts, only to \$643.08. To my mind it would be improper and unjust to illegitimate the boy in a proceeding where so little is involved. He has reasonable expectations of a long life and should not be harmed by the stigma of illegitimacy if it can be avoided. I will, for all the reasons set forth, hold that there was a valid common-law marriage existing between respondent and the intestate, and I deny the application to revoke the letters of administration.

Application denied.

(109 Misc. Rep. 169)

In re HOWLAND'S ESTATE.

(Surrogate's Court, New York County. October 27, 1919.)

TAXATION ¶897—ADDITION OF REMAINDER TO LIFE ESTATE TO DETERMINE RATE OF TRANSFER TAX.

Under the Tax Law, § 221a, providing that remainders shall be taxed at the highest rate possible under any contingency, where decedent gave his widow a life estate in his residuary estate, and provided for division of the remainder among children, but authorized the trustees in their discretion to pay the widow any part of the principal, the trustees may pay over to the widow the entire residuary estate, and the remainder should be added to the value of her life estate to determine the rate of transfer tax.

In the matter of the estate of William B. Howland. From an order fixing the transfer tax on decedent's estate, the State Comptroller appeals. Order fixing tax modified.

Stetson, Jennings & Russell, of New York City, for petitioner.

Lafayette B. Gleason, of New York City, for state comptroller.

FOWLER, S. The state comptroller contends, upon this appeal from the order assessing a tax upon the estate of the decedent, that the remainder after the life estate of the decedent's widow should be added to the value of her life estate for the purpose of determining the rate at which the remainder should be taxed.

The decedent gave to his widow a life estate in his residuary estate and then provided for the division of the remainder among his children, but he authorized his trustees in their discretion to pay to the widow any part of the principal of the residuary estate. The trustees under this power may pay to the widow the entire residuary estate, and as the Tax Law (Consol. Laws, c. 60) provides that remainders shall be taxed at the highest rate which under any contingency would be possible, the remainder should be added to the value of the widow's life estate for the purpose of determining the rate of taxation. *Matter of Parker*, 226 N. Y. 260, 123 N. E. 366.

The order fixing tax will be modified accordingly. Settle order on notice.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

(189 App. Div. 865)

SHAW v. AMERICAN BODY CO. et al

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

1. MASTER AND SERVANT ¶385(1)—DETERMINATION OF AVERAGE WEEKLY WAGE.

Where claimant had worked for the employer only a short time, and the greater part of the work was piece work, the Industrial Commission was justified in determining his average weekly wage, under Workmen's Compensation Act, § 14, subd. 8, by determining the average weekly earnings of employes in the same class.

2. MASTER AND SERVANT ¶405(6)—AWARD UNDER WORKMEN'S COMPENSATION ACT.

A finding by the Industrial Commission that an employe's weekly wages were in excess of \$80, on basis of which the commission made an award of \$20 a week for a permanent loss of the use of his right hand, held warranted by the evidence.

Appeal from State Industrial Commission.

In the matter of the claim of John A. Shaw for compensation under the Workmen's Compensation Act against the American Body Company, employer, and the Standard Accident Insurance Company, insurance carrier. From an award of the State Industrial Commission in favor of claimant, the employer and insurance carrier appeal. Affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Neile F. Towner, of Albany, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

Bernard L. Shientag, of New York City, for State Industrial Commission.

LYON, J. The award appealed from was of \$20 per week for the permanent loss of the use of the claimant's right hand. He was a body builder of automobiles. While engaged in the regular course of his employment on November 2, 1917, he cut the ball of the thumb of his right hand, which became infected, and in time involved the entire arm. On December 22d he and his employer entered into an agreement in regard to compensation, which was duly approved by the commission. On February 15, 1918, a medical examiner reported a permanent loss of the use of the hand, and advised a re-examination in three or four months. On June 7, 1918, a hearing was had and a re-examination of claimant's hand made. Dr. Lewy reported a loss of the use of the hand. Although the carrier was represented by counsel, no request or attempt to cross-examine Dr. Lewy was made. The representative of the carrier objected to an award being then made, although more than seven months had elapsed since the accident, claiming it was too soon to tell the extent of the injury, and also that the manner of computing the compensation was wrong. The commission made an award of \$20 per week. The carrier objected,

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and on August 15th asked that the matter of wages be more fully covered. On November 15th evidence was taken as to the earnings of other men in the same line of work during the period of one year prior to the time of the accident. At the hearing both parties were represented. From the award made on November 15, 1918, the date of the last hearing, more than one year after the accident, the appellant took this appeal.

[1, 2] The claimant had worked but 45 days for the employer at the time of the injury. During this period his earnings had been \$242.50, or an average of approximately \$32 per week. It appeared that the average earnings of five employes in the same class for the year commencing January 1, 1917, had been \$1,777.95. The commission determined under Workmen's Compensation Law (Consol. Laws, c. 67) § 14, subd. 3, that claimant's weekly wages were in excess of \$30, and awarded compensation for the permanent loss of the use of claimant's hand at the rate of \$20 per week. The evidence supports the finding of the commission. The appellant at no time offered evidence as to the probability of improvement in the use of the hand. If, however, appellants should at any time claim that they are entitled to a modification of the award, they can make application under section 22 for such modification.

In view of the fact that the claimant had worked for the employer only a short time, and the greater part of the work was piece work, I think the commission was justified in determining his average weekly wage under subdivision 3 of section 14, and that there is evidence to support the determination.

The award should be affirmed. All concur.

MORRIS PLAN CO. OF NEW YORK v. RAINESS et al.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

BILLS AND NOTES ~~§~~489(7)—JUDGMENT NOT SUPPORTED BY PROOF OF NOTE BEARING DATE DIFFERENT FROM THAT ALLEGED.

In action on note dated February 28, 1918, the offering for identification of note dated September 28, 1918, held insufficient to sustain judgment for plaintiff.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Morris Plan Company of New York against Harry Rainess and others. Judgment for plaintiffs, and defendants appeal. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

George Wolf, of New York City, for appellants.

Harold H. Kissam, of New York City, for respondents.

PER CURIAM. It does not appear that the note sued upon was offered, either for identification or in evidence, at the trial of this case.

↪ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

There was a note offered for identification, which was dated, according to the record, September 28, 1918, while the note set up in the complaint appears to have been dated February 28, 1918. Under such circumstances, there must be a new trial.

Judgment reversed, and new trial ordered, with \$30 costs to appellant to abide the event.

PENTON PUB. CO. V. AMERICAN OIL-REFINING CO.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

CONTRACTS 6-204—EVIDENCE IN ACTION FOR ADVERTISING INSUFFICIENT TO SHOW COMPLIANCE WITH CONTRACT.

Under publisher's contract with advertiser, providing for monthly insertions of advertisements, "publisher to prepare copy, if not furnished by advertiser, previous advertisement to be repeated in absence of new copy," where advertiser furnished copy for the original advertisement, the publisher's right to recover under the contract depended on repeating the advertisement of the previous month; the publisher's right to prepare copy arising only when no copy at all was furnished by the advertiser.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Penton Publishing Company against the American Oil-Refining Company. Judgment for plaintiff, and defendant appeals. Reversed, and complaint dismissed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Teitelbaum & Jaykowsky, of New York City (Louis Jaykowsky, of New York City, of counsel), for appellant.

Lynn W. Thompson, of New York City (William C. Gehring, of New York City, of counsel), for respondent.

DELEHANTY, J. The plaintiff publishes a magazine known as "Foundry," and in the course of its business entered into a contract to insert in its publication for the period of one year a monthly advertisement at the rate of \$51 a month, plus charges for cuts, etc. The terms of the agreement, which were reduced to writing, among other things, further provided:

"The publisher to prepare copy, if not furnished by advertiser. Previous advertisement to be repeated, in absence of new copy."

At the end of the year the contract was renewed upon the same terms, except that the price per insertion was advanced to \$60. Plaintiff sued for various monthly insertions of advertising under the contract, and the defendant proved upon the trial that the copy used by the plaintiff was not the copy provided for in the agreement. Despite this fact, judgment was rendered in favor of the plaintiff for the full amount.

This was clearly erroneous. The defendant furnished copy for the original advertisement, and by the express terms of the agreement,

upon any default in furnishing copy thereafter, the plaintiff was to repeat the advertisement of the previous month. Having failed to do so, there can be no recovery under the contract.

Judgment reversed, with \$30 costs, and complaint dismissed, with appropriate costs in the court below. All concur.

(108 Misc. Rep. 407)

DEWEY v. MORRIS.

(Supreme Court, Special Term, Steuben County. August 13, 1919.)

JUDGMENT $\Leftrightarrow$ 143 (2)—**MOTION TO OPEN DEFAULT; WHAT MUST BE SHOWN.**

On motion to open plaintiff's default, she must show, not only reasonable excuse for her negligence in failing to appear when her case was reached in regular order, as required by Code Civ. Proc. § 724, but also must set forth facts showing a meritorious case; an affidavit of merits being insufficient.

Action by Mary H. Dewey against Alva B. Morris. On motion by plaintiff to open default. Motion denied without prejudice.

James O. Sebring, of Corning, for the motion.

Thomas F. Rogers, of Corning, opposed.

THOMPSON, J. So far as plaintiff's negligence in failing to appear when her case was reached in regular order, is concerned, it must be held that the reasonable excuse therefor which is required by section 724 of the Code of Civil Procedure has been established. But the papers fail to set forth facts showing a meritorious case. *Rothschild v. Haviland*, 172 App. Div. 562, 158 N. Y. Supp. 661.

One who addresses himself to the court on the plea of favor must show himself entitled thereto in all ways, and the duty is laid upon the court to closely scrutinize such an application, in order that it may be advised of the merit of the mover's case before determining whether or not he is entitled to the extraordinary relief he demands. For this purpose the facts themselves must be shown; an affidavit of merits is not sufficient. *Heischouer v. Polishook*, 152 App. Div. 193, 136 N. Y. Supp. 567; *Dana v. Thaw*, 56 Misc. Rep. 612, 107 N. Y. Supp. 870; *Empire State Pickling Co. v. Pfister*, 161 App. Div. 909, 145 N. Y. Supp. 1122, affirming 80 Misc. Rep. 162, 141 N. Y. Supp. 817.

The motion is denied with \$10 costs, without prejudice to a further application on additional papers showing merit.

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

UINTAH BASIN PRODUCING & REFINING CO. v. CAMPBELL.

(Supreme Court, Special Term, New York County. November 10, 1919.)

1. ARREST $\Leftrightarrow$ 13—UNDER FOREIGN JUDGMENT FOR FRAUD.

Under Code Civ. Proc. § 552, a defendant, sued on a foreign judgment, may be arrested at the instance of the plaintiff, where the original cause of action on which judgment had been rendered was for fraud and conversion, and would have justified an order of arrest.

2. ARREST $\Leftrightarrow$ 13—ON FOREIGN JUDGMENT FOR FRAUD.

In a suit in New York on a foreign judgment, which was based on a cause of action arising out of defendant's fraud and conversion, *held*, that plaintiff may seek only monetary relief, and obtain an order of arrest, under Code Civ. Proc. § 552, and may disregard the provisions in the foreign judgment for equitable relief, in which case sections 550, 551, will not be applicable.

3. ARREST $\Leftrightarrow$ 35—COMPLAINT IN ACTION ON FOREIGN JUDGMENT JUSTIFYING ARREST.

A complaint in an action on a judgment rendered in a foreign state, based on a cause for fraud and conversion, *held* to state a cause of action on the judgment and to be sufficient basis for an order of arrest.

Action by the Uintah Basin Producing & Refining Company against Charles A. Campbell. On motion by defendant to vacate an order of arrest. Motion denied.

O'Gorman, Battle & Vandiver, of New York City (Leon N. Futter, of New York City, of counsel), for the motion.
Dudley A. Wilson, of New York City, opposed.

GIEGERICH, J. The defendant moves to vacate an order of arrest upon the grounds that the papers on which it was granted are insufficient upon their face and that the defendant was and is a resident of this state and was not concealing his whereabouts. The action in which the order was procured was brought upon a judgment rendered in favor of the plaintiff and against the defendant in the state of Indiana. In addition to the recovery of money, the Indiana judgment awarded to the plaintiff several forms of equitable relief, such as the cancellation of certain shares of stock, cancellation of a contract, and an injunction against the defendant. In the action in this state, however, the only relief sought is a money judgment for the amount recovered under the Indiana judgment. The complaint in the action in this state, however, in addition to pleading the portion of the Indiana judgment which awarded the money recovery, alleges the fact that the recovery of the Indiana judgment was for the defendant's fraud upon the plaintiff and his wrongful appropriation of the plaintiff's property, as more fully set forth in a copy of the judgment annexed to the complaint. The copy of the judgment so annexed to the complaint fully supports the allegations of fraud and conversion.

[1] One ground upon which the order of arrest is attacked is that the order, the complaint, and the Indiana judgment are at variance and mutually destructive. The argument is that the cause of action in this state is not for fraud or conversion, but is merely upon a debt,

and, consequently, the order of arrest was unauthorized, since it purports to be based upon the ground of the fraud and conversion by the defendant of the plaintiff's property. It is true that the complaint in the present action does ask merely for a money judgment, but that fact does not, in a case like the present, preclude the plaintiff from his right to arrest upon the ground of fraud and conversion. In *Baxter v. Drake*, 85 N. Y. 502, it was held that, under the provisions of section 552 of the Code of Civil Procedure, in an action upon a judgment of a court not of the state, the plaintiff is entitled to an order of arrest where the original cause of action was such as to authorize the arrest of the defendant. The court said (pages 504, 505):

"The provision cited [section 552] clearly declares that, where a judgment has been recovered in the court of another state for the same cause of action, the right of the party to an order of arrest is not affected. This interpretation gives the right to prosecute upon the demand the same as if no judgment had been obtained, and whether the suit was upon the judgment or upon the original cause of action separately is not, I think, material, and cannot affect the right conferred, as 'the same cause of action' evidently means the cause of action on which the judgment was entered. The action here is on the judgment, and one of the affidavits upon which the order of arrest was granted shows that it was for the conversion of property, and thus establishes that it was for the same identical cause of action as the judgment itself."

And later on it was said:

"No sufficient reason exists why the action may not be maintained upon the judgment and an order of arrest be granted upon proof that a proper cause of action originally existed."

What the court there said might be done, and what was done in that case, seems to have been done in the present case, and therefore I can see no reason for refusing to the plaintiff the remedy expressly provided by section 552.

[2] The order of arrest is also attacked upon the ground that the plaintiff has pleaded a mere equitable cause of action, and that, such being the case, the order could only be granted by a court; section 551 of the Code of Civil Procedure being cited on this proposition. I do not think, however, that the provisions of section 551 apply to the present case. Those provisions are limited to the cases specified in section 550, which include actions wherein the judgment demanded requires the performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt. The judgment demanded in this action is merely a money judgment; the other relief granted by the Indiana judgment being ignored. All the relief asked for in this action is that portion of the relief granted in the Indiana judgment in the form of an award of money. I can conceive of no reason why the plaintiff should not be permitted, if it so elects when it comes to sue in this state upon the Indiana judgment, to refrain from seeking to enforce against the defendant in this jurisdiction certain portions of the relief granted to it by the Indiana judgment and confining itself to the award of money, taking from the Indiana judgment, in addition to the award of money, the adjudication of fraud and conversion, so as to carry in this state the right to arrest.

[3] It is further urged that the motion should be granted, because

the complaint does not set forth a cause of action. The criticism is that the complaint merely alleges that the defendant became indebted to the plaintiff by reason of a judgment of the state of Indiana. I do not think, however, that the allegations of the complaint warrant the construction thus placed upon it. The exact words, so far as necessary to quote, are as follows:

"That heretofore, and on or about the 12th day of November, 1918, the defendant became indebted to the plaintiff in the sum of \$31,441.85 by reason of a judgment duly rendered in favor of plaintiff and against defendant in an action brought by plaintiff against defendant in the superior court of Marion county, state of Indiana, for defendant's fraud upon plaintiff and defendant's wrongful appropriation of plaintiff's property, as is more fully set forth in a copy of said judgment hereto attached and made a part of this pleading."

Then follows an allegation that no part of the judgment has been paid. I am of the opinion that the language above quoted, when fairly construed, should be held to allege the fact of the rendition of the foreign judgment and that the allegation of indebtedness, although it may be a conclusion, is harmless; indeed, it may be treated as surplusage. The material facts alleged are the due rendition of the judgment and its nonpayment. The right to an order of arrest in this case not being dependent upon extrinsic facts, but upon the nature of the action, it is not necessary to determine the conflict arising upon the affidavits as to the defendant's residence and whether or not he has been concealing his whereabouts.

The motion should be denied, with \$10 costs. Settle order on notice.

STANDARD MATCH CO. v. PORTER.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

REPLEVIN ¶10—EVIDENCE SUSTAINING JUDGMENT FOR PLAINTIFF.

Where the evidence clearly established that plaintiff's goods came into the possession of defendant, and were sold and delivered by defendant to a third person, such facts are sufficient to justify a judgment in favor of plaintiff in replevin action.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Standard Match Company against Abraham Porter. Judgment for defendant, and plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

George P. Breckenridge, of New York City, for appellant.

Louis Halle, of New York City (Benjamin W. Goldberg, of New York City, of counsel), for respondent.

GUY, J. Plaintiff sued in replevin to recover 75 cases of matches alleged to have been the property of plaintiff, which came into de-

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defendant's possession, or to recover the value thereof. A previous judgment in favor of plaintiff was reversed, because of insufficient proof as to the identity of the goods which came into defendant's possession. The evidence on this trial clearly establishes title in the plaintiff, and also that plaintiff's goods came into possession of the defendant, and were sold and delivered by defendant to a third person. On this proof plaintiff was entitled to recover.

The judgment must therefore be reversed, and judgment directed in favor of plaintiff for the value of the goods in question, with \$30 costs of appeal and in the court below. All concur.

BECKER v. GOLDEN E. SERVICE CO., Inc.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. APPEAL AND ERROR §927(3)—REVIEW OF DISMISSAL OF COMPLAINT.

On appeal from judgment dismissing complaint at close of plaintiff's case, plaintiff's evidence must be taken as true.

2. MUNICIPAL CORPORATIONS §706(7)—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN CROSSING STREET A JURY QUESTION.

In action for injuries to pedestrian, struck by defendant's automobile while crossing street, question of pedestrian's contributory negligence held, under the evidence, for the jury.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Isaac Becker against the Golden E. Service Company, Incorporated. Judgment dismissing complaint at close of plaintiff's case, and plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Laurence J. Bershad, of New York City, for appellant.
Daniel Drangle, of New York City, for respondent.

DELEHANTY, J. [1] This action was brought to recover for personal injuries received by the plaintiff by reason of being hit by defendant's automobile while he was endeavoring to cross the street in this city known as the Southern Boulevard. The accident occurred at a crossing where the rights of the parties were equal. The complaint was dismissed, and the case taken from the jury at the close of the plaintiff's case. The evidence adduced on the part of the plaintiff must therefore be taken as true. A diagram was referred to in the giving of the testimony and was introduced as an exhibit.

[2] The testimony shows that the plaintiff stepped off the sidewalk at the southwest corner of Westchester avenue and the Southern Boulevard, and an automobile going south passed. He then looked north, and saw another automobile coming, which was then about three-quarters of a block distant. He proceeded on his way, and was hit by this car, which belonged to the defendant, and was injured. No other circumstances were shown from which it could be charged

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that the plaintiff was guilty of negligence as matter of law, and those described above are insufficient to sustain such a claim. The case should have been submitted to the jury.

Judgment reversed, and new trial ordered, with \$30 costs to appellant to abide the event. All concur.

GUTMAN et al. v. WEISBARTH et al.

(Supreme Court, Appellate Term, First Department. November 8, 1919.)

SALES §89—TESTIMONY NOT SHOWING DEPARTURE FROM CONTRACT DATE OF DELIVERY.

In an action for goods sold and delivered under written contract specifying date of delivery as September 1st, testimony of plaintiffs' salesman alone, which was denied by defendants, *held* insufficient to sustain their burden to prove an entire departure from the terms of the written contract by the fixing of an extended date, September 20th, for delivery.

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Eugene Gutman and another against Benjamin Weisbarth and others. From a judgment for plaintiffs, defendants appeal. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

David Drechsler, of New York City, for appellants.

Seligsborg, Lewis & Strouse, of New York City (Clarence M. Lewis, and Jay Leo Rothschild, both of New York City, of counsel), for respondents.

BIJUR, J. Plaintiffs sued defendants for goods sold and delivered under a written contract specifying the date of delivery as September 1st. Plaintiffs' salesman testified that he showed styles of the goods to the defendants some time prior to the date of delivery; that defendants expressed their disapproval of these styles, whereupon the salesman showed them other styles, which they did approve; that he told them that the styles selected could not be delivered until practically some three weeks after the date fixed in the contract, September 1st, and that defendants assented; that the goods were delivered to defendants on September 20th, but were returned, the salesman claiming that defendants said that the price had dropped, but conceding at the same time that defendants had told him that they had bought other goods of the same kind elsewhere in the meantime. The salesman further said that he coaxed the defendants into accepting the goods; the arrangement being that plaintiffs would hold them until defendants called for them, defendants meanwhile to have 60 days' time for payment (apparently beyond the extended date of delivery, namely, September 20th). Two of the defendants and their foreman, with whom the salesman testified that he had had the con-

versation, denied his story, and asserted that when the styles were selected nothing was said about a delay in delivery, and that no request was ever made for an extension of time, but that the salesman was told that the goods had been returned because the delivery was too late and that other goods had been purchased in the meantime.

It appears to me to be clear that in a case like this, where the original agreement was made in writing according to the ordinary custom of both parties in the form of a regular order blank, it requires something more than the mere word of one witness to justify an entire departure from its terms, where the other parties categorically deny any modification of the written agreement, and where their entire conduct is consistent with their position that, the contract having been broken in an important respect, they refused to accept the goods sold. In my opinion, plaintiffs have failed to sustain the burden of proof on this branch of the case, and without further extended comment it may be said that the same criticism applies to the proof of damage.

It follows, therefore, that without comment upon the possible admissibility of the letter of plaintiffs of December 2d, which was put in evidence over defendants' objection, the judgment must be reversed, and new trial granted, with \$30 costs to appellants to abide the event. All concur.

JAMES H. RHODES & CO. v. S. WEISGLASS & CO., Inc.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

PAYMENT §21—NOT EFFECTED BY UNACCEPTED AND UNPAID CHECK.

Checks, unless accepted and paid, constitute no payment of an indebtedness, and a buyer could not extinguish the seller's claim merely by sending a check, which was refused.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by James H. Rhodes & Co. against S. Weisglass & Co., Incorporated. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Kramer & Swartz, of New York City (Henry Swartz, of New York City, of counsel), for appellant.

Otto A. Samuels, of New York City (Jerome M. Schwartz, of New York City, of counsel), for respondent.

DELEHANTY, J. There must be a new trial of this action. At the close of the entire case the undisputed testimony showed that the defendant was indebted to the plaintiff in at least the sum of \$22.55. This was for a shipment and delivery of goods to the defendant of that amount on or about April 8, 1918. With this exception the en-

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tire record is devoted to showing the delivery to the defendant of a shipment of goods amounting to the sum of \$101.73.

It is undisputed that a check for the sum of \$53.83 had been sent to plaintiff, which it refused to accept, and which was returned to the defendant, who again sent it to the plaintiff. This check was produced in open court by the plaintiff and offered to the defendant. What this was in payment of nowhere appears in the record. Checks, unless accepted and paid, constitute no payment of an indebtedness, and the defendant could not extinguish the plaintiff's claim by the mere sending of a check, which was refused. As the testimony shows without dispute that the defendant owed the plaintiff \$22.55, the judgment should not have been in favor of the defendant.

Judgment reversed, and new trial ordered, with \$30 costs to appellant to abide the event. All concur.

WRIGHT v. BLUMENFELD et al.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

BROKERS §—86(5)—**SUFFICIENCY OF EVIDENCE IN ACTION FOR COMMISSION.**

In broker's action for commissions, evidence *held* to show that the procured purchaser had sufficient funds to purchase on the terms stated by defendant owners.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by James O. Wright against Frank Blumenfeld and another. Judgment for plaintiff, and defendants appeal. Reversed, and new trial ordered, unless plaintiff files consent to reduction of amount of judgment, in which event the judgment, as so modified, is affirmed.

Argued October term 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Sobel & Brand, of New York City (Samuel Sobel, of New York City, of counsel), for appellants.

Strasbourger & Schallek, of New York City (Jesse S. Raphael, of New York City, of counsel), for respondent.

GUY, J. The evidence is ample to support the finding that plaintiff procured for the defendant a purchaser of defendant's property, who was ready, able, and willing to purchase on the terms stated by defendants.

The contention of defendants that the proposed purchaser, Cohen, did not have sufficient cash on hand to comply with defendants' terms, is entirely overcome by the fact, established by the evidence, that plaintiff, in order to facilitate the sale, had obtained a written consent from the owner of the second mortgage to an extension thereof, so that Cohen, the proposed purchaser, would only have been required to pay the amount over and above the two mortgages, which amount, the evidence showed, he had then in bank. It is, however, established

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conclusively by the evidence that defendants, in employing plaintiff as a broker, expressly limited their obligation to pay commissions to the sum of \$300, and plaintiff is therefore limited in his right of recovery to the amount so agreed upon.

Judgment reversed, and new trial ordered, with \$30 costs to the appellant to abide the event, unless within 10 days plaintiff files with the clerk of the Municipal Court a written consent that the judgment be modified, by reducing the amount thereof to \$300, with interest and costs in the court below. If such consent is so filed, judgment then modified in accordance therewith, and affirmed, without costs of appeal. All concur.

WILLIAM ANDERSON TEXTILE MFG. CO., Inc., v. ROSENMAN et al.
(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. SALES §88—INTERPRETATION OF CONTRACT FOR THE COURT.

Interpretation of the language of a contract to purchase samples to be delivered "as soon as possible" is for the court.

2. APPEAL AND ERROR §1062(4)—INTERPRETATION OF CONTRACT BY WITNESS PREJUDICIAL ERROR.

Interpretation of language of contract to buy goods, samples to be delivered "as soon as possible," being for the court, it was prejudicial to defendants, sued for not accepting and relying on samples not having been tendered for four months, to allow a witness to say what the term meant, and that the samples were in fact delivered "as soon as possible," and then leave to the jury the question of this having been done.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the William Anderson Textile Manufacturing Company, Incorporated, against Sigmund Rosenman and others. From a judgment on a verdict for plaintiff, defendants appeal. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Bernard Fliaashnick, of New York City, for appellants.

Julius B. Baer, of New York City, for respondent.

BIJUR, J. Plaintiff sued for damages for defendants' breach of an agreement to purchase certain goods, the samples for which the contract provided should be delivered to defendants "as soon as possible." Although the contract was made on July 8th, the bulk of the samples were not tendered until some time in November.

[1, 2] Over the objection and exception of defendants' counsel the learned judge below permitted a witness for the plaintiff to say what is meant by the term "as soon as possible," and also that the samples were in fact delivered "as soon as possible," and finally left it to the jury to determine whether that had been done. As the interpretation of this language was for the court (see *Sentenne v. Kelly*, 59 Hun, 512, 13 N. Y. Supp. 529; *Goldblatt v. Longacre Const. Co., Inc.*, 170 N. Y. Supp. 54), and the error was material, the judgment must be reversed, and new trial granted, with \$30 costs to appellant to abide the event. All concur.

WILTON HOLDING CORPORATION v. FIX.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. LANDLORD AND TENANT §298(1)—IN SUMMARY PROCEEDINGS, LEASE FROM THIRD PARTY NO DEFENSE.

In landlord's summary proceedings, lease from party, who was not shown to have been either owner of fee or leasehold, was no defense.

2. MORTGAGES §497(2)—TENANT, PARTY IN FORECLOSURE ACTION, CONCLUDED BY JUDGMENT.

Tenant, who was made party defendant in foreclosure action, was concluded by judgment therein as to any rights as a tenant prior to entry of judgment.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Summary proceedings by the Wilton Holding Corporation, landlord, against Samuel Fix, tenant. From a final order for the tenant, the landlord appeals. Reversed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Henry M. Bellinger, Jr., of New York City (Charles Frankel, of New York City, on the brief), for appellant.

Harry Fieldsteel, of New York City (Joseph R. Brodsky, of New York City, of counsel), for respondent.

GUY, J. The landlord herein purchased the premises at a foreclosure sale; the deed to it bearing date July 10, 1918. At the time of said transfer of title to the landlord the defendant was a tenant occupying part of said premises, and was a party defendant in the foreclosure action. During the pendency of the foreclosure action the tenant respondent paid rent to a receiver appointed in said action at the rate of \$150 a month. After transfer of title to the plaintiff herein by virtue of the sale and foreclosure, plaintiff's agent notified the tenants, including the tenant respondent, that the new landlord had taken possession, and collected rent from the tenant respondent at the same rate he had paid the receiver.

Defendant's answer admitted the landlord's ownership of the premises, denied the other material allegations of the petition, and, as a separate defense, alleged that the tenant "holds possession of the premises * * * by virtue of a certain lease under which and whereby he has full right and interest to the possession of said premises up to and on or about the 15th day of July, 1922." In support of said separate defense the tenant respondent was allowed to introduce in evidence, over the objection and exception of plaintiff, a certain lease, dated February 15, 1915, from one Sachs, who was not a party to the foreclosure action, and was not shown to have been at any time either the owner of the fee or the leasehold of said premises; also a letter, dated October 1, 1917, signed "Minsker Realty Company, by Louis D. Minsky," purporting to extend said lease from Sachs to the tenant herein until October 1, 1922. On the date when

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said letter was written the Minsker Realty Company had no title to the leasehold of said premises; it having on November 1, 1912, leased half of the said premises for a term of 10 years to the said Louis D. Minsky, and leased the other half on the same date for a like term to one Max D. Steuer, who assigned the lease to said Minsky on December 1, 1912.

[1, 2] The tenant respondent contends that the landlord herein having permitted him to remain in possession on payment of the same rent therefor paid the receiver, and the receiver having permitted him to remain in possession under his lease from Sachs, as extended by the letter of October 1, 1917, signed "Minsker Realty Company, by Louis D. Minsky," such retention of possession by him and acceptance of rent by the landlord constituted an attornment and a recognition in full of his lease from Sachs and the extension of said lease by said letter. As the evidence fails to disclose any title in said Sachs, or any title to the leasehold existing in the Minsker Realty Company on October 1, 1917, the date of said alleged letter of extension, even on the proof, improperly admitted, as to the Sachs lease and the extension thereof, the tenant respondent failed to establish any defense. It also appearing that the tenant respondent was a party defendant in the foreclosure action, he is concluded by the judgment therein as to any rights as a tenant prior to the entry of said judgment.

The order must therefore be reversed, and an order directed to be entered in favor of the landlord, with \$30 costs of appeal and in the court below. All concur.

(189 App. Div. 566)

HOLLAND v. TURNER.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. NEGLIGENCE ~~§~~44—REMOVAL OF FLOORING AND SUPPORTS FROM JOISTS IN BUILDING REPAIRS NOT NEGLIGENCE.

It is not negligence for contractor to remove flooring and side supports from joists in making alterations contracted for, where a safe passageway remains, so that he has no reason to apprehend that any one will walk on the joists.

2. NEGLIGENCE ~~§~~71—EVIDENCE SHOWING CONTRIBUTORY NEGLIGENCE.

An experienced man, who walks across joists from which flooring and side supports have been removed, instead of using a safe passageway open to him, is negligent.

Appeal from Trial Term, New York County.

Action by John Holland against Ernest M. Turner. From a judgment upon a verdict for plaintiff, and from an order denying motion for new trial, defendant appeals. Reversed, and complaint dismissed.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

Robert M. McCormick, of New York City (Joseph F. Murray, of New York City, of counsel), for appellant.

Braun & Solomon, of New York City (Louis H. Solomon, of New York City, of counsel), for respondent.

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SMITH, J. The action is brought to recover for negligence. The owner of a building, 410-416 East Sixty-Eighth street, in the borough of Manhattan, made a contract with this defendant; under which contract the defendant was to change the location of a stairway leading from the first to the second floor. This involved the necessity of cutting out some joists on the second floor about 12 feet from the head of the stairway as it theretofore existed. In the process of the work the contractor had taken off the floor boards for the space of about 12 feet to the east of the stairway. He had also taken out some small cross pieces that are used between joists for the main purpose of keeping the joists upright. Plaintiff was a plumber, also engaged under contract in the repair of this same building. He was on the second floor, and had occasion to go to the first floor. He proceeded to walk across these joists, from which the boards had been taken and from which the side supports had been taken, to the stairway, and one of the joists tipped over and fell to the floor below, causing him to fall, and thereby he sustained the injuries for which he sues.

This room in which this work was being done was sufficiently wide, so that there was abundant room south of this open space for the plaintiff to walk upon a safe floorway. In going to the stairs upon the safe path, he would have had to pass over from three to four feet of joists upon which there was no flooring, because the flooring had been taken up by the carpenter at the request of the plumber, to give him space for his pipes. In this three or four feet, however, the joists were perfectly strong, and would have furnished a perfectly safe passage for the plaintiff. After he was hurt, he was taken up to the second floor, where the office is situated, and was taken along this floorway, where, as it is indicated, he might have walked with perfect safety to reach the head of the stairs in order to descend. Instead of taking this safe path, he chose to make a short cut, and pass over joists from which the flooring had been taken up, and from which the side supports had been taken away.

[1, 2] I can find no evidence of negligence on the part of the defendant, and abundant evidence of contributory negligence on the part of the plaintiff. If this were the only pathway to the head of the stairs, and persons had occasion to go up and down the stairs, a different question might be presented; but defendant was proceeding to do just what he was engaged to do, taking down these joists in order that he might replace the stairway in a different position. He had no reason to apprehend that any one else would walk over the joists from which he had removed the flooring and the side supports, when there was another perfectly safe way by which the stairway could be reached, and the plaintiff, in walking around a building in course of repair, is bound to the exercise of the reasonable care of an experienced man, such as he was, and the proof shows his utter disregard of such precautions, which a reasonable man would have taken to avoid danger.

The judgment and order should therefore be reversed, with costs, and the complaint dismissed, with costs. The finding that the defendant was guilty of negligence and the finding that the plaintiff was free from contributory negligence are reversed. Order filed. All concur.

DINNEEN v. MARTIN.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. HUSBAND AND WIFE ⇐138(2)—NO PRESUMPTION THAT HUSBAND WAS AGENT OF WIFE.

The mere fact that wife owned premises on which work was performed under a contract raised no presumption that the husband, who executed the contract, was the agent of the wife in making the contract.

2. EVIDENCE ⇐158(15)—AS TO CONTENTS OF RECORDS, NOT BEST EVIDENCE.

Where the public records showing ownership of property were obtainable, and could have been introduced in evidence, it was reversible error to permit a witness to testify over objection as to the contents of the records.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by John J. Dinneen against Gertrude Martin. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

J. Emanuel Ankus, of New York City, for appellant.

Benjamin W. Burger, of New York City, for respondent.

GUY, J. The action is brought to recover the value of work, labor, and services alleged to have been rendered by plaintiff under a written contract entered into with one James Martin, the husband of the defendant; the respondent contending that James Martin, with whom the contract was made, was agent for his wife, the defendant.

[1, 2] The only suggestion of agency is the testimony of plaintiff's attorney that he had examined the records in the register's office, and that according to said records the defendant, at the time of the making of the contract, was the owner of premises in which the work was performed under the contract. Of course, this raises no presumption of the husband's agency. This evidence as to the contents of public records was objected to as incompetent, and an exception duly taken to the admission of the evidence. As the records were obtainable, and could have been introduced in evidence, the testimony as to their contents was incompetent, and the admission thereof constitutes reversible error. *Kain v. Larkin*, 131 N. Y. 300, 311, 30 N. E. 105.

The judgment must therefore be reversed, and a new trial ordered, with \$30 costs to appellant to abide the event. All concur.

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WESER BROS., Inc., v. OFRIO.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

SALES ~~855~~(2)—IN ACTION FOR PRICE, DEFENSE OF FRAUD SHOULD BE SPECIALLY PLEADED.

In seller's action for balance of purchase price, defense of fraud, in that seller had delivered a defective secondhand piano, instead of the new piano buyer had bought, should have been specially pleaded, and was not available under a general denial.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Weser Bros., Incorporated, against Joseph Ofrio. Judgment for defendant, and plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Irving Levine, of New York City, for appellant.

Levy & McMahon (Nathan D. Levy, of New York City, of counsel), for respondent.

PER CURIAM. The defendant in this case purchased a piano on the installment plan for the sum of \$375. Having paid but \$227 on the contract, and defaulting as to the balance, action was brought against him for the sum of \$148 in the court below. The pleadings were oral, and the answer was a general denial. Upon the trial, over plaintiff's objection, defendant was allowed to interpose the defense of fraud, in that defendant purchased a new piano, and a secondhand one, with a broken leg, was delivered. The court awarded a verdict in favor of the defendant, and from the judgment entered thereon this appeal is taken.

The defense of fraud was not available. It should have been specially pleaded. Aside from this point, however, the claim of the defendant is wholly improbable. A period of five years has almost elapsed since the piano was purchased, and during that time an action was instituted against the defendant, prior to this one, for default in the payment of installments. If the defense now urged was available, it is difficult to understand why it was not then set up. The defendant's conduct throughout is such as to cast doubt upon the merit of his claim.

Judgment reversed, with \$30 costs, and judgment directed for the plaintiff for \$148, with appropriate costs in the court below.

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WELLINS v. TOBIN.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

LANDLORD AND TENANT ~~§~~296(1)—**DEBT UNDER OLD LEASE NO GROUND FOR DISPOSSESS PROCEEDINGS UNDER NEW LEASE.**

Tenant's indebtedness under a former lease is no ground for recovery of possession held by tenant under a new lease.

Appeal from Municipal Court, Borough of the Bronx, Second District. Action by Sarah Wellins against Kathryn Tobin. From an order awarding plaintiff possession of premises for nonpayment of rent, defendant appeals. Reversed, and petition denied.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Robert L. Turk, of New York City, for appellant.

Julius D. Tobias, of New York City, for respondent.

GUY, J. The defendant tenant appeals from an order awarding the landlord possession of premises for nonpayment of rent. It appears that the relation of landlord and tenant existed between these parties for about five years prior to the commencement of this proceeding, and that under a lease from the 1st of October, 1917, to the 30th of September, 1918, the rental was at the rate of \$29 per month. On September 14, 1918, a new lease was entered into between the parties, for a term of one year to commence on September 15, 1918, and to end September 14, 1919, at \$35 per month, payable on the 15th of each month. On September 15, 1918, the defendant tenant paid to the landlord the sum of \$35, and made payments in similar amounts on October 15, November 15, and December 15, and on January 15, 1919, tendered \$35 as rent for the month beginning January 15, 1919, and ending February 15, 1919. This the landlord rejected, claiming that there was still a half month's rent due, arising out of the fact, that while the rent was payable on the 1st of each month under the old lease, which terminated on September 30, 1918, the landlord had permitted the defendant customarily to pay rent on the 15th of each month, and that, therefore, the \$35 paid on September 15, 1918, constituted a payment of a half month's rent under the old lease, and only half of the rent due under the new lease for the month beginning September 15th, and that each subsequent payment of rent up to the 15th of January still left unpaid a balance of half a month's rent.

As the rent prior to September 15, 1918, was at the rate of \$29 per month, this calculation as to the amount of rent due, if any, was clearly erroneous; but it is also clearly established by the evidence that the payments made on September 15, 1918, and on the 15th of each month thereafter, including the tender of payment on January 15, 1919, were payments of rent under the new lease, and that if any part of the rent under the old lease remained unpaid at the time of the making of the new lease, such indebtedness under the old lease could form no proper basis for a dispossession proceeding under the new lease. On the

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undisputed evidence the entire rent as due under the present lease was paid up to the 15th of January, 1919, and the full amount of rent due for the month beginning January 15, 1919, was tendered by the defendant tenant to the plaintiff landlord, and refused by said landlord.

As it appears, therefore, that there was no default in the payment of rent by the tenant to the landlord under the existing lease, the order must be reversed, with \$30 costs, and the petition denied, with costs. All concur.

SALWAY v. FRED HOLLANDER & CO.

(Supreme Court, Appellate Term, First Department. November 8, 1919.)

MASTER AND SERVANT §80(18)—IMPLIED CONTRACT OF EMPLOYMENT A JURY QUESTION.

In accountant's suit on implied contract of employment, based on requests by defendant, in conjunction with other importers, where defense was that no such request had been made, and that his services were voluntary, and were rendered by reason of his connection with one of the other importers, evidence held to create issue of fact for the jury.

Appeal from Municipal Court, Borough of Manhattan, First District. Action by William S. Salway against Fred Hollander & Co. Judgment dismissing complaint, and plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Henry Schoenherr, of New York City, for appellant.

Wesselman & Kraus, of New York City (Bertram L. Kraus, of New York City, of counsel), for respondent.

GUY, J. Plaintiff sues on an implied contract of employment based upon requests made by the defendant, in conjunction with other beer importers, to perform certain services in connection with a proposed suit for a refunding of federal taxes, which suit was subsequently brought by an association composed of the parties, who, including the defendant, made such requests, and resulted in the recovery by them of a substantial amount.

Plaintiff is a certified accountant, and had formerly been secretary of an association of beer importers, of which defendant was a member. Plaintiff testified as to various conferences at which defendant and other importers were present, and that they jointly requested him to prepare plans involving measurements and calculations of contents of barrels, the substitution of attorneys, and a visit to Washington, which was subsequently made by plaintiff at the request of defendant and the other importers, and various other services which were testified to in detail; that after part of the services were rendered he made a lump charge for services rendered up to a certain date, dividing the charge pro rata among the members of the association, and sending a bill to the defendant for its share, which bill was paid; and that, upon rendering an additional bill for the amount in suit, de-

defendant's proportionate share of the total charge for services, defendant's president promised to pay the same. Defendant denied having made any requests of plaintiff for the performance of services, or having paid for any part of plaintiff's alleged services; and defendant's witnesses testified that such services as were rendered by plaintiff were voluntary services tendered by plaintiff by reason of his connection with one of the members of the association whom he represented at the conference. This evidence created an issue of fact to be passed upon by the jury.

The judgment dismissing the complaint was therefore error, and must be reversed, and a new trial ordered, with \$30 costs to appellant to abide the event. All concur.

DEITELBAUM v. HARRISON & MEYER.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. **TROVER AND CONVERSION** ¶40(1)—**SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT.**

In action against cement contractor for conversion of tar paper, evidence *held* insufficient to sustain verdict for plaintiff.

2. **TRIAL** ¶315—**COMPROMISE VERDICT INDICATED BY NONCONFORMITY TO UNCONTRADICTED EVIDENCE.**

In action for conversion, where evidence as to quantity and value was uncontradicted and plaintiff was entitled to a verdict for the entire amount of such value or nothing, verdict for a smaller sum indicated a mistake or compromise and cannot be sustained.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Isidor Deitelbaum against Harrison & Meyer. Judgment for plaintiff on verdict of jury, and defendants appeal. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Isaac W. Goodhue, of New York City, for appellants.

Herman Turkel, of New York City, for respondent.

BIJUR, J. Defendants were sued for damages for the conversion of \$162.50 worth of tar paper. It appears that plaintiff and defendants were both engaged in doing some work upon Ward's Island; the defendants laying cement. Plaintiff's evidence in regard to the quantity and value of the paper claimed to have been converted was uncontradicted and unchallenged. The only proof, however, connecting the defendants with the transaction, was the testimony of two witnesses for the plaintiff to the effect that they found some of their paper "on Harrison & Meyer's job"; also that "Harrison & Meyer's cement was covered up with our roofing paper." This cement was also described as being in bags which lay around in various parts of the work, "scattered around over five square blocks." Although the

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statement of the conclusion of the witnesses as to the ownership of the cement by defendants was permitted to pass without objection to its competency, it was manifestly the mere statement of the witnesses' conclusion, or it might be more accurate to say, guess.

On the other hand, defendants proved without contradiction or, indeed, any impairment of the truth and accuracy of their testimony, that so far as they used tar paper at all it was of an entirely different weight from that made or used by the plaintiff, and that they had practically no cement stored at Ward's Island during the period covered by the complaint, that they purchased such cement as they needed from day to day from the general contractor who had a store of cement on the premises, and that the total of cement which they had on hand at any time amounted to but a negligible fraction of the quantity alleged to have been seen by plaintiff's witnesses covered with the plaintiff's paper.

[1, 2] It is difficult to conceive of a sustainable verdict in plaintiff's favor on these facts, and it is quite evident from the amount of the jury's verdict, namely, \$66, that it was not arrived at on the theory that plaintiff had proven his case, but by reason of some mistake or compromise; for plaintiff was, as the jury must have realized, entitled to \$162.50 or nothing.

Judgment reversed, and new trial granted, with \$30 costs to appellant to abide the event. All concur.

UPRIGHT CO. v. DELSON.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. LANDLORD AND TENANT §157(6)—IMPROVEMENTS BY TENANT NOT AFFECTING RENT.

Tenant could not deduct from rent for month the cost of a door installed for her own convenience without landlord's consent.

2. ACCORD AND SATISFACTION §11(2)—NOT CREATED BY RETENTION OF CHECK BY LANDLORD.

Where tenant for her own convenience and without consent of landlord installed a door, the use by the landlord of a check sent by the tenant in a letter stating that the cost of the door was deducted from "this month's rent" would not amount to accord and satisfaction, even if the check had indorsed on it when received a statement that it was in payment for month's rent.

3. LANDLORD AND TENANT §194(2)—SURRENDER OF LEASE AND ACCEPTANCE BY LANDLORD.

Though tenant left premises without giving the landlord the key, or indicating that she intended to surrender lease expiring in a month, where the landlord on the day following procured a key and entered into possession, and within a few days thereafter gave possession to a new tenant, held there could be no recovery of rent for the last month covered by the lease.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Upright Company against Max Delson. From a judgment for plaintiff, defendant appeals. Modified, and, as modified, affirmed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Julius G. Kremer, of New York City, for appellant.

Leo Levy, of New York City (L. B. Dribben, of New York City, of counsel), for respondent.

DELEHANTY, J. The plaintiff has recovered a judgment for the sum of \$70 based upon two causes of action. The defendant had a written lease from the plaintiff of an apartment expiring October 1, 1918. The rent reserved in the lease was \$50 per month, payable in advance on the 1st day of every month. The landlord sued for a balance due of \$20 for the month of August and \$50 for the month of September.

On August 15, 1918, the tenant sent a letter to plaintiff, in which she stated that she had put into the apartment a French door at an expense of \$20, and said:

"In view of the fact that I now desire to terminate my lease, and as I have no further need of this door, I deduct amount from this month's rent."

This letter was accompanied by the defendant's check for \$30, payable to the plaintiff, which he deposited, and used the proceeds. Upon this showing the court below allowed plaintiff's claim of \$20 for the balance of rent for the month of August. This was correct.

[1, 2] Plaintiff had given no authority to the defendant to install the door, and the amount of rent was due and not disputed. The tenant could not render the landlord liable for the expense of additions to the demised premises made by her for her own convenience and without the consent of the landlord. Otherwise, she might have remodeled or made additions to the apartment to any extent desired, and thereby extinguished the rent for the entire term. The use of the check was not an accord and satisfaction, under such circumstances, of the entire claim. The cases cited by the appellant do not in any way support his contention that the rent was paid by the acceptance of the check, even assuming that the check had indorsed upon it, when received by the landlord, a statement that it was in payment for the rent of August, of which there is some doubt.

[3] As to plaintiff's cause of action for September rent, the testimony shows that the defendant left the premises about August 31st, locking up the apartment and keeping the key, and in no way indicating to the plaintiff that she intended to surrender them, except the desire expressed in her letter of August 15, 1918. The landlord, on or about September 1st, procured a key made, and entered into possession of the apartment, and on September 10th gave possession to a new tenant, and stated to her that she might occupy them rent free for the month of September. He attempts to excuse this entry by a claim that the lease gave authority to enter for the purpose of making repairs; but such entry is limited by the lease to make "necessary re-

pairs," and there is nothing to show what repairs were made, if any, and if any were necessary. Under such circumstances it is clear that there was such an acceptance and occupation of the demised premises by the landlord as precludes him from recovering rent for the month of September, 1918.

Judgment modified, by reducing the amount of recovery in the court below to \$20 and appropriate costs, and, as modified, affirmed, with \$20 costs to appellant to be offset against the judgment. All concur.

ESTATIO v. O'HARA.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

APPEAL AND ERROR §977(3)—REVIEW OF ORDER GRANTING NEW TRIAL.

An order granting a new trial will not be interfered with on appeal, where no abuse of discretion or violation of any statute is shown.

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Paul Estatio against Frank O'Hara. From an order setting aside a judgment in favor of plaintiff, and granting a new trial, plaintiff appeals. Affirmed.

See, also, 174 N. Y. Supp. 608.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Matthew M. Black, of Brooklyn, for appellant.

James I. Moore, of New York City, for respondent.

PER CURIAM. We see no abuse of discretion or violation of any statute in the action of the court below in setting aside the verdict herein and ordering a new trial before a jury of six men, and the order must therefore be affirmed.

Order affirmed, with \$10 costs.

SIEGEL v. MARYLAND CASUALTY CO.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. CORPORATIONS §617(1)—ASSIGNMENT OF CAUSE OF ACTION DURING SUSPENSION OF POWERS INVALID.

Where the corporate rights of a corporation were suspended by the California Corporate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371), an assignment of a cause of action during the suspension was invalid, and the assignee could not recover thereon.

2. CORPORATIONS §618(2)—PROCLAMATION BY GOVERNOR UNNECESSARY FOR SUSPENSION OF RIGHTS.

A proclamation by the Governor of California was not necessary to render operative a suspension of corporate rights under the California Corporate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371).

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3. CORPORATIONS $\S$ 691—EFFECT IN OTHER STATES OF SUSPENSION OF RIGHTS.

A suspension of corporate rights in California under the California Corporate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371), is operative in New York, so as to prevent an action by an assignee of a cause of action, although no decree has been entered in New York making the suspension operative there.

4. CORPORATIONS $\S$ 619—POWERS OF OFFICERS DURING SUSPENSION OF RIGHTS.

The California statute permitting directors or managers of corporations which have been subjected to forfeiture to have full power as trustees to settle the affairs of the corporation, etc., has no application to a corporation whose rights have been suspended under the California Corporate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371).

5. CORPORATIONS $\S$ 619—RIGHTS OF OFFICERS DURING SUSPENSION OF POWERS.

Assuming that the California statute, permitting directors or managers of a corporation subjected to forfeiture to have full powers as trustees to settle the affairs of the corporation, applied to a corporation whose rights were suspended under the California Corporate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371), an assignment of a cause of action purporting to be made by the corporation itself would not be valid.

6. CORPORATIONS $\S$ 617(1)—ESTOPPEL AS AGAINST CORPORATION WHOSE RIGHTS ARE SUSPENDED.

The principle of estoppel cannot be applied against a corporation which has undertaken to perform an act after its corporate powers have been suspended, and hence its assignee is not estopped.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Julius E. Siegel against the Maryland Casualty Company. From a judgment for plaintiff, entered upon verdict of a jury, defendant appeals. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Smith, Heymsfeld & Weiss, of New York City (David T. Smith and Nicholas A. Heymsfeld, both of New York City, of counsel), for appellant.

Jesse S. Epstein, of New York City (Arthur J. Brothers, of Brooklyn, of counsel), for respondent.

BIJUR, J. It is unnecessary to discuss a number of points which have been raised by the appellant on this appeal, because its contention in respect of the invalidity of the assignment of the cause of action by the J. Nossen Bag Company, Incorporated, a California corporation, to the plaintiff, is manifestly sound. The defendant appellant pleaded and proved a California statute known as the Corporate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371), providing in substance that for failure to pay a license tax the corporate rights, privileges, and powers of the corporation shall be suspended, except to execute and deliver certain deeds "and to defend in court any action brought against such corporation." It also proved by competent evidence that the J. Nossen Bag Company, Incorporated, had been "suspended" as of March 2, 1918.

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[1-8] Respondent's contention that the evidence of suspension is insufficient, because no proclamation by the Governor had been proven, citing Kehrlein, etc., Co. v. Rapken, 30 Cal. App. 11, 156 Pac. 972, is entirely inapplicable, because that case refers to the statute of 1908, which evidently provided for such proclamation, whereas the defense pleaded is based upon the statute of 1917. Respondent also claims that the suspension is inoperative in this state until some decree is entered here, citing Hammond v. National Life Association, 58 App. Div. 453, 69 N. Y. Supp. 585. That case, however, is concerned with a situation so entirely different as to have no bearing at all. Moreover, respondent is unable to suggest what possible decree could be entered to affect the premises.

Finally, it is urged by respondent that a California statute—not put in evidence—permits the directors or managers of a corporation which has been subjected to forfeiture to have full power as trustees to settle the affairs of the corporation, etc. As the instant case does not deal with the situation of a corporation whose rights have been forfeited, the statute is plainly inapplicable; but, if it were, the assignment does not pretend to have been made by the directors or managers acting as trustees, but by the corporation itself. The same reasoning applies to the further argument that, "the assignor being estopped by its assignment from subsequently asserting its claim, the defendant appellant cannot further question the validity of the assignment." Respondent does not explain how the principle of estoppel can be applied against a corporation which has undertaken to perform an act after its corporate powers have been suspended.

Judgment reversed, and a new trial granted, with \$30 costs to appellant to abide event. All concur.

AMERICAN PACKING HOUSE ENGINEERING CO. v. EHRlich.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

WORK AND LABOR §14(2)—RIGHT TO RECOVER REASONABLE VALUE OF SERVICES.

Under contract whereby plaintiff was to provide preliminary sketches for an abattoir for 1 per cent. of the lowest bid, and, if defendant decided to build, plaintiff was to receive 4 per cent. for engineering and architectural services, including plans, where plaintiff's further work, after preparation of preliminary sketches, was prevented by defendant's decision not to build, plaintiff is entitled to recover reasonable value of services subsequent to preparation of sketches and prior to defendant's final decision not to build.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the American Packing House Engineering Company against Jacob M. Ehrlich. From a judgment for plaintiff, awarding

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less relief than demanded, after trial by a judge without a jury, plaintiff appeals. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Stover, Hall, Cunningham & Bevier, of New York City (John H. Jackson, of New York City, of counsel), for appellant.

Emanuel Schwartz, of New York City (George Wolf, of New York City, of counsel), for respondent.

BIJUR, J. Plaintiff sued for the "agreed price and reasonable value" of services rendered. It developed without contradiction that on February 6th the parties entered into an agreement, expressed in writing, whereunder plaintiff agreed to make "preliminary sketches" for the building of an abattoir for the defendant for 1 per cent. of the lowest bid and "preliminary sketches" for a rendering plant for $1\frac{1}{2}$ per cent. of the lowest bid. Thereupon defendant was to have the option of going ahead with the building or not. If he decided to proceed, plaintiff was to receive 4 per cent. "for the entire engineering and architectural services," which was to include "plans to the building department" and further services. The remaining provisions of the contract are immaterial. As no claim was made by plaintiff in regard to the rendering plant, that also may be omitted from consideration.

Plaintiff testified that it prepared and delivered the "preliminary sketches" for the abattoir, and that at defendant's express request it also prepared and delivered "plans" for the abattoir, obtained bids thereon, and did some other incidental work, and then defendant determined not to build. The preparation, delivery, and receipt of the "plans" by the defendant and the obtaining of bids by plaintiff are admitted. It is conceded that the judgment awarded plaintiff covered only his services for preparing the "preliminary sketches" for the abattoir.

Although at one point in his testimony plaintiff's witness explained the difference between "preliminary sketches" and "plans," these two terms were constantly confounded in the course of his examination and cross-examination, and certainly no careful distinction was drawn between them during the entire course of the trial. This confusion quite naturally led the trial judge into an erroneous decision.

The contract, as pointed out above (and limiting the discussion solely to the abattoir), provided that the plaintiff was to receive 1 per cent. for preparing the "preliminary sketches," which would be the limit of its compensation if defendant determined at that point not to proceed with the building. When defendant either ordered plaintiff to proceed with the "plans" or permitted it to proceed with their preparation, and received them from it, and further permitted it to solicit bids and do other work preliminary to the actual work of construction the second factor of plaintiff's compensation was called into existence. Since it is established that plaintiff's further work was prevented by defendant's decision at that point not to build, plaintiff has elected to ask only for the reasonable value of its services subsequent to the prepara-

tion of the "preliminary sketches," as to which he gave competent evidence, and was entitled to recover the amount found to be reasonable.

Judgment reversed, and new trial granted, with \$30 costs to appellant to abide the event. All concur.

MIGHTOM v. MILLER.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

LANDLORD AND TENANT §125(1), 171(3)—ABANDONMENT OF PREMISES FOR PRESENCE OF VERMIN.

Where the tenant's family was annoyed by bugs, but only two were found, and the landlord sent a vermin exterminator, who found two, and after his visits one was found, the tenant was not justified in abandoning the premises, and had no right of action for breach of implied warranty of tenantability.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Joseph S. Michtom against Joseph Miller. From a judgment for plaintiff, defendant appeals. Reversed, and complaint dismissed, and judgment directed for defendant on his counterclaim.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Hirsh, Newman & Reass, of Brooklyn (Benjamin Reass, of New York City, of counsel), for appellant.

Lippman & Sachs, of New York City (Nathan I. Sachs, of New York City, of counsel), for respondent.

GUY, J. The plaintiff, tenant of a seashore bungalow, sues to recover damages for constructive eviction. Defendant counterclaimed for rent under the lease, and the court after trial dismissed the counterclaim, and gave judgment to the tenant for \$268, being the amount of the rent and water fee paid by the tenant, together with \$100 damages; the last-named sum being apparently the difference between the rental value as testified and the rent reserved.

The bungalow was let furnished, and the lease was made March 15, 1919, for the season of 1919, to commence on the 1st day of June, and to end on the 1st day of October. The tenant paid the first installment of rent, \$108.34, and also the water fee, and moved into the premises on May 17th. On June 3d he abandoned possession, moving to another neighboring bungalow.

It appears from the testimony introduced by plaintiff that on the first night of occupancy he and his family were disturbed by what they claim to be bugs, and that upon investigation they found two bugs; that complaint was made to the landlord on the following morning, and the latter immediately sent an exterminator to the bungalow, and the exterminator in the course of his treatment and investigation found

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two bugs; that for a day or two after the exterminator's visit things seemed all right, "and then conditions started up all over again"; that the exterminator made a second visit about a week afterwards, and sprayed the bungalow, and a bug was then found on the baby's blanket; that in the interval between the visits of the exterminator the tenant's family used a bug killer and aired the bedding every day. On June 3d they left the premises.

It was also testified in behalf of the tenant that "larva" was found on the beaver boards inside of the bungalow and that blood stains were on the linens. The tenant furnished the blankets, sheets, and pillows. He stated that after leaving the demised premises he took possession of a larger bungalow in the neighborhood, and that the new abode accommodated, not only the tenant's family, but also his wife's father and mother.

The landlord testified that he had never received any complaint from any one about bedbugs being on the premises; that after letting the bungalow he had the place thoroughly painted and cleaned; that upon complaint being made by the plaintiff he furnished an exterminator; and he also testified that upon the abandonment of the premises he examined them and found no bugs there, in which regard his testimony was corroborated by several other witnesses.

Although the tenant and his family were subjected to annoyance by the presence of bugs, it is clear that he failed to prove a condition justifying an abandonment of the premises, or which gave him a right of action against the landlord for breach of the implied warranty of tenantability. *Morgenthau v. Ehrich*, 77 Misc. Rep. 139, 136 N. Y. Supp. 140.

Judgment reversed, and complaint dismissed, with \$30 costs to the appellant, and judgment directed in favor of the defendant on his counterclaim for \$108.33, with interest and appropriate costs in the court below. All concur.

QUATTROCCHI v. FRANKEL et al.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

PAYMENT $\Leftrightarrow$ 30—CREDITING GOODS ON EXISTING INDEBTEDNESS.

Where seller agreed that buyers should apply goods toward his indebtedness to buyers, buyers, by applying and crediting the goods received towards the payment of seller's account, liquidated the debt for such goods, as much so as if amount of purchase price had been paid in cash.

BIJUR, J., dissenting.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Joseph Quattrocchi against Joseph Frankel and others. Judgment for plaintiff, after trial by court without a jury, and defendants appeal. Reversed, and complaint dismissed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

David J. Gladstone, of New York City, for appellants.
Isadore Shapiro, of New York City, for respondent.

DELEHANTY, J. The parties to this action were engaged in the business of buying and selling beads. Plaintiff concedes that he obtained goods from the defendants, first, on the 26th day of December, 1918, of the agreed value of \$278.90; and, secondly, on the 16th day of January 1919, of the agreed value of \$181.04, making a total of \$459.94. It is conceded on the part of the defendants that they purchased goods from the plaintiff on the 9th day of January, 1919, in the sum of \$117.50. Defendants thereafter instituted an action to recover for the goods delivered by them; the amount sought to be recovered being the difference in value between the goods delivered by the defendants to the plaintiff and the goods delivered by the plaintiff to defendants. Upon the trial of that action the present plaintiff, who at the time of the transaction in question was 20 years of age, set up a plea of infancy, and upon that ground a judgment was rendered against these defendants. Plaintiff thereupon instituted this action to recover for the goods delivered by him to the defendants, and the answer consisted of a general denial, offset, accord and satisfaction, and payment. The court below has awarded judgment in favor of the plaintiff for the full amount.

It is repugnant to the sense of justice and fair dealing that upon the facts presented plaintiff should be allowed to recover herein. However, the credible testimony in the case clearly establishes that at the time the plaintiff delivered the goods to the defendants he agreed that the same should be applied towards the indebtedness which at that time was owing by him to the defendants, and that the defendants accordingly applied and credited the goods received towards the payment of plaintiff's account. So far, therefore, as that transaction is concerned, it must be regarded in the sense of an executed contract. The debt was liquidated thereby, as much so as if the amount of the purchase price had been paid in cash. *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703; *Lown v. Spoon*, 158 App. Div. 900, 143 N. Y. Supp. 275; *Pecararo v. Pecararo*, 84 N. Y. Supp. 581.

Judgment reversed, with \$30 costs, and complaint dismissed, with appropriate costs in the court below.

GUY, J., concurs.

BIJUR, J., dissents.

SCHWARTZ et al. v. BEDELL, Inc.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. SALES §179(1)—LIABILITY OF BUYER RETAINING GOODS.

Buyer, who retains goods, is liable for purchase price thereof.

2. SALES §372—ACCEPTANCE BY SELLER OF RETURNED GOODS.

Seller, having accepted goods returned by buyer, and having issued its credit memorandum therefor without complaint, cannot recover damages for buyer's refusal to accept the goods.

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Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Morris Schwartz and another against Bedell, Incorporated. Judgment for plaintiffs, and defendant appeals. Affirmed, as modified.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Claude V. Pallister, of New York City (Frank R. Greene, of New York City, of counsel), for appellants.

Levy, Hamburger & Pelikan, of New York City (Simon S. Hamburger, of New York City, of counsel), for respondents.

PER CURIAM. [1, 2] Defendant, having retained three of the waists, is liable for the purchase price thereof, namely, \$8. The balance of plaintiffs' claim is untenable. Having accepted the return of the goods as repacked by the defendant, and having then issued a credit memorandum therefor without complaint, the court below was not authorized to award damages in excess of the amount above mentioned.

Judgment modified, by reducing the same to the sum of \$8, with appropriate costs in the court below, and, as modified, affirmed, without costs on appeal.

(109 Misc. Rep. 170)

HOFFMAN et al. v. HARRY GREENBERG CO., Inc.

Supreme Court, Appellate Term, First Department, November 6, 1919.)

1. ARBITRATION AND AWARD §57—AWARD DEFECTIVE IN NOT REFERRING TO COUNTERCLAIM PLEADED.

Award of arbitrator in arbitration, under Municipal Court rules, should show upon its face that arbitrator has decided all issues submitted to him, and, where counterclaim has been interposed, should show disposition thereof, so as to preclude any future litigation by either party involving the same matters.

2. ARBITRATION AND AWARD §57—THE WORD "CONTROVERSY," IN AWARD INSUFFICIENT TO SHOW CONSIDERATION OF COUNTERCLAIM PLEADED.

Where defendant had interposed counterclaim, award of arbitrator in arbitration under Municipal Court rules that "I have heard the parties to said controversy * * * and decide that * * * [plaintiffs] are entitled to receive" certain sum from defendants *held* defective, under Code Civ. Proc. § 2374, subd. 4, being silent as to counterclaim; the word "controversy" being insufficient to give rise to inference that counterclaim was passed on.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Controversy.]

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Nathan Hoffman and others against the Harry Greenberg Company, Incorporated. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Julius J. Michael, of New York City, for respondents.
Morris Weintraub, of New York City, for respondent.

DELEHANTY, J. After issue had been joined in this action, the oral pleadings having been amplified by bills of particulars furnished by each side, the parties signed an agreement to submit their controversy to an arbitrator. The complaint and plaintiff's bill of particulars set forth a cause of action for work, labor, and services, and also claimed damages by reason of defendant's refusal to furnish plaintiffs with sufficient material and trimming to complete a certain number of garments delivered to them for manufacture for the defendants. The defense was a general denial and a counterclaim for overcharges made by plaintiff and the value of garments which plaintiff failed to deliver to defendant and claimed a judgment for \$1,000.

The arbitration was agreed to under the rules of the Municipal Court, which provide that, when a consent to arbitrate shall have been signed by the parties and filed with the clerk of the court, an arbitrator shall be appointed by the justice. These rules also provide that the arbitrator shall not be bound by the rules of evidence, but may receive such testimony as shall seem to him just and proper, and that no record of the proceedings shall be kept. When the award is made, it shall be filed with the clerk, who shall enter judgment thereon, provided the award is filed within 30 days after submission, unless both parties file a request in writing not to enter judgment. The consent of the parties herein recites that the parties designate _____ as arbitrator to hear and determine the following "controversy existing between us, namely, as per bills of particulars and pleadings filed in an action," etc. The arbitrator filed an award in which he states that:

"I have heard the parties to said controversy, and the evidence submitted by them, and find and decide that the plaintiff * * * is entitled to receive from the defendant * * * the sum of \$457.60."

This award was filed on July 24, 1919, and on July 29, 1919, judgment was duly entered thereon in the Municipal Court. The defendant then moved to vacate such judgment, upon the ground that the award shows upon its face that the arbitrator failed to decide the issues submitted to him, "in that he failed to make any disposition of the counterclaim interposed by the defendant herein." This motion was denied, and from the judgment the defendant appeals, bringing up for review the above-mentioned order.

[1] I think this judgment should be reversed. The arbitration provided for by the Municipal Court rules contemplate a submission by the parties of all their differences, to the end that there may be an equitable disposition thereof, and a final determination of the same, and future litigation prevented. The award should be so definite and certain as to preclude any future litigation by either party involving the same matters. This method of disposing of disputes practically prevents appeals from any judgment entered thereon, as no rules are observed and, no record being kept, no appeal could be successfully sustained. The statute now applicable to the Municipal Court (sec-

tion 2374, subd. 4, C. C. P.) provides that the award must be "a mutual, final and definite award, upon the subject matter submitted."

[2] Clearly the award in the instant case is defective, in that it is silent as to the counterclaim which was a part of the subject-matter submitted. Whether or not the entire "controversy" was passed upon by the arbitrator cannot be determined by a recourse to the language of the award. The award would afford no protection to the plaintiff in an action that might be hereafter brought for the same cause of action set up in the counterclaim. It is idle to argue that the word "controversy," as used in the award, implies that the counterclaim was considered and passed upon. There would be a controversy, if only a general denial had been interposed, and for all that appears that portion of the controversy is all that was heard by the arbitrator. If there was a record before this court from which it could be "fairly inferred" that the arbitrator had "passed upon the issues," as was the case in *Rosenberg v. Aldhaus* (Sup.) 132 N. Y. Supp. 369, another situation would present itself. But there is none, and the plain language of the statute should not be disregarded, and an uncertain construction of the language used in the award be substituted therefor.

Judgment reversed, and new trial ordered, with \$30 costs to appellant to abide the event. All concur.

ROTHENBERG v. HARTMAN.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

MASTER AND SERVANT §—302(6)—OWNER NOT LIABLE FOR NEGLIGENCE OF CHAUFFEUR USING CAR FOR OWN PLEASURE.

An automobile owner is not liable to one run down by it while used by the driver for his own business and pleasure, in disobedience of the owner's explicit instructions, though he hired the driver without investigating the false assertion that he was a licensed chauffeur.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Elias Rothenberg against William Hartman. Judgment for plaintiff, and defendant appeals. Reversed, and complaint dismissed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

J. Arthur Hilton, of New York City, for appellant.

Reisfeld & Cymberg, of New York City (Isidor Enselman, of New York City, of counsel), for respondent.

GUY, J. Plaintiff has recovered damages for personal injuries caused by being knocked down by an automobile, which automobile was, at the time of the accident, owned by the defendant appellant. The undisputed testimony shows, however, that at the time of the accident the driver of the automobile was running it solely for his own

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business and pleasure, without the defendant's knowledge or consent, and in disobedience of explicit instructions given to him by the defendant.

The driver was employed as chauffeur by the defendant the evening before the accident, and at the time of said employment the driver told the defendant he was a licensed chauffeur. As a matter of fact this was not true. The learned trial justice, however, held that it appeared that the chauffeur, at the time he was employed by the defendant, was 19 years of age, and there was no evidence that he was a licensed chauffeur, except his statement to the defendant; that the defendant should therefore have made investigation of the fact, and his failure to do so made him liable for the chauffeur's negligence, even though at the time of the accident he was not acting within the scope of his employment. In so ruling the learned trial judge erred. While the employment of the driver without full inquiry as to his being a licensed chauffeur, as required by the statute, might constitute negligence on the part of the employer for all acts of the chauffeur within the line of his employment and in the performance of all acts authorized by the defendant, it would not charge defendant with liability for acts committed by the chauffeur outside of his employment and without the authorization of the defendant.

Judgment must therefore be reversed; with \$30 costs, and the complaint dismissed, with costs. All concur.

CARUANA v. PRUDENTIAL SPICE CO., Inc.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. CONTRACTS ⇐72—SUFFICIENCY OF CONSIDERATION.

While the abandonment of a colorable claim advanced by one party is consideration for the reciprocal promise by another, the claim must at least be colorable.

2. SALES ⇐89—CONSIDERATION FOR MODIFICATION OF CONTRACT.

Where defendant purchased from plaintiff's principal goods to be shipped from Spain, the written contract of sale providing that cost, insurance, and freight were included in the price, held that, where plaintiff stated that his principal had been put to delay and expense by reason of war conditions, and compelled to pay out a considerable sum of money, and that plaintiff would not deliver the goods or documents of title unless defendant agreed to bear half of the expense, there was no consideration for defendant's promise to bear half of such expense, and plaintiff could not recover, where defendant, who gave a check for the amount, stopped payment after obtaining the documents of title.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Joseph Caruana against the Prudential Spice Company, Incorporated. From a judgment for plaintiff entered upon verdict of jury, defendant appeals. Reversed, and verdict directed for defendant.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Bernard Fliashnick, of New York City, for appellant.
James F. Carroll, of New York City, for respondent.

BIJUR, J. Defendant had purchased from plaintiff's principal certain goods to be shipped from Spain at an agreed value of some \$1,700, and the written contract of sale provided that cost, insurance, and freight were included in the price, the goods to be delivered in New York. When they arrived, plaintiff called on defendant, and told him that his principal in Spain had been put to some delay and expense by reason of war conditions which had compelled him to pay out some \$440, and that plaintiff would not deliver the goods or documents of title to defendant, unless he would pay half of that amount. Thereupon defendant drew his check to plaintiff's order for \$220, marking it with the words "Paid under protest." As soon as he obtained the documents, he stopped payment on the check, and plaintiff brought suit thereon.

[1, 2] It is quite plain that the check was without consideration, and a verdict in defendant's favor should have been directed as duly requested. While it is quite true that the abandonment of even a colorable claim advanced by one party is consideration for the reciprocal promise of the other, the claim must at least be colorable. *White v. Hoyt*, 73 N. Y. 505, 514; *Springstead v. Nees*, 125 App. Div. 230, 232, 109 N. Y. Supp. 148; *Eysaman v. Nelson*, 79 Misc. Rep. 304, 340, 140 N. Y. Supp. 183. In the instant case there was not even a claim advanced against defendant, colorable or otherwise. The best that respondent's counsel can say in justification of the demand was that the contract did not require plaintiff to pay for these expenses in Spain, which are alluded to as "demurrage." There may doubtless be many other expenses which plaintiff's principal may have had in Spain, either in connection with this contract or any other matter; but there is not the slightest suggestion anywhere why defendant should be bound to reimburse him therefor, nor why any one should have expected him to do so.

Judgment reversed, and verdict directed in favor of defendant, with \$30 costs of this appeal and in the court below. All concur.

(189 App. Div. 49)

RYAN v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Third Department. September 18, 1919.)

MASTER AND SERVANT §364—THE WORD "EMPLOYER," IN WORKMEN'S COMPENSATION ACT, INCLUDES CITY, AND "EMPLOYÉ" CERTAIN SERVANTS.

Claim for injuries received by patrolman of New York City while removing a bulb from an electric fixture in ceiling of police station, work detailed to him by his superior officer, comes within Workmen's Compensation Law, § 2, groups 42, 44; the term "employer" including (section 3, subds. 3, 4) a municipal corporation, and the term "employé" meaning a person engaged in one of the occupations enumerated in section 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Employer.]

Henry T. Kellogg and Cochrane, JJ., dissenting.

⇒ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from State Industrial Commission.

Claim for compensation under the Workmen's Compensation Law by Cornelius Ryan, opposed by the City of New York. From an award of the State Industrial Commission, the City appeals. Affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

William P. Burr, Corp. Counsel, of New York City (Terence Farley, William E. C. Mayer, and Isaac F. Cohen, all of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

LYON, J. The question presented by this appeal is whether this claim comes within the provisions of the Workmen's Compensation Law (Consol. Laws, c. 67). The claimant was a patrolman of the city of New York. He was injured June 11, 1918, by falling from a box to the concrete cellar floor while removing a bulb from the electrical fixture in the ceiling of the station house. His right wrist and shoulder were sprained. He was removed to the Fordham Hospital, and there confined from June 19th to July 6th. He was assigned as attendant October 16, 1917. His duties were to care for the prisoners who were brought to the Thirty-Seventh Precinct station house, and to take charge of the lower floor, clean the walls and the floor, and fix the electric lights. He worked seven days of the week. An award was made him by the commission for three weeks and four days at \$15 per week. From such award the city appeals.

Section 2 specifies what are hazardous employments and subdivides them into groups. Group 42 provides that the maintenance and care of buildings, sanitary lighting or heating, installation or repair, are hazardous employments. Group 43 provides that any employment enumerated in the foregoing groups and carried on by the state or a municipal corporation, or other subdivision thereof, notwithstanding the definition of the term "employment" in subdivision 5 of section 3 of this chapter, is a hazardous employment. It may be noted, as bearing upon the intention of the Legislature as to the construction to be given to the act, that group 44 provides "employment as a keeper, guard * * * or orderly, in a prison, reformatory, * * * maintained or operated by the state or municipal corporation or other subdivision thereof," notwithstanding the definition of the term "employment," "employer," or "employee" in subdivisions 3, 4, and 5 of section 3 of this chapter, is a hazardous employment.

By section 3, subds. 3 and 4, the word "employer" includes a state and a municipal corporation, or other political subdivision thereof, employing workmen in hazardous employments, and the term "employee" means a person engaged in one of the occupations enumerated in section 2. Having been detailed by his superior officer to care for and maintain the station house, and to look after the installation or repair of the electric lighting system, he comes within the definition of an employee under the law. He has not received any pay for his time while laid up from his injury, although he had made application there-

for. Had he received pay, and that fact have been interposed as a defense, it would be proper for us to inquire what effect, if any, it had upon his right to receive compensation. We think it was the intention of the Legislature, in the enactment of the Workmen's Compensation Law, and the amendments thereto, to impose upon municipal corporations liability thereunder for accidental injuries sustained by persons employed by them, who have been detailed by their superiors to perform work designated as one of the hazardous employments, to the same extent that an individual employer is liable.

The award should be affirmed. All concur, except

HENRY T. KELLOGG, J. (dissenting). No other person than an employer is required to pay or provide compensation to an injured employé. Consequently, even though the claimant at the time of his injury was engaged in a hazardous occupation, he could have no compensation at the hands of the city of New York, unless that city was his employer. If a police officer, or other officer of a city or state, is guilty of negligence in the performance of governmental duties, no liability attaches to the city or state. The reason is that the police or other officer is not the employé of a city or a state regarded as corporations, but is rather the representative of the unorganized public, a part of the sovereign power of which he is engaged in exercising. Indeed, he is not in the ordinary sense either an employé or an agent of any person or body, except as all public officers are the servants of the public. This theory is so thoroughly exposed in the leading case of *Maxmilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468, that it seems unnecessary to enlarge upon the subject further than to make therefrom the following quotation:

"Where the duties which are imposed upon municipalities are of the latter class [governmental], they are generally to be performed by officers who, though deriving their appointment from the corporation itself, through the nomination of some of its executive agents, by a power devolved thereon as a convenient mode of exercising a function of government, are yet the officers, and hence the servants, of the public at large. They have powers and perform duties for the benefit of all the citizens, and are not under the control of the municipality which has no benefit in its corporate capacity from the performance thereof. They are not then the agents or servants of the municipal corporation, but are public officers, agents or servants of the public at large, and the corporation is not responsible for their acts or omissions, nor for the acts or omissions of the subordinates by them appointed. *Fisher v. Boston*, 104 Mass. 87 [8 Am. Rep. 196]. And where a municipal corporation elects or appoints an officer, in obedience to an act of the Legislature, to perform a public service, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable."

The claimant was a police officer of the city of New York, who at the time of the accident was acting as an attendant at a police station in that city. It was his duty to take care of the prisoners, to clean the walls and floors of the station house, and to repair the electric lights therein. The maintenance and care of a police station is an exclusively governmental function, so that every branch of the work which the claimant was called upon to perform was of a strictly governmental

character. *Wilcox v. City of Rochester*, 190 N. Y. 137, 82 N. E. 1119, 17 L. R. A. (N. S.) 741, 13 Ann. Cas. 759. In that case the court, writing through Willard Bartlett, J., said:

"The question which confronts us, on the branch of this appeal now under consideration, is whether the duty exercised by the city of Rochester, under the general statutes relating to cities of the second class, of maintaining and caring for a police station, is a governmental duty appertaining to the general administration of the state or a duty imposed and undertaken for the benefit of the municipality as a corporate body."

The court then proceeded to answer in the affirmative the first question thus propounded. It follows, under the authorities cited, that the relationship of master and servant did not exist between the city of New York and the claimant; that the latter was not in the employ of the former; therefore, that an award of compensation against the appellant in favor of the respondent should not have been made.

I favor a reversal of the award and a dismissal of the claim.

COCHRANE, J., concurs.

(189 App. Div. 250)

AVERETT v. AVERETT.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. DIVORCE ~~§~~130—EVIDENCE INSUFFICIENT TO SUSTAIN JUDGMENT OF SEPARATION FOR CRUELTY.

In wife's action for separation on ground of cruel and inhuman treatment, evidence, though sufficient to show strained relations, causing bitterness and quarreling, *held* insufficient to justify judgment of separation, under the statute.

2. DIVORCE ~~§~~34—SEPARATION FOR INCOMPATIBILITY DENIED.

The fact that incompatibility exists, and that a husband and wife find it impossible to live in harmony, does not meet the requirements for a judicial separation fixed by the statute.

3. DIVORCE ~~§~~125—TESTIMONY OF WIFE AIDED BY HUSBAND'S ADMISSIONS.

In wife's action for separation, where the entire proof rests practically upon the testimony of a wife, it will be deemed sufficient, where the defendant partially admits some of the accusations.

4. WITNESSES ~~§~~405(2)—CONTRADICTING AS TO IMMATERIAL MATTER.

In wife's action for separation on ground of cruel and inhuman treatment it was error to allow evidence to contradict husband's denial of his alleged assault on the wife after action had commenced; the denial being of an immaterial and irrelevant fact.

Page and Merrell, JJ., dissenting.

Appeal from Special Term, New York County.

Action by Birdie Averett against Abraham M. Averett. Judgment for plaintiff, entered on decision after trial at Special Term, and defendant appeals. Reversed, and new trial granted.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

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Myers, Kutner & Schuhmann, of New York City (Nathan Ottinger, of New York City, of counsel, and I. Maurice Wormser, of New York City, on the brief), for appellant.

Max D. Steuer, of New York City, for respondent.

PHILBIN, J. The defendant appeals from a judgment rendered against him in an action brought by his wife for separation. The complaint, among other things, alleges cruel and inhuman treatment, such as to render it unsafe and improper for plaintiff to cohabit with defendant. It is alleged that he called her low names, and used vile and violent language to her; that he humiliated her in the presence of her family and friends; that he refused to associate with her, made slanderous statements concerning her, and stated she was a vile woman and unfit to take care of their child; that plaintiff was in the habit of visiting disorderly houses for the purpose of prostitution. It is further stated that defendant, on December 21, 1917, and at various times, struck plaintiff. Other allegations as to the financial condition and resources of the defendant are made. The answer denies all the material allegations above described.

[1] There is sufficient proof to show that the relations between the parties were strained and antagonistic, causing much bitterness and quarreling; but there is not sufficient proof, in my opinion, to justify a judgment of separation under the statute.

[2] The fact that incompatibility exists, and that a husband and wife find it impossible to live in harmony, while no doubt furnishing justifiable reasons as between themselves for separating, does not meet the requirements for a judicial separation fixed by the statute and the policy of the state. A spouse may be unfit to live with as such, because of habits, character, or temperament; but unless there is cruel and inhuman treatment, or conduct that would render it unsafe and improper for the party seeking separation to cohabit with the defendant, or abandonment by the latter of the plaintiff, the court has no power to decree separation. A case presented may establish to the satisfaction of the court that the parties will continue indefinitely to suffer unhappiness if they are not allowed to separate; but no relief can be given unless the requirements of law above stated exist. The injured party must suffer the consequences of the apparent mistake, made when the marriage took place, in not discovering any temperamental defects that then existed. *McBride v. McBride*, 56 Hun, 649, 9 N. Y. Supp. 827.

The plaintiff testified to facts which, if true, would bring the case within the statute; but it appears that, not only is her testimony contradicted by the defendant and uncorroborated in its essential details, but in some respects it is inherently improbable. The alleged assault of December, 1917, set forth in the complaint, was testified to by plaintiff, who stated that at the time of the assault a servant, one Margaret Reilly, was present. The servant's testimony does not support the charge made. She testified that on the occasion in question the plaintiff grabbed defendant's arm, and he grabbed her, and plaintiff then said, "Margaret, see what he does with me." The witness then told

defendant he had better stop and let go, whereupon both let go. The witness expressed the opinion in court that there was nothing in the episode to make plaintiff stay away from home.

The coincidence in the data of certain events lends plausibility to the defendant's claim that the quarrel which occurred on this occasion was intentionally and advisedly brought on by plaintiff. It had been the rule of the parties to buy nothing on credit, and plaintiff had never done so. Her attorney was employed a few days before plaintiff purchased some necessary clothing on credit, and upon defendant being notified by the shop of the transaction the quarrel occurred. Plaintiff testified she knew defendant would object. The summons in this action bears date the day after the quarrel.

Plaintiff testified to another alleged assault on November 26, 1917, but this also is uncorroborated. It is true that, immediately after the time she says the assault occurred, some people found her in a fainting condition in the hall just outside of the apartment in which the parties lived; but there is nothing to indicate she had been assaulted, except her statement to that effect. She said that at that time defendant threw her on the floor; that he pushed her, and she fell; that he had refused to let her go out. It was on this occasion that defendant, according to plaintiff, called her a bastard and a prostitute in the presence of a servant, one Blanche Gross. The latter testified that plaintiff wanted to run out, and defendant pulled her back in the hall, and she fell, and he had hold of her by the hand. The witness did not say anything in her testimony in support of plaintiff's declaration that defendant called her a prostitute. The plaintiff's brother-in-law, Bernstein, arrived immediately after this alleged assault. He testified that plaintiff made no claim that defendant had assaulted her.

The plaintiff also testified that in the year 1916 defendant struck her, and that one Clara Kosak was there at the time; but the latter was not called as a witness. A governess was in the employ of the parties at the same time, and while she testified that the parties were not friendly, and used angry words to each other, she also said she never saw defendant strike plaintiff. The witness was unfriendly to defendant, because of a dispute with him.

Plaintiff also testified that defendant accused her of visiting disorderly houses for the purpose of prostitution, but this testimony is likewise uncorroborated. Plaintiff swore that, on one of the occasions when it is said she was so accused, her brother-in-law and one Greenberg were present. Although both of these persons testified (the former for the plaintiff), they failed to support plaintiff's testimony as to defendant's alleged charge of unchastity.

The trial court found substantially all the alleged facts set forth in the complaint and immediately upon the close of the trial in court directed judgment for the plaintiff. The opportunity for an analysis of the testimony by an examination of the record, therefore, was not had by the Special Term.

[3] Where the entire proof rests practically upon the testimony of the wife, it will be deemed sufficient where the defendant partially admits some of the accusations (*McNulty v. McNulty*, 119 App. Div.

150, 104 N. Y. Supp. 251), but in the instant case the defendant denied all the charges of cruelty. Furthermore, as already pointed out, the plaintiff's testimony in some important details is negatived by the failure of the persons who, she said, were present on the occasions to corroborate her. This tends to discredit her entire claim.

[4] There was also error in allowing certain testimony to contradict the defendant as to an alleged assault after the action had been commenced. On cross-examination, defendant was asked if he had ever struck the plaintiff, and he replied in the negative. In other words, he declared in effect that he had not struck the plaintiff, either (a) at any of the times alleged in the complaint, or (b) any other time, whether prior or subsequent thereto. Any evidence legitimately bearing on the issue under (a) would be admissible. For that reason, evidence under (b) tending to show a prior assault might be admissible, as creating a presumption of a continuing disposition to commit an assault. It is clear, however, that evidence of an assault subsequent to those charged in the complaint would be incompetent. Presumptions reach forward, not backward. It is apparent, therefore, that the plaintiff was not entitled to call witnesses to disprove the denial of the defendant on an immaterial and irrelevant fact.

The judgment should be reversed, and a new trial granted. Settle order on notice.

CLARKE, P. J., and DOWLING, J., concur.

PAGE and MERRELL, JJ., dissent.

(189 App. Div. 297)

In re MATORIS.

MATORIS v. ESTEY PIANO CO. et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

1. MASTER AND SERVANT §405(4)—INJURY IN REGULAR COURSE OF EMPLOYMENT.

Evidence held insufficient to support finding that claimant, while engaged in the regular course of his employment, while operating a machine, was injured on the left side of his body, as a result of which he sustained injuries, consisting of a large indirect reducible left inguinal hernia.

2. MASTER AND SERVANT §405(6)—REVERSAL OF AWARD FOR FAILURE TO SHOW LENGTH OF DISABILITY.

That there is no evidence of the period of disability for which compensation was made is a reason for reversal of award; claimant having been cured before award was made.

John M. Kellogg, P. J., and Lyon, J., dissenting.

Appeal from State Industrial Commission.

Proceeding for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67) by Frank Matoris opposed by the Estey Piano Company, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurer. Award by the State Indus-

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trial Commission for claimant, and employer and insurer appeal. Award reversed, and proceeding remitted to the Commission.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Philip J. O'Brien, of New York City (Ainsworth, Carlisle & Sullivan and John N. Carlisle, all of Albany, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. An award has been made to the claimant for injuries resulting in a hernia. The finding of the commission, on which the award is based, is as follows:

"On January 18, 1919, Frank Matoris was working for his employer at his employer's plant, and while engaged in the regular course of his employment, while operating a machine, he was injured on the left side of his body, as a result of which he sustained injuries consisting of a large indirect irreducible left inguinal hernia, which injuries disabled him from February 1, 1919, to March 29, 1919. Prior to this accident to the said Frank Matoris, he was in good physical condition, and worked for his employer for over two years."

[1] The above finding is unsupported by the evidence. In his claim for compensation, made February 14, 1919, the claimant made statements as follows:

"State occupation when injured. Moving truck from press. * * * How did accident happen? While using press, he strained his left side. State fully nature of injury. The injury consists of a large indirect reducible left inguinal hernia."

There is no statement, however, from which it can be legitimately inferred that the strain produced the hernia. In an affidavit made February 3, 1919, and introduced in evidence, the claimant stated as follows:

"What was your occupation? Working at a machine making cases for pianos. How did your accident happen? I was pulling truck, loaded with boards, to the press, weighing about five or six hundred pounds, and I felt a pain on my left side."

On the hearing before the commission he testified as follows:

"Q. How did the accident happen? A. I went to put in a guard press into the machine, and wanted to pull it out, and it struck me right on the side (indicating the left side). * * * What were you doing—operating a truck? A. Pulling the truck. * * * While attempting to pull, I was struck by the truck (indicating the left side)."

Another employé testified that he pushed the truck, and the claimant pulled it, and that the claimant told him "he got hurt," but that the witness did not see the truck strike the claimant. He continued work for two weeks thereafter without interruption. He then consulted a physician and was subjected to an operation. He was examined by a physician of the commission, who reported that his examination showed evidence of a left hernia which had healed with good results.

In *Matter of Alpert v. Powers*, 223 N. Y. 97, 119 N. E. 229, there was a finding that the claimant, while engaged in lifting a bundle of paper, sustained a hernia; but there was no finding that the hernia

was caused by the lifting of paper, or by any strain, or was in any way due to the work the claimant was performing. The court pointed out that no medical evidence was given as to the nature or cause of the hernia, which might be due to natural causes, as well as to an accident, and that it was therefore incumbent upon the plaintiff to offer some evidence that his employment caused, or could have caused, the injury.

In the present case the testimony of the claimant is conflicting and inconsistent. He says in his claim that while using the press he strained his left side. He says in his affidavit that while pulling the truck he felt a pain in his left side. In his testimony before the commission he says that, while pulling out the guard press to put into the machine, it struck him on the left side, and also that while pulling a truck it struck him on the left side. From these conflicting statements the commission has evolved the finding that he was injured on the left side "while operating a machine." We must therefore disregard the evidence as to the truck, and assume, as did the commission, that the claimant was injured "while operating a machine."

We are, however, unable to discover any evidence connecting the hernia with the operation of the machine. In the statement of his claim the claimant said, while using the machine or press, he strained his left side. In his testimony he said the press struck him on the side. A strain and a blow are dissimilar and unrelated. This, however, is not fatal to the award. Either may produce a hernia. So, also, it may develop from natural causes. Hence the necessity of evidence demonstrating that the strain or blow caused the hernia. There is no evidence that the hernia appeared simultaneously with the strain or blow, or approximately so. The case on the finding of the commission rests solely on the testimony of the claimant. He could have testified, if it were true, that he had previously experienced no pain or discomfort in the region affected, and that he began to experience the same when he received the strain or blow, or immediately thereafter. He could have testified as to the nature of the strain or blow, and as to the circumstances accompanying the same, as to the weight he was lifting or pulling when he received the alleged strain, or the force of the alleged blow; and especially should it appear that the strain or blow was where the hernia appeared. The left side of the body, where the strain or blow occurred, is vastly more comprehensive than the left groin, where the hernia appeared. There is no testimony as to these facts. We have simply his statement that he received either a strain or was struck by something, which strain or blow may have been so slight as to be wholly unimportant, and that two weeks thereafter he was operated on for a hernia.

The statement in the finding of the commission that prior to the accident the claimant was in good physical condition is absolutely without evidence in its support. So far as the record discloses he may have had this hernia for a long time. There is no evidence of any pain or discomfort in connection with the use of the machine, either as the result of a strain while using the same or as the result of being struck thereby. The claimant says that he felt a pain while pulling the truck, but as the commission has found that the injury was not

occasioned by the truck, but by the machine, we must disregard that testimony. There is no evidence, however, that the hernia first made its appearance at or about the time he was pulling the truck.

In the Alpert Case the difficulty was in the insufficiency of the findings. The findings in this case are certainly ambiguous and unsatisfactory. They leave us in doubt as to whether the commission intended to say that the hernia was caused by a strain or blow, or either. But, passing that point, the difficulty is in the insufficiency of the evidence to establish that fact. The principle of the Alpert Case applies. There is no evidence that the alleged strain or blow, whichever it may have been, was sufficient to produce the hernia, or, if sufficient, that it did in fact produce it. The claimant does not anywhere say, in substance or effect, that the strain or blow caused the hernia. In *Clover, Clayton & Co. v. Hughes*, 3 B. W. C. C. 275, there was a finding that a strain in fact caused a hernia, and the court said:

"If that occurred when he was lifting a weight, it would be properly described as an accident. * * * But it does not establish that the accident was one 'arising out of the employment.' * * * It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working."

And that statement received the approval of the Court of Appeals in the Alpert Case. Paraphrasing some of the other language in the opinion in that case, it may properly be said that the lapse between cause and effect is as apparent from the evidence as if the claimant had said that while operating the machine he strained himself, or was struck, and had a mental collapse, a nervous breakdown, or an attack of pneumonia.

[2] Another reason for a reversal of this award consists in the fact that there is no evidence of the period of disability for which compensation was made. The claimant had been unemployed, but had been cured before the award, and there is no evidence as to the length of disability.

The award should be reversed, and the proceeding remitted to the commission. All concur, except JOHN M. KELLOGG, P. J., and LYON, J., who dissent.

COOPER et al. v. NISSINOFF.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. SALES §479(6)—FORECLOSURE OF CONDITIONAL SALE CONTRACTS.

Where a piano was sold on the installment plan, under an agreement that title should remain in the seller until it was paid for, *held* that, where the purchaser was in default and was about to remove the piano from the state, it is no defense to an action by the seller to foreclose the lien, where the piano was taken into the custody of the marshal before payment was made, that he stated to defendant's wife that the piano might be moved in case security was given and the arrears paid, etc.

2. PARTNERSHIP §22—WRITTEN AGREEMENT UNNECESSARY TO VEST INTEREST IN NEW PARTNERS.

Where a father gave his sons an interest in the business, making them copartners, a written instrument was not essential to vest an interest in the sons.

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Charles Cooper and others to foreclose a lien on a chattel against Louis Nissinoff. From a judgment on a verdict for defendant, plaintiffs appeal. Reversed, and judgment granted in favor of plaintiffs.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Barnett Levy, of New York City, for appellants.

Emanuel S. Klausner, of New York City, for respondent.

GUY, J. The issue submitted to the jury in this action to foreclose a lien upon piano sold to defendant on the installment plan, title remaining in the vendor, was whether, although concededly defendant was in default at the time of the seizure of the chattel, an agreement was made by the parties which suspended plaintiffs' right to enforce the lien.

The plaintiff Charles Cooper testified that he saw the defendant's wife at her residence on March 15, 1919; that she was packing up to move, and she said she was moving to Bayonne, N. J.; that he told her she was several months in arrears, but she could have the piano providing the arrears were paid and security was given for future payments in New York; that the next morning the piano was taken under process by the marshal, and on the following day the defendant called on the witness and objected that he had to pay the expressman for taking the piano to Bayonne; that again plaintiff said that defendant could have the piano if he paid the arrears and gave security, but that defendant said he would sue.

Defendant's wife testified that when the plaintiff Charles Cooper called at her home on March 5th she said she wanted to move the piano to Bayonne, and he said, "I don't move any pianos to Bayonne"; that she then stated:

"I will pay the difference to you, whatever it may be.' He asked \$42. I said, 'All right, I will give you the money that's due to you, and you should give me the money for the difference in the moving.' 'All right, I will be here to-morrow.' Then he went away. In the morning, when I waited for him to come to give him the money, he came with some judgment of the court, and took away the piano. When I asked him why did he take the piano away, he didn't answer me."

She further testified that when she asked the plaintiff to deliver the piano he said "I want the money;" that she then said, "I will give you the money that's coming to you, and you take off for me the cost of moving;" that "I didn't give him the money in the hand."

The testimony of the mother of defendant's wife tended to corroborate that given by her daughter; but she also testified that her daughter "had the money in her hand"; that the daughter said, "Here is the money; give me what it cost;" that "she had the money in her hand, \$3 or \$5, I don't know which."

[1] Plaintiff's motion for the direction of a verdict should have been granted. Under the terms of the contract they were entitled to

the possession of the piano upon defendant's default, and, assuming the truth of the defendant's testimony as to what took place between defendant's wife and plaintiff Charles Cooper on March 5th, the alleged agreement as claimed constituted no defense to the action.

[2] It appears that the piano was sold in December, 1916, and plaintiff Charles Cooper testified that some time after the sale was made he gave his sons an interest in the business, so that they became co-partners, and that the transfer was an oral one, not evidenced by any writing. As between the father and his sons, a writing was not essential to vest an interest in the latter.

Judgment reversed, with \$30 costs, and judgment granted in favor of plaintiffs for the foreclosure of lien as prayed for, with appropriate costs in the court below. All concur.

GRAYBILL v. SMADBECK.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. TRIAL ~~§~~109—NONSUIT ON OPENING OF COUNSEL.

The practice of disposing of cases on the mere opening of counsel is a very unsafe method of deciding controversies, where there is anything to decide, and cannot be resorted to unless counsel stating the case to the jury deliberately and intentionally states or admits some fact that in any view of the case is fatal to the action.

2. TRIAL ~~§~~109—NONSUIT ON OPENING OF COUNSEL.

In an action for damages for false representations made in sale of land, where the complaint was oral, but the summons bore an indorsement, "Fraud in obtaining moneys upon false and fraudulent representations," and bill of particulars detailed defendant's false representations, *held*, that it was erroneous to nonsuit plaintiff on the opening of her counsel.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Charlotte Graybill against Arthur Smadbeck. From a judgment of nonsuit, rendered upon the opening of plaintiff's counsel, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Sidney S. Levine, of New York City, for appellant.

Henry J. Engel, of New York City (Valentine Taylor, of New York City, of counsel), for respondent.

DELEHANTY, J. The action is to recover damages for false representations made by defendant under the following circumstances: The plaintiff, a maidservant, prior to the occasion in question had purchased from defendant and his brother some vacant lots in New Jersey, and defendant, desirous of selling her more, caused her to be taken by his agent to Somerville, N. J., where she was shown property, which he represented was about one-half mile from the railroad station; that he informed her that it was a very valuable property, and

worth \$1,500 to \$2,000; that he would let her have same free and clear for \$1,070. Plaintiff, relying on said statements, purchased the property, and thereafter discovered that there was a mortgage of \$1,800 thereon; that the location of the property was about two miles from the station, and it was of a value considerably less than as represented. All these facts were presented in the opening made by plaintiff's counsel to the jury, which was taken down by the court stenographer.

[1, 2] While the complaint was an oral one, the summons bore the following indorsement: "Fraud in obtaining moneys upon false and fraudulent representations." A bill of particulars was later served, which set forth more in detail the facts alleged, and which was particularly and by consent made part of plaintiff's opening. In *Hoffman House v. Foote*, 172 N. Y. 348, 350, 65 N. E. 169, the court said:

"The practice of disposing of cases upon the mere opening of counsel is generally a very unsafe method of deciding controversies, where there is or ever was anything to decide. It cannot be resorted to in many cases with justice to the parties, unless the counsel stating the case to the jury deliberately and intentionally states or admits some fact that, in view of the case, is fatal to the action."

We think, upon the papers presented, that the court exceeded its authority in nonsuiting the plaintiff without further investigation of the facts presented. Upon the face of the pleadings the plaintiff had some cause of action, and she is certainly entitled to her day in court thereon.

It necessarily follows that the judgment should be reversed, and a new trial ordered, with \$30 costs to appellant to abide the event. All concur.

HANN v. DE FREEST.

(Supreme Court, Special Term, New York County. November, 1919.)

1. HUSBAND AND WIFE ⇨278(1)—VALIDITY OF AGREEMENT FOR SEPARATE MAINTENANCE.

An agreement between a husband and wife for an immediate separation and for a separate allowance to the wife for her support is valid.

2. HUSBAND AND WIFE ⇨281—ATTACK ON AGREEMENT FOR SEPARATE MAINTENANCE AFTER PAYMENTS FOR SIX YEARS.

Where a husband and wife made agreement for separate maintenance followed immediately by separation, and the husband did not deny the execution of the agreement, but admitted making payments thereunder for a period of six years, he cannot, in a suit for unpaid installments, subsequently set up his lack of knowledge that the agreement stated that they had theretofore separated, and allege that the agreement was made while they were still living together, in order to attack its validity.

3. HUSBAND AND WIFE ⇨279(2)—ALLEGATION OF SUBSEQUENT ADULTERY NO DEFENSE TO SEPARATE MAINTENANCE AGREEMENT.

Where a husband and wife made a valid separate maintenance agreement, and later the husband obtained a divorce against the wife for a subsequent adultery with H., in an action by the divorced wife, now the wife of H., upon the maintenance agreement, for unpaid payments, an allegation of such subsequent adultery constitutes no defense.

Action by Edith J. Hann against Herbert E. De Freest to recover upon a separation agreement between husband and wife. Plaintiff

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demurred generally to the two affirmative defenses, consisting of new matter in the amended answer, and moved for judgment upon the pleadings and the relief demanded in the complaint. Demurrers sustained, with leave to defendant to serve a second amended answer.

The complaint set forth the marriage of the parties on April 27, 1893, and they were on and after October 29, 1909, living separate and apart; that on October 29, 1909, they entered into a written agreement which set forth differences and disagreements have arisen between them which had caused them to separate and live apart. The agreement attached to the complaint set forth that the parties were living apart because of differences between them, and after providing for certain transfers of real estate, mortgages, and settlement of a lawsuit, and disposition of the family horses and carriages and other personal property, the husband agreed to pay the wife \$20 per week for life. The complaint alleged that defendant has not paid this \$20 for several years last past, and demanded judgment against him for \$6,740, the arrears under said agreement.

The amended answer admits the execution of the agreement and that payments were made under said agreement for a period of six years. The amended answer then sets up an affirmative defense that said agreement contained a recital to the effect that differences and disagreements had arisen between the parties which had caused them to theretofore separate and live apart from each other, and that at the time of said agreement they were so separated and living apart from each other, which recital and statement was false and untrue, and known by the parties thereto to be false and untrue, and that at the time of the execution of said agreement the parties were actually living together and not apart, and that said recital in said agreement escaped the attention and notice of defendant, and he did not, when he signed same, have any knowledge of said recital, and did not understand that same was contained therein, and alleged that said recital was incorporated therein for the purpose of giving to same the appearance of validity, whereas the said agreement rested on no basis to authorize a legal agreement of separation.

The defendant, for a further defense, sets forth that subsequent to said separation, and on November 1, 1909, plaintiff was guilty of adultery with a man named William A. Hann, the present husband of plaintiff herein; that on January 14, 1915, defendant commenced an action against this plaintiff in the Supreme Court of Rensselaer county for an absolute divorce upon the grounds of adultery alleged to have been committed as aforesaid, and after a trial of said issues before a jury, in which plaintiff appeared and was represented by counsel, the jury found plaintiff guilty of adultery as alleged in the complaint, whereupon interlocutory and final judgments of divorce were thereon duly given to this defendant against plaintiff, which are in full force; that by reason of the premises said agreement is illegal, void, and of no force and effect.

The plaintiff demurred to the affirmative defenses consisting of new matter in the amended answer, on the ground that they were insufficient in law upon the face thereof. Upon the complaint, amended answer, and plaintiff's demurrer, plaintiff moved for judgment upon the pleadings for the relief demanded in the complaint.

Warren McConihe, of New York City, for plaintiff.

Thomas F. Powers, of Troy, and Thomas H. Keogh, of New York City, for defendant

COHALAN, J. Plaintiff has demurred to two affirmative defenses set up in the answer, on the ground that they are insufficient in law on the face thereof, and has moved for judgment on the pleadings. The action is brought to recover the sum of \$6,742, alleged to be due under a separation agreement. The complaint shows that the defendant was

formerly the plaintiff's husband, and that the parties entered into an agreement for her support under date of October 29, 1909. The defendant in his amended answer, by way of affirmative defense, alleges that the recital in the agreement to the effect that the parties had already separated at the time the agreement was entered into was false, and so inserted, without the defendant's knowledge, in order to give the agreement the appearance of validity. In a word, that the agreement rested on no basis that would authorize a legal separation.

[1-3] It appears that the agreement is not in fact a separation agreement, but one for the separate maintenance of the plaintiff. An agreement between a husband and the wife for an immediate separation and for a separate allowance to the wife for her support is a valid agreement. *Landes v. Landes*, 94 Misc. Rep. 486, 159 N. Y. Supp. 586. The defendant does not deny the execution of the agreement, but in fact admits making payments thereunder for a period of six years. The attempt at this time to set up the defendant's lack of knowledge of the contents of the agreement is not sufficient to raise a valid defense, especially in the absence of a prayer for the reformation of the agreement. In the second affirmative defense the defendant alleges that the plaintiff committed adultery with one William A. Hann, in consequence of which the defendant in this action secured a final judgment of divorce from the plaintiff herein. In the case of *Randolph v. Field*, 165 App. Div. 279, 150 N. Y. Supp. 822, it was held that an allegation of plaintiff's adultery subsequent to the making of the agreement constitutes no defense to an action of this kind.

The demurrers are in all respects sustained, with leave to the defendant to serve a second amended answer on payment of \$10 costs.

(189 App. Div. 363)

MULLER v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

MASTER AND SERVANT ⇐364—WHEN RELATION EXISTS.

One appointed as a laborer under Military Law, § 188, on a farm owned by a cavalry organization of the state National Guard is not an employé of the city of New York, so as to render it liable under the Workmen's Compensation Act for his injuries, though under section 189 his compensation was paid by the city.

Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

In the matter of the claim for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67) made by Frieda Muller for the death of Charles W. Muller, deceased, against the City of New York, employer and self-insurer. From an award by the State Industrial Commission, in favor of claimant, the City appeals. Award reversed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

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William P. Burr, Corp. Counsel, of New York City (John F. O'Brien, William A. Walling, and Isaac F. Cohen, all of New York City, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

Bernard L. Shientag, of New York City, for State Industrial Commission.

LYON, J. The deceased was appointed a laborer under section 188 of the Military Law of the state (Consol. Laws, c. 36) by the commanding officer of squadron A. He was paid by the city of New York upon the certificate of the officer appointing him. His duties were wherever the horses of the squadron were sent. The farm where he was at work when injured was owned by squadron A, Cavalry, New York State National Guard. The organization was a corporation composed of members of the military organizations. While engaged in the regular course of his employment on June 7, 1918, he was injured. He died as a result thereof two days later. The widow presented a claim for compensation against the city of New York to the State Industrial Commission. The city opposed the claim, upon the grounds that the deceased was an employé of the state and not of the city, and that at the time he was injured he was a farm laborer. The commission made an award in her favor, from which this appeal has been taken.

Was the deceased an employé of the city of New York? Sections 187 and 188 of the Military Law of the state authorizes the employment of armorers, janitors, engineers, and laborers for the armories and arsenals occupied by the National Guard of the state, and designates the officers by whom they shall be appointed. Section 189 of the Military Law provides that the persons so appointed shall receive certain compensation, which within the city of New York shall be a county charge upon the county in which such armory is situated, and shall be levied, collected, and paid in the same manner as other brigade, district, or county charges are levied, collected, and paid.

We think the deceased was in the military service, and not in the civil service. *Bryant v. Palmer*, 152 N. Y. 412, 46 N. E. 851; *Matter of the Application of Burns v. Fox*, 98 App. Div. 507, 90 N. Y. Supp. 254. The respondent has cited the case of *Sexton v. Public Service Commission*, 180 App. Div. 111, 167 N. Y. Supp. 493. There the engineer was supervising the construction of a part of the subway in the city of New York. He was doing work in the interest of the city of New York, under the direction of the Public Service Commission, First District. In the case at bar the deceased was doing the work of the military organization of the state, although he was being paid by the city of New York. There is no law for the organization of a military service for the city of New York, but the Military Law provides for the establishment, government, and duties of persons in the military service of the state.

We have not discussed the question as to the deceased being a farm laborer. The evidence upon that point is meager in the present record,

and the decision of that question is not necessary to the determination of the case.

The award must be reversed. All concur, except JOHN M. KELLOGG, P. J., who dissents.

(189 App. Div. 395)

WOODRUFF v. R. H. HOWES CONST. CO. et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

MASTER AND SERVANT — 378—INJURY RESULTING FROM "ACCIDENT."

Where carpenter, hanging doors, bruised the palm of his hand in pressing screwdriver, the bruise resulting in a felon, the injury was the result of an "accident," within Workmen's Compensation Law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident.]

Henry T. Kellogg, J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Emerson H. Woodruff, employé, opposed by the R. H. Howes Construction Company, employer, and the Travelers' Insurance Company, insurance carrier. From an award of the State Industrial Commission for claimant, employer and insurance carrier appeal. Affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Amos H. Stephens, of New York City (E. C. Sherwood and William B. Davis, both of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

Bernard L. Shientag, of New York City, for State Industrial Commission.

LYON, J. The question involved in this appeal is whether the injury to the claimant was the result of an accident. He was a carpenter, and had been employed for three or four weeks preceding December 23, 1918, at the United States government hospital at Otisville, N. Y. For two weeks he had been employed in hanging doors and sash, pressing the handle of a screwdriver, bruising, as he believes, the palm of his hand, which resulted in a felon. At times he fastened a pin in the jamb of the screwdriver and hit the screwdriver with his hand. He said the pain was several days coming on. On Saturday December 21st, he felt a pain between the first and second fingers very much as though he had run a splinter in the palm of his hand. On Sunday the pain was severe. On Monday he worked, but with pain. On Tuesday December 24th, he went to a doctor, who lanced the swelling, from which pus came. There was no evidence of any undue strain, nor of any puncture. Under this undisputed state of facts, the appellants claim that the claimant was not entitled to an award; that an injury, to be the result of an accident, must be traceable to a definite time, place, and cause.

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"Accident" is defined in *United States Mutual Accident Association v. Barry*, 131 U. S. 100, 121, 9 Sup. Ct. 755, 762 (33 L. Ed. 60), quoted by defendants' counsel:

"As meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;' that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means."

The appellant has cited several decisions of the courts of England holding that the injury was not the result of an accident, where the occurrence was not accompanied by any slip, wrench, or strain, or where the person injured was unable to give any specific time of the happening of the accident.

Contrary to the holding of these cases is that of the House of Lords in *Clover, Clayton & Co. v. Hughes*, 3 B. W. C. C. 275, where a workman suffering from an advanced aneurism of the aorta was doing his work in the ordinary way by tightening a nut with a spanner. This ordinary strain caused a rupture of the aneurism, resulting in death. Held, that the workman's death resulted from a personal injury by accident. But these cases are subject to the ruling of the House of Lords in the case of *Fenton v. Thorley*, in which the claimant ruptured himself at work. "There was no evidence of any slip or wrench or sudden jerk." Held, that it was an accidental injury. The House of Lords defined the meaning of "personal injury by accident" in the *English Workmen's Compensation Act* (60 & 61 Vict. c. 37, § 1) as an unlooked-for mishap or an untoward event, which is not expected or designed. *Fenton v. Thorley & Co., Ltd.*, L. R. [1903] A. C. 443, 5 W. C. C. 1.

The felon was the unexpected result of the bruising of claimant's hand. In *Swart v. Town of Shelby*, 186 App. Div. 927, 172 N. Y. Supp. 921, a teamster dumped 20 or 30 loads of dirt each day, striking the lever with his hand. It pained him, and he was obliged to desist from work. On examination the doctor found the palm of his hand calloused, and a blood blister, and evidences of infection. The infection spread to his arm, necessitating amputation, and causing his death. An award of compensation was affirmed by this court.

The award should be affirmed. All concur, except HENRY T. KELLOGG, J., who dissents.

DUKAS v. HENNESSY REALTY CO. et al.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. TRIAL §25(13)—DEFENDANT ENTITLED TO OPEN AND CLOSE ON COUNTERCLAIM.

Defendants' answer, admitting every allegation of the complaint, except the conclusion that a certain balance was due, raised no issue, and, having pleaded counterclaims, the denial of defendants' motion to be allowed the affirmative with the jury was error.

2. PLEADING §8(5)—ALLEGATION THAT CERTAIN AMOUNT IS DUE ON NOTES STATES CONCLUSION.

An allegation that certain amounts are still due and owing to plaintiff on notes sued on states a conclusion.

3. PLEADING §125—DENIAL OF CONCLUSION RAISES NO ISSUE.

Denial of the conclusion that a certain balance is due plaintiff raises no issue.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Julius J. Dukas, as trustee in bankruptcy of Harry Jarmulowsky and another, individually and as copartners trading as S. Jarmulowsky's Bank, against the Hennessy Realty Company and another. From an order denying defendants' motion for a new trial, defendants appeal. Order reversed, motion granted, judgment vacated, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Adolph Cohen, of New York City, for appellants.

S. F. Hyman, of New York City (Jacob J. Lesser, of New York City, of counsel), for respondents.

GUY, J. Plaintiff, as trustee in bankruptcy of a bank, sues on two promissory notes made by the defendant realty company and indorsed by the defendant Polstein, alleging that by the indorsement of said notes to said bankrupt, it became the true and lawful owner of said notes, and further alleging the making of certain payments by defendants on each of said notes, and that defendants, upon demand, refused to pay the balance of said notes.

The answer admits each and every allegation in the complaint, except the allegation as to one of the notes in paragraph 7 "leaving a balance due plaintiff of \$401.31," and in paragraph 14 the allegation as to the other note "leaving a balance of \$201.31 due plaintiff," and sets up two counterclaims—one for \$427, alleged to have been due one Sheitel, a depositor in said bank, which claim was assigned to the defendant Polstein, and subsequently, before the petition in bankruptcy was filed, was assigned by said defendant to the defendant realty company; the other a claim for \$47.15, alleged to be due defendant realty company as part of a certain commission agreed to be allowed by said bankrupt to said realty company upon the discounting of certain notes under an agreement that 2 per cent. of said commission should be

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repaid to the defendant realty company when the last note or renewal thereof was paid; that certain of said notes were renewed, the last of said renewals being the notes sued on herein.

[1-3] At the opening of the trial the defendants moved to strike out the allegation in the complaint, "leaving a balance due plaintiff," etc., and demanded the affirmative in going to and closing before the jury. This motion to be allowed the affirmative with the jury was denied, and an exception taken. Thereupon plaintiff introduced the notes in evidence. The denial of said motion by the learned court was error requiring a reversal. *Millerd v. Thorn*, 56 N. Y. 402; *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489. On the pleadings no material allegation of the complaint was denied. The allegation that certain amounts were still due and owing to the plaintiff on said notes was not a material allegation, but a statement of a conclusion, the denial of which raised no issue. *Conkling v. Weatherwax*, 181 N. Y. 258, 73 N. E. 1028, 2 Ann. Cas. 740.

Order reversed, motion granted, judgment vacated, and a new trial ordered, with \$30 costs to appellant to abide the event. All concur.

(189 App. Div. 564)

WHITE v. SLAYBACK et al. *

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. PLEADING ⇨214(1)—ON DEMURRER, COMPLAINT DEEMED TRUE.

Upon defendants' demurrer, allegations of complaint will be taken as true.

2. BROKERS ⇨85—CONVERSION BY STOCKBROKERS.

Where owners deposited stock with stockbrokers to protect marginal account, under brokers' agreement to make demand for margin and give due notice of the time and place of sale before selling stock for failure of margin, the sale of such stock by brokers without giving such notice constituted conversion.

3. BROKERS ⇨24(1)—AGREEMENT WITH OWNER OF STOCK DEPOSITED TO PROTECT MARGINAL ACCOUNT.

Stockbrokers' agreement with owner of stock deposited to protect marginal account to carry owner's account "for a reasonable time" and "see her through" held too uncertain from which to find a binding obligation.

4. BROKERS ⇨38(3)—SUFFICIENCY OF COMPLAINT IN ACTION FOR CONVERSION OF STOCK.

In an action against stockbrokers for conversion of collateral stock deposited for purpose of protecting marginal account, complaint held to state a cause of action.

Appeal from Special Term, New York County.

Action by Flora MacDonald White against Henry B. Slayback and others. From two orders denying plaintiff's motion for judgment on the pleadings, plaintiff appeals. Orders reversed, and motions granted, with leave to defendants to withdraw demurrers and to answer, on payment of costs.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

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*Reargument denied, and leave to appeal denied, — App. Div. —, 178 N. Y. Supp. 211.

Goldman & Unger, of New York City (Abraham Freedman, of New York City, of counsel), for appellant.

Francis X. Brosnan, of New York City (Richard J. Cronan, of New York City, of counsel), for respondent Feitner.

Coleman, Stern & Gotthold, of New York City (Ernest J. Ellenwood, of New York City, of counsel), for respondents Slayback and Coyne.

SMITH, J. [1] The pleadings consist of the complaint and of the demurrers of Slayback, Coyne, and Feitner; the same attorneys appearing for Slayback and Coyne. Two orders were entered only. The plaintiff was doing business with the defendants as copartners in the stock brokerage business in the city of New York. She brings this action for conversion in the sale of certain collateral which she held with the defendants for the purpose of protecting her marginal account. The Special Term has held that the complaint did not state a cause of action. We are of opinion that, taking the allegations of the complaint as true, which we must do upon the defendants' demurrer, the plaintiff's complaint states a cause of action in both counts thereof.

[2] In the first cause of action the plaintiff alleges that the defendants agreed, before selling any stocks belonging to the plaintiff for failure of margin, "they would make due demand on the plaintiff for margin and would give plaintiff due notice of the time and place of sale," and that the plaintiff's stocks were sold without notifying the plaintiff of the amount of margin required and without giving the plaintiff due notice of the place of sale. If this agreement were in fact made, and these stocks were sold without compliance on the part of the defendants with the conditions under which they were authorized to sell, the plaintiff has a right of action for their conversion, and we think the matters referred to in the first count of the complaint sufficiently allege such a cause of action.

[3, 4] The second count realleges the matters alleged in the first count, and further alleges an agreement upon the part of the defendants upon consideration to carry her account "for a reasonable time" and "see her through." The allegation "to see her through" is clearly too indefinite to impose any obligation on the part of the defendants. In view of the nature of the transactions, where the amount of necessary margin depends upon a fluctuating market, always uncertain and always capricious, in my judgment, a promise to carry her account for a reasonable time is also too uncertain from which to find a binding obligation. This complaint also alleges, however, that these stocks were sold without notifying plaintiff of the amount of margin required and without giving the plaintiff notice of the place of sale, and, upon these allegations, we find a cause of action stated which is not obnoxious to a demurrer for insufficiency.

The orders should therefore be reversed, with \$10 costs and disbursements, and the plaintiff's motions granted, with \$10 costs, with leave to defendants to withdraw demurrers and to answer on payment of said costs. Order filed. All concur.

(189 App. Div. 235)

BACKERMAN v. COCCOLA et al.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. INFANTS ~~§~~82—FINANCIAL IRRESPONSIBILITY GROUND FOR REMOVAL OF GUARDIAN AD LITEM.

Where guardian ad litem appointed for infant defendant was irresponsible financially, it was proper for defendant to call the court's attention thereto and move for an order revoking the appointment, since guardian's responsibility for costs, under Code Civ. Proc. § 460, gave defendant an interest in the matter.

2. INFANTS ~~§~~82—IRRESPONSIBLE GUARDIAN AD LITEM REMOVED THOUGH OFFERING SECURITY FOR COSTS.

Since court has no power to require guardian ad litem to give security for costs, under Code Civ. Proc. § 3268, and since the requirement that a responsible person be appointed guardian ad litem under section 460 is primarily for the protection of the infant, an irresponsible guardian ad litem should not be allowed to continue to act merely upon giving security for costs.

Appeal from Special Term, New York County.

Action by Charles Backerman, an infant, etc., against Elizabeth Coccola, impleaded, etc. From an order denying a motion to revoke appointment of guardian ad litem, and for the appointment of a responsible person as guardian, unless the present appointee qualified by giving security for costs to defendant in sum of \$250, defendant appeals. Reversed, motion to remove guardian ad litem granted, and matter remitted, with directions.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Moses Miller, of Port Chester (Frederick Zorn, of New York City, of counsel, and Joseph Kahn, of New York City, on the brief), for appellant.

Louis Sanders, of New York City (Arnold Gross, of New York City, of counsel), for respondent.

PAGE, J. The action was brought by Charles Backerman, an infant, by Leah Backerman, his guardian ad litem, and is to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant. Leah Backerman is the mother of the infant plaintiff and petitioned to be appointed as guardian ad litem. On this appointment she made an affidavit:

"That she is of sufficient financial ability to answer to the said infant for any damages which may be sustained by her carelessness or negligence in the prosecution of said suit, and is worth at least the sum of two hundred and fifty (\$250) dollars, consisting of cash and household effects, and above all her debts and liabilities."

The attorney for the defendant presents an affidavit that he called on the guardian ad litem at her place of residence and was informed by said guardian that she owns no real estate or personal property of any kind, character, nature, or description; that she and her three children were wholly dependent upon her husband, David Backerman, for sup-

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port, care, and maintenance. No papers were presented in opposition. The court, notwithstanding, denied the motion.

Under the Revised Statutes of 1829 a defendant in an action brought in a court of record could require security for costs to be given where the plaintiff, when the action was commenced, was an infant whose next friend had not given security for costs. R. S. pt. 3, c. 10, tit. 2, § 1. This provision was carried into the Code of Civil Procedure, with the substitution of guardian ad litem for next friend. Section 3268, subd. 5. Subdivision 5 was eliminated from the section in 1904. Laws 1904, c. 524. Since 1904 there has been no statutory authority to require security for costs to be given by a guardian ad litem.

Section 469 of the Code of Civil Procedure provides:

"Before a summons is issued, in the name of an infant plaintiff, a competent and responsible person must be appointed, to appear as his guardian for the purpose of the action, who shall be responsible for the costs thereof, except where such infant prosecutes as a poor person as provided for under section 459 of this act, in which case security for costs shall not be required."

[1, 2] This section requires a responsible person to be appointed. While primarily this is for the protection of the infant (*McGovern v. N. Y. Telep. Co.*, 100 Misc. Rep. 177, 165 N. Y. Supp. 480), yet the section provides that the guardian shall be responsible for costs. Therefore the financial ability of the guardian is a question in which the defendant has an interest, and it was proper for her to call the court's attention to the pecuniary irresponsibility of the guardian ad litem, and move for an order revoking the appointment. *Tropeano v. Grimaldi*, 173 App. Div. 534, 159 N. Y. Supp. 1025. There being no power in the court to exact security for costs, and the requirement for the appointment of a responsible person being primarily for the protection of the infant, in my opinion, the irresponsible guardian ad litem should not be allowed to continue to act, merely upon giving security for costs. It appears, and is not denied, that the guardian ad litem is pecuniarily irresponsible. Had this appeared at the time the application for her appointment was made, she could not have been appointed.

The order should be reversed, with \$10 costs and disbursements, and the motion to remove the guardian ad litem granted, and the matter remitted to the Special Term of the Supreme Court, to appoint a suitable and responsible person guardian ad litem for the infant plaintiff. Order filed. All concur.

FALCONIER v. PILGRIM WAIST CO., Inc.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

ACCOUNT STATED ~~§~~19(3)—SUFFICIENCY OF EVIDENCE.

In an action for commissions claimed to be due from defendant, *held*, that judgment for plaintiff was erroneous; plaintiff not explaining a writing in his own hand relating to commissions, which defendant set up as a defense and counterclaim, asserting that such writing was an account stated.

~~¶~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by R. Di Mond Falconier against the Pilgrim Waist Company, Incorporated. From a judgment for plaintiff, after trial without jury, defendant appeals. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Abraham H. Sarasohn, of New York City, for appellant.
Moses H. Rothstein, of New York City, for respondent.

BIJUR, J. Plaintiff has recovered for a balance of commissions varying from 5 to 2½ per cent. alleged to be due him. Defendant set up a defense and counterclaim based upon an account stated alleged by defendant to have been arrived at between the parties on May 4, 1918.

According to defendant's story on this accounting it was found that some \$160 was due from plaintiff to defendant, but that the sum was adjusted, as defendant's president testifies, by plaintiff saying:

"Call it an even \$100. * * * When I make \$1,000, I shall get \$30, and the rest shall be left on the \$100 that I owe. When I sell less than \$1,000, I shall get 75 per cent., and the rest shall be left over from the money that I owe."

Thereupon the plaintiff wrote in his own handwriting:

"100.00	May 4, 1918.	
up to \$1000.00		\$30.00
" " 500.		or less
will take 75% commission."		

Defendant's bookkeeper or accountant testified to the same effect. Plaintiff's attempted explanation of this paper, concededly written in his own hand, is practically an admission that he is unable to account for it, except on the consistent theory advanced by defendant. Under such circumstances this judgment cannot be allowed to stand.

Judgment reversed, and new trial granted, with \$30 costs to appellant to abide the event. All concur.

JENSEN v. MUIR et al.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

NEW TRIAL ~~68~~—SETTING ASIDE OF VERDICT.

Verdict by properly instructed jury upon clean-cut issue of fact should not be set aside by court, where there was nothing from which it could be inferred that jury were influenced by sympathy, passion, or prejudice.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Anders M. Jensen against John Muir and others. From an order setting aside a verdict for plaintiff, plaintiff appeals. Reversed, and verdict reinstated.

~~68~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

George Wolf, of New York City (I. Maurice Wormser, of New York City, of counsel), for appellant.

Frank E. Loughran, of New York City (Richard Condon, of New York City, of counsel), for respondents.

DELEHANTY, J. It is not necessary to give the history of this case in detail. There was nothing but a clean-cut issue of fact. There is not the slightest reason shown in the record from which it even can be inferred, much less declared, that the jury were influenced by sympathy, passion, or prejudice. The rulings were clearly in favor of the defendants throughout the trial. The justice gave a fair and impartial charge, holding correctly that the sole question was one of fact, and that the burden of proof was upon the plaintiff. No exception thereto was taken by the defendants' attorney, and when he made the usual motion to set aside the verdict, the court reiterated his former statement, saying, "It seems to me to be a question of fact." However, he reserved decision upon the motion, and subsequently set the verdict aside, writing an opinion, which is in no way conclusive, and which gives no valid reason for such action. The opinion of Mr. Justice Guy, in *Perlman v. Brooklyn Heights Co.*, 78 Misc. Rep. 168, 137 N. Y. Supp. 917, is peculiarly applicable to the instant case. He says (78 Misc. Rep. at page 170, 137 N. Y. Supp. at page 918):

"Unless the system of trial by jury is to be entirely overthrown, there must be a point where the determination of a jury on questions of fact shall no longer be interfered with by the court. The power vested in a trial court to set aside a manifestly unjust verdict, where it is clearly the result of passion, prejudice, or corruption, was not intended as establishing the proposition that the verdict of a jury on questions of fact shall not be permitted to stand, unless it is in harmony with the views of the justice presiding."

See, also, *Sater v. Solomon* (Sup.) 134 N. Y. Supp. 417.

In a very recent case decided in Appellate Term, First Department (*Goldberg v. Burrows*, 185 App. Div. 244, 172 N. Y. Supp. 761), the syllabus reads as follows:

"Where there was a sharp conflict in testimony by witnesses, number being equally divided, and a vigorous attack was made on credibility of principal witness of plaintiff, who gave the only comprehensible account of the accident it was error to set aside a verdict for defendant, where it could be fairly inferred that the jury refused to believe plaintiff's principal witness."

Order reversed, with \$30 costs, and verdict reinstated. All concur.

(189 App. Div. 214)

LASK v. SILVERMAN et al.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

MORTGAGES — 568—SUMMARY PROCEEDINGS AGAINST ATTORNEYS IN FORECLOSURE BY MORTGAGEE.

Where mortgage was assigned for the purpose of foreclosure, and an action brought by a firm as attorneys for assignee, the property being bid in by assignee, who assigned his claim to a corporation, to which deed was given, the mortgagee cannot maintain summary proceedings in the foreclosure action for an order directing the attorneys to turn over to her a deed for the property and account for the rents, issues, and profits; the attorneys having no title.

Appeal from Special Term, New York County.

Action by Charles Lask against Robert M. Silverman and Rose L. Silverman. From an order, on motion by Rose L. Silverman, directing Charles Meyers and Jacob Manne, attorneys in the action, who acted for the plaintiff, to execute and deliver a deed of the property involved to Rose L. Silverman, the attorneys appeal. Order reversed, and motion denied.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Louis Ehrenberg, of New York City, for appellants.

McLaughlin & Stern, of New York City (Alonzo G. McLaughlin, of New York City, of counsel), for respondent.

PAGE, J. Robert M. Silverman executed and delivered to his wife, Rose L. Silverman, a mortgage lien upon certain real estate which he owned, to secure the payment of a note for \$2,000 made by Silverman to his wife. The mortgage was assigned to Charles Lask, for the purpose of foreclosure. The action was brought by Manne & Meyers as attorneys for plaintiff, and a sale had, and the property was bid in by the plaintiff. The plaintiff assigned his bid to the Excellent Holding Corporation, and the deed was executed and delivered to the said corporation. Rose L. Silverman claims that Manne & Meyers acted as her attorneys and agreed to have the property deeded to her, and that on demand they have refused to do so, or to account for the rents, issues, and profits thereof. She made a motion, entitled in the foreclosure action, for an order directing them to turn over to her a deed of the property and account for the rents, issues, and profits thereof. The attorneys denied that they were retained by her, or that the action was brought in her behalf, but claim that they were retained by and acted on behalf of her husband, Robert M. Silverman, and that the action was brought for the purpose of having the property turned over to a corporation, all with the knowledge and consent of Rose. Robert M. corroborated the affidavit of the attorneys, and states that he owns all of the stock of the Excellent Holding Corporation.

The justice at Special Term granted the order, which provides: (1) For an accounting of the rents and profits. (2) Rose L. Silverman to pay the amount, if any may be found due the attorneys, for the costs,

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expenses, and disbursements in the foreclosure action and any deficiency resulting from the expenses of carrying said real estate over and above the rents and profits, etc., and, upon receiving payment, the attorneys to execute and deliver to her a good and sufficient deed conveying to her the fee of the premises. (3) If the referee shall find a balance due to Rose L. Silverman, then the attorneys are directed within five days to pay over the said sum and deliver the deed.

The order is incapable of being executed. The attorneys, not having title to the property, cannot convey the fee thereof to Rose L. Silverman or anybody else. The plaintiff has mistaken her remedy. If the facts alleged by her are true, she would have an action in equity, in which action the corporation, her husband, and possibly the attorneys should be parties defendant; but a summary proceeding in the foreclosure action cannot be maintained.

The order should be reversed, with \$10 costs and disbursements, and the motion denied. Order filed. All concur.

(189 App. Div. 234)

VARAGNOLA v. PARTOLA MFG. CO.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. SALES §418(2)—DAMAGES FOR SELLER'S REFUSAL TO DELIVER.

Where delivery and payment are to be concurrent acts, and seller refuses to deliver, buyer is entitled to recover as damages the difference between the contract price and market value of the goods at the time and place appointed for delivery.

2. SALES §418(2)—MEASURE OF DAMAGES FOR REFUSAL TO DELIVER.

Where goods were to be shipped from New York to Italy, payment to be made upon shipment against shipping documents by certain New York banks, with whom buyer agreed to open and maintain a credit for that purpose, the damage for refusal to deliver was the difference between contract and market price in New York at time of shipment, and not Italy; New York being place of delivery.

Appeal from Special Term, New York County.

Action by Eugenio Varagnola against the Partola Manufacturing Company. From an order granting plaintiff's motion for letters rogatory to examine a witness in Genoa, Italy, defendant appeals. Order affirmed, as modified.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Hovel, McChesney & Clarkson, of Brooklyn (Albert A. Hovel, of Brooklyn, of counsel, and Sidney A. Clarkson, of Brooklyn, on the brief), for appellant.

Hunt, Hill & Betts, of New York City (George C. Sprague, of New York City, of counsel), for respondent.

PAGE, J. The action is brought by a resident and subject of the kingdom of Italy to recover damages for failure of the defendant to deliver American caustic soda, which it had agreed to sell and deliver to the plaintiff. In addition to the witnesses whose testimony

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may be material and necessary, the order provides for the examination of eight merchants, for the purpose of proving the market price of American caustic soda in Genoa, Italy, at the time of the alleged breach of the contract. The soda was to be shipped from New York, payment to be made upon shipment against shipping documents by certain New York banks, with whom the plaintiff agreed to open and maintain a credit for that purpose. It is not alleged in the complaint that plaintiff was compelled to buy any caustic soda in Genoa, Italy.

[1, 2] The rule is that, where delivery and payment are to be concurrent acts and the vendor refuses to deliver, the vendee is entitled to recover as damages the difference between the contract price and market value of the goods at the time and place appointed for delivery. The place was New York City, and not Genoa, Italy, and therefore the market price of caustic soda in Genoa, Italy, was not material or relevant to the case.

The order for the issuance of the letters rogatory will be modified, by striking therefrom the following names: "Attilio Carmagnani, Eugenio Cignogna, E. Cicolani, M. Tamburini, of the firm of Portuso & Tamburini, Richard Roe, president of the Chamber of Commerce, in Genoa, Italy (the name Richard Roe being fictitious, the true name being unknown, said witness being the president of the Chamber of Commerce in Genoa, Italy), F. Serimaglio, of F. Serimaglio & Co., Tito Tubini, and Pienemonte Branceleoni"—and, as so modified, affirmed, with \$10 costs and disbursements to the appellant. Order filed. All concur.

WEITZEL v. SCHMITT et al.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. ATTORNEY AND CLIENT ~~§~~192(2)—AUTHORITY OF COURT TO DETERMINE AMOUNT OF ATTORNEY'S LIEN.

On petition to set aside satisfaction of judgment to the extent of an unsatisfied attorney's lien, court in setting aside satisfaction has no authority to determine the amount for which judgment will be restored, but will merely set aside satisfaction to the extent of the attorney's lien, leaving amount thereof to be determined thereafter in an appropriate proceeding.

2. ATTORNEY AND CLIENT ~~§~~190(2)—SETTING ASIDE SATISFACTION OF JUDGMENT TO EXTENT OF ATTORNEY'S LIEN.

Where judgment for plaintiff was satisfied, without satisfying the lien of plaintiff's attorney upon the judgment, the satisfaction of the judgment will be set aside to the extent of the attorney's lien.

Appeal from Municipal Court, Borough of the Bronx, First District. Action by Mary E. Weitzel against Joseph Schmitt and another. From an order denying the petition of G. Arnold Moses, attorney for plaintiff, to set aside satisfaction of judgment to the extent of his lien, the attorney appeals. Order reversed, and satisfaction of judgment set aside to the extent of the attorney's lien.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

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George F. Allison, of New York City, for appellant.
McKeown & Flynn, of New York City (William J. McKeown, of New York City, of counsel), for respondents.

PER CURIAM. [1, 2] This case comes up on an appeal from an order of the Municipal Court, denying the petition of an attorney to set aside the satisfaction of a judgment entered in favor of the plaintiff against defendants, upon the ground that the petitioner was the attorney for the plaintiff in the action which resulted in the judgment, and that his lien upon said judgment had never been satisfied. The petitioner asks that the satisfaction of judgment be set aside "to the extent of \$29 attorney's lien, and restoring said judgment to that amount." The granting of this motion would be in effect a determination of the extent of the attorney's lien, and this the court below had no authority to do. *Duringshoff v. Coates & Co.*, 93 Misc. Rep. 485, 157 N. Y. Supp. 230. The court would and should, however, have set aside the satisfaction of judgment to the extent of the attorney's lien, leaving the amount of such lien to be determined hereafter in an appropriate proceeding. See *Duringshoff v. Coates*, 93 Misc. Rep. 485, 157 N. Y. Supp. 230, *supra*.

Order reversed, without costs; satisfaction of judgment set aside to the extent of the attorney's lien.

(189 App. Div. 217)

KURSHEEDT MFG. CO. v. ROSENZWEIG et al.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. PLEADING $\S$ 258(1)—AMENDMENT OF ANSWER WITHOUT SHOWING OF GOOD FAITH ERRONEOUS.

Where defendants' attorney had prevented plaintiff for nearly a year from having issues made, so that notice of trial could be served by amendments of answer which did not comply with orders of court, and by incorporating in amended answer defense to which demurrer had been sustained, a motion to allow defendant to serve a proposed amended answer was improperly granted; defendant not having shown good faith as required by General Rules of Practice, rule 23.

2. PLEADING $\S$ 236(1)—GOOD FAITH NECESSARY TO AMENDMENTS.

Generally court will permit a party to put his pleading in such shape as will enable him to raise and have determined at the trial any question affecting his interest, where application to amend is made in good faith, and where injustice will not be done to adverse party.

3. PLEADING $\S$ 258(1)—EVIDENCE SHOWING BAD FAITH OF ATTORNEY IN AMENDMENTS OF ANSWER.

Conduct of defendant's attorney in failing repeatedly to observe orders of court in amendment of pleadings, and in reincorporating in amended answer the defense to which a demurrer has been sustained, warrants conclusion, in absence of substantial proof to the contrary, that he is not proceeding in good faith, but that he has abused leniency of court for purpose of delaying cause to which he has no defense.

Appeal from Special Term, New York County.

Action by the Kursheedt Manufacturing Company against Isidor Rosenzweig and another. From an order permitting defendants to

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serve an amended answer, plaintiff appeals. Order reversed, and motion denied.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Nathaniel A. Elsberg, of New York City (Francis Woodbridge, of New York City, of counsel), for appellant.

Louis B. Brodsky, of New York City, for respondents.

PAGE, J. The action is for damages for breach of a contract to purchase goods. The contract consists of two papers, annexed to the complaint as Exhibits A and B, being a broker's sales note and an amendment thereto. There was a delay in delivery of a portion of the goods, and defendants refused to accept the same. Plaintiff alleges that the delay was due solely to conditions beyond the control of the manufacturers, or of the plaintiff, and was caused by abnormal war conditions. The contract provided:

"The Seller shall not be held responsible for delays of delivery due to
* * * conditions beyond the mill's control, caused by abnormal war conditions."

The answer of the defendants admits the making of the contract, consisting of the two pieces of paper, and contains certain admissions and denials which, taken together, present the issue of whether the delay was occasioned by a cause covered by the contract. Upon receipt of this answer plaintiff noticed the case for trial. Within 20 days of the service of the answer defendant served an amended answer as of right, which was the same as the original answer, except it alleged as a separate defense a general trade custom that in a contract for the delivery of print cloth in installments within a specified time a failure of a seller to deliver a complete installment as provided in the contract relieves the purchaser from accepting any further deliveries under the contract, and that time is the essence of said contract. The separate defense repeated the preceding allegations which contained denials, and reiterated expressly the admissions contained therein. Plaintiff moved to strike out the repeated denials, in order that it might demur to the defense. This motion was granted, and defendants served an amended answer, eliminating these repeated denials and admissions, and also changed the allegations of the defense. Instead of "a general custom and usage in the print cloth business," it alleged "a uniform and well-settled custom and usage in the business of print cloth hereinafter and in the complaint referred to," and changed the allegation that "time is of the essence of the contract" to "and that such specified time is of the essence of such contract," and adding to the twelfth allegation:

"As in said contract provided, but delivered 704 pieces, a quantity substantially smaller than provided for in the said contract, which violation materially affected the performance of the said contract."

This answer was returned by the plaintiff's attorney upon the grounds that the same was not in conformity with the order; that the defendants, having once amended of course, had no right to further

amend their answer, except as authorized by the order, and changes not authorized by the order could not be made. The defendants moved that the plaintiff be directed to accept the amended answer. The court held that the amended answer did not conform to the order, but granted the motion to the extent of allowing them to serve their answer in accordance with the order, and stating that, if the defendants desire to serve a second amended answer, they may make such application upon a separate motion.

The defendants then served an amended answer, which conformed with the order of February 17, 1919, except that, while the order struck out the denials, it left in:

"The defendants reiterate the admissions contained in this amended answer."

Thereupon the plaintiff's attorney returned that answer as not conforming to the orders of February 17 and March 6, 1919. The defendants then served an answer that conformed to said orders, whereupon the plaintiff demurred to the defense, and brought the demurrer on for hearing as a contested motion. The demurrer was sustained, with leave to plead over. While this motion was pending, the defendants moved to be allowed to serve an amended answer, a copy of which was annexed. This motion was denied, upon the ground that the question of leave to amend should be left to the justice before whom the hearing on the demurrer was pending. Pursuant to the leave to amend given on the decision of the demurrer, the defendants served the answer that they had theretofore moved to be allowed to serve, and which had been denied. In this answer, many of the allegations, admissions, and denials of the former answers were materially changed. The defense to which the demurrer had been sustained was reincorporated, with some further allegations, which did not have any bearing on the original defense, but were either amplification of the denials or appropriate to a distinct defense. This answer was returned. Defendants then moved that the plaintiff be directed to accept the amended answer, or that leave be granted to further amend their answer in conformity to the proposed answer, a copy of which was annexed to the motion papers. This motion was granted, to the extent of allowing the defendants to serve the proposed amended answer upon the payment of \$10 costs.

[1, 2] This motion should not have been granted. As a general rule the court will permit a party to put his pleading in such shape as will enable him to raise and have determined at the trial any question affecting his interest. This rule is qualified by the requirement that the application to be allowed to amend is made in good faith, and that injustice will not be done to the adverse party. *Muller v. City of Philadelphia*, 113 App. Div. 92, 96, 99 N. Y. Supp. 93. The motion papers did not show merits and the good faith of the defense, as required by rule 23 of the General Rules of Practice. It has been repeatedly pointed out that the requirement of this rule is not met by the old form of an affidavit of merits.

[3] The conduct of the attorney for the defendants, in his repeated failure to observe the orders of the court and in reincorporating in an

amended answer the defense to which a demurrer had been sustained, leads to the conclusion, unless substantial proof to the contrary should be adduced, that he is not proceeding in good faith, but that he is abusing the leniency of the court for the purpose of delaying a cause to which he has no defense. The complaint was served November 23, 1918. By reason of the dilatory tactics of the defendants, the plaintiff had been prevented for nearly a year from having the issues made, so that a notice of trial could be served. If leave to further amend should hereafter be granted, it should be on substantial proof of the merits and good faith of the defense, and upon payment of costs to date.

Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs. Order filed. All concur.

(189 App. Div. 301)

PEOPLE v. DAVIS.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

ANIMALS § 98—FAILURE OF VETERINARIAN TO REPORT EXAMINATION.

Veterinarian was not liable to penalty, under Agricultural Law, § 98, for failure to report that cows examined by him were afflicted with tuberculosis, where in fact the cows were not tubercular, although upon making the examination veterinarian thought that they were so diseased; the statute creating liability only for failure to report the existence of disease and not veterinarian's belief or opinion as to its existence.

Woodward and Lyon, JJ., dissenting.

Appeal from Trial Term, Delaware County.

Action by the People of the State of New York against George H. Davis. From a judgment for the People, and from an order denying the motion for a new trial made upon the minutes, defendant appeals. Judgment and order reversed, and complaint dismissed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Sewell & France, of Sidney (H. B. Sewell, of Sidney, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (C. T. Dawes, Deputy Atty. Gen., of counsel), for the People.

COCHRANE, J. The complaint alleges four separate causes of action arising out of the conduct of the defendant, a veterinarian, in making an examination of four groups or herds of cows, and condemning one in each group as tubercular, without having made any report to the commissioner of agriculture, as required by the Agricultural Law (Consol. Laws, c. 1). Section 98 of the act provides that "all veterinarians in the state shall immediately report to the commissioner of agriculture the existence among animals of any infectious or communicable disease coming to their knowledge," and the actions are brought to recover the penalties provided in the act for a violation of its provisions.

The defendant admits having made a physical examination of the cows in each case, but denies that they were afflicted with tuberculosis, or that he condemned them for having the disease. There is evidence, however, that the defendant did declare to the several owners and persons in interest that the condemned cows were tubercular, and this fact has been found against him by the jury. It is nevertheless admitted that the animals in question were not diseased.

Section 98 of the Agricultural Law requires veterinarians to report "the existence among animals of any infectious or communicable disease coming to their knowledge." It being admitted that these cows were not diseased, there was nothing to report. It may be there should be a statute requiring a veterinarian to report his suspicions or his diagnosis, but that is a matter for the Legislature. Clearly one cannot report the existence of that which does not exist. The statute only creates liability for a failure to report the existence of disease, and not the belief or opinion of the veterinarian that such disease exists. The judgment, therefore, should be reversed.

Judgment and order reversed, and complaint dismissed, with costs. All concur, except WOODWARD, J., dissenting, with a memorandum, in which LYON, J., concurs.

WOODWARD, J. (dissenting). The purpose of the statute is to bring to the attention of the department of agriculture any case of infectious disease among cattle, through the agency of veterinarians, and the evidence in this case clearly establishes that the defendant has disregarded his duty because, so far as his action was concerned the cattle were to be deemed infected, because he said they were, and it seems obvious that his conduct was not such as to justify any strained effort to relieve him of the penalties he has incurred.

BIJOU BUTTON CO., Inc., v. EMPRESS NOVELTY CO., Inc.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. APPEAL AND ERROR §842(1)—QUESTION OF LAW.

Where under Personal Property Law, § 144, subd. 3, a seller before suing for price mailed a letter to buyer, but during his absence delivery was refused by buyer's employes the question whether due notice was given is, for purpose of review, one of law and not of fact.

2. SALES §333—ACTION FOR PRICE ON BUYER'S REFUSAL TO RECEIVE.

If a seller, whose goods have been refused, mails to buyer a letter containing the notice required by Personal Property Law, § 144, subd. 3, to entitle seller to sue for purchase price; but during buyer's absence delivery is refused by one of buyer's employes and the letter is returned to plaintiff unopened, there is no sufficient notice under such section.

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by the Bijou Button Company, Incorporated, against the Empress Novelty Company, Incorporated. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Benjamin H. Cohen, for appellant.

Samuel Sculnick, of New York City, for respondent.

DELEHANTY, J. The complaint in this action consisted of an indorsement on the summons, of two causes of action, for goods sold and delivered amounting to the sum of \$117.18, for which plaintiff has recovered a judgment. It appears from the testimony that one order was in writing, and one given verbally, for the manufacture of certain merchandise known as novelties in celluloid buttons. Delivery was to be made on November 5, 1918. When the first order was given does not clearly appear, but the verbal order was given on October 26, 1919. It is quite evident that both orders were treated as one entire order, there being some testimony to the effect that the buttons to be made under one order could only be used in connection with those made under the other.

[1, 2] Plaintiff's claim is that the merchandise was of a nature that it could not be resold in the markets at a reasonable price; that the goods were offered for delivery and delivery refused; that "prompt, proper, and due" notice, under section 144, subdivision 3, of the Personal Property Law (Consol. Laws, c. 41), was given that the goods would be held on account of the purchaser; and that the plaintiff was thereby entitled to maintain an action for the purchase price. The only evidence of notification to the buyer that the goods would be held as bailee for the defendant was a letter offered in evidence by the plaintiff. This letter had been properly addressed to the defendant and registered and mailed, but during the absence of the defendant from his place of business delivery there had been refused by one of defendant's employés, and thereupon it was returned to the plaintiff unopened. Defendant had no knowledge of the contents of the letter until it was produced in court, unopened, and a copy offered and received in evidence. As a notice this was clearly insufficient. Had the plaintiff properly mailed a letter containing the notification, required by section 144 of the Personal Property Law, and had defendant denied receiving it, a question of fact would have been presented upon which the decision of the lower court would not have been disturbed, but concededly no notification was ever given the defendant. There is undisputed evidence that the defendant wrote a letter to the plaintiff canceling the orders, and that plaintiff received such letter. It is not clear, however, whether the letter was received before or after tender of the goods was made. The motion made at the close of the plaintiff's case to dismiss should have been granted.

Judgment reversed, and new trial ordered, with \$30 costs to appellant to abide the event. All concur.

(189 App. Div. 391)

PEOPLE ex rel. MENZIE v. DAVIS, Mayor, et al

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

1. MUNICIPAL CORPORATIONS ~~§~~218(9)—POWER TO REVIEW REMOVAL OF EMPLOYÉ OF CITY.

Where a statute makes no provision for a hearing, but confers the power of removal of a city employé subject to no limitation, except the requirement that the reasons therefor be stated in writing and filed, and opportunity for explanation given, the act of removal is executive, and is not reviewable on certiorari; but where removal is only to be had after a hearing and finding of misconduct, the act of removal is reviewable on certiorari.

2. MUNICIPAL CORPORATIONS ~~§~~185(8)—HEARING REQUIRED BEFORE REMOVAL OF POLICEMAN.

Under Ithaca City Charter, §§ 15, 21, providing that the mayor should have the power to summarily hear, try, and determine any complaint for misconduct or neglect of duty against an officer of the city appointed by the mayor, and that police officers are subject to removal when found to be incompetent, a police officer could not be removed without a trial in the usual form of law upon evidence given publicly under the sanction of an oath, and where such a hearing is not given the removal may be annulled, under Code Civ. Proc. § 2140.

3. MUNICIPAL CORPORATIONS ~~§~~185(7)—HEARING ON REMOVAL OF POLICE OFFICERS CONFINED TO CHARGES MADE.

Where a police officer is entitled to hearing upon charges made against him, the cause of removal after such a trial must be confined to the charges shown and heard, and should not extend to matters within the personal knowledge of the mayor.

Proceeding by the People of the State of New York, on the relation of Orson H. Menzie, to review the action of Frank B. Davis, as Mayor of the City of Ithaca, and Harry C. Baldwin, as Police Commissioner, in removing the relator as a member of the police force of the city. Determination annulled.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

John Courtney, Jr., of Cortland (Morse E. Ames, of Cortland, of counsel), for relator.

Fitch H. Stephens, of Ithaca (John D. Collins, of Ithaca, of counsel), for respondents.

LYON, J. This is a proceeding by certiorari to review the action of the mayor of the city of Ithaca in removing the relator as a member of the police force of the city. The charges were: First, that on the night of March 17, 1919, he did not make his 4 o'clock morning report to the officer in charge of police headquarters, while working beat No. 3, known as Inlet beat; second, that on January 17, 1919, he absented himself from his post from the hours of 10 p. m. to 11:15 p. m., without permission from the chief of police; that on the same night he frequented the Lehigh Valley Hotel by the front door, and remained there for a period of 15 or 20 minutes without apparent cause; that he did continually smoke cigarettes while on duty that night before midnight, and absent himself from all that part of his beat from Buffalo street south, including State street, which is the

~~§~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

main street, from 9 p. m. until midnight, without any good reason; and, third, that on or about September 15, 1918, he did neglect his duty by leaving his post on what is known as Cayuga street beat between the hours of 9:30 and 10:30 p. m.

The charges were in writing and were duly served on the relator. He filed an answer denying these charges on April 7th, and adjournments were had at his request until April 26th. On that day, relator appeared with counsel and asked that he be confronted with the witnesses to sustain the charges and to have the privilege of cross-examining them. The mayor, holding that the hearing was not a trial, but simply to give the relator an opportunity for explanation, denied the relator's request, to which the relator duly excepted. The relator then called several witnesses in his behalf and himself testified.

On May 26, 1919, the mayor filed a decision in which he found that the relator had failed to prove to his satisfaction, either by substantial evidence or by written explanation, that the charges as preferred, 1 and 2, were not true, and stating he knew from personal investigation the second charge was true; that the fact that he specifically denied under oath the charges, which he knew of his own knowledge were true, and made statements which of his own knowledge were not true, seemed to him to be a further reason for the decision, and also raised a question in his mind as to Menzie's veracity in his other statements and denials. He made no findings as to the third charge, although he stated there was some doubt, in view of other statements made, but, as bearing on the determination to be made, stated his personal knowledge as to the relator's general conduct, and that he had an utter disregard for discipline, and talked back, and criticized his superior officers, and used unbecoming language. Further, he felt it would not tend to give new men a good impression as to what constituted good discipline, and that relator was guilty of said charges, and ordered that he be dismissed from the police department of the city of Ithaca as of the date of his suspension. The relator thereupon sued out this writ of certiorari to review the determination.

The contention of the relator is that he was entitled to a fair and impartial trial, and evidence given to sustain the charges, before he was required to present his defense; that he was denied the right to cross-examine, or to hear any witness sworn to substantiate the charges; and that there was no competent evidence adduced upon the hearing to prove him guilty. The contention of the respondents is that the charter of the city of Ithaca vests in the mayor the absolute power of removal in cases of misconduct and neglect of duty, and that the only requirements are that the reasons for the dismissal shall be stated in writing, and that the person removed shall have an opportunity to make explanation.

Section 15 of the Charter of the City of Ithaca (Laws of 1908, c. 503), provides:

"He [the mayor] shall have power summarily to hear, try and determine any complaint for misconduct or neglect of duty against any officer of the city appointed by the mayor. * * *"

Section 21 provides:

"The policemen and officers of the force now in office shall continue to be policemen, but each subject to removal by the mayor when found to be incompetent, negligent or guilty of misconduct in or about, or unable to perform, the duties of his office, or guilty of wilfully violating any of the rules and regulations of the police commissioner or of any superior officer. * * *

[1, 2] Where a statute makes no provision for a hearing, but confers the power of removal, subject to no limitation, except the requirement that the reasons therefor be stated in writing and filed, and an opportunity for explanation given, the act of removal is executive, and is not reviewable on certiorari. *People ex rel. Kennedy v. Brady*, 166 N. Y. 44, 59 N. E. 701. But the mayor's power of removal in the case at bar is "summarily to hear, try and determine any complaint of misconduct" and "each subject to removal by the mayor when found to be incompetent."

To "try," and, when he shall be "found" to be guilty of misconduct or incompetency, to remove, implies a trial in the usual form of law upon evidence given publicly, under the sanction of an oath. *People ex rel. Maloney v. Douglass*, 195 N. Y. 145, 87 N. E. 1070.

"When by statute or by implication of law the power of removal can only be exercised for cause or after a hearing, the proceeding, although the exercise of an administrative power, is judicial in its nature, and as a necessary consequence is subject to review by certiorari." *People ex rel. Hayes v. Waldo*, 212 N. Y. 156, 170, 105 N. E. 961, 966.

Where a person is protected in the enjoyment of a public office or employment from removal, except for cause, to be ascertained and adjudged upon a hearing of a judicial nature, and it appears that he has been removed, without any proof of the necessary facts upon oath, the determination, if not absolutely without jurisdiction, is clearly erroneous as matter of law. *People ex rel. Kasschau v. Police Commissioners*, 155 N. Y. 40, 49 N. E. 257.

[3] The decision states that the mayor has heard him criticize his superior officers, including the commissioner and the chief of police, and as well the aldermen.

"I might go deeper into the matter from my own personal observation since I have been mayor, but do not deem it necessary. In view of all these facts, I feel that mere disciplinary measures would be inadequate."

None of these matters were charges against him. The cause of removal must be confined to the charge shown and heard. *People ex rel. Kasschau v. Police Com'rs*, 155 N. Y. 40, 44, 49 N. E. 257; *People ex rel. Shuster v. Humphrey et al.*, 156 N. Y. 231, 50 N. E. 860.

The relator has been a policeman since September, 1900. He had grown old in the service, perhaps a little impatient as well, with the reputation, as disclosed by the evidence, of having been a good officer. He and his witnesses make plausible explanations, which tend in a large measure to explain the charges against him. If he is to be convicted and deprived of his position in disgrace, it should be after

a fair trial, in which he may meet his accusers bound under the sanctity of an oath.

Under subdivisions 3 and 4 of section 2140 of the Code of Civil Procedure, the determination must be annulled, and a new hearing had, with \$50 costs and disbursements to the relator. All concur.

(189 App. Div. 352)

FISH v. RUTLAND R. CO.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

1. COMMERCE ⇨27(8)—MASTER AND SERVANT ⇨365—EMPLOYÉ NOT ENGAGED IN "INTERSTATE COMMERCE."

Claimant millwright, while engaged at a terminus of a run between Vermont and New York in ripping a piece of timber, to be used, when ripped, in repairing a caboose which had been operated on the run that day, was not engaged in interstate commerce, and his claim for resulting injuries would come within Workmen's Compensation Law, in view of section 21, providing that the presumption is, in the absence of substantial evidence to the contrary, that the claim comes within provisions of the Compensation Law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. MASTER AND SERVANT ⇨403—BURDEN OF PROOF THAT EMPLOYÉ'S PRODUCT WAS USED IN INTERSTATE COMMERCE.

The burden was on employer railroad, if it claimed that planks which claimant was engaged in ripping at the time of injury were used in repairing a caboose engaged in interstate commerce, to prove an actual application.

3. RAILROADS ⇨5½, New, vol. 6A Key-No. Series—AWARD TO CLAIMANT SHOULD BE AGAINST EMPLOYER, NOT AGAINST DIRECTOR GENERAL.

Contention that, as employer's railroad was being operated by the Director General, the award to claimant employé should have been against the Director General cannot be sustained; the railroad company having described itself as employer in the report of the injury which it filed with the commission.

4. MASTER AND SERVANT ⇨419—POWER OF COMMISSION TO INCREASE AWARD.

The commission may reopen the claim and make a larger award, especially where previous award is for an incorrect amount.

Appeal from State Industrial Commission.

Proceeding for compensation under the Workmen's Compensation Law by Peter Fish, opposed by the Rutland Railroad Company. From an award by the State Industrial Commission in favor of claimant, the Railroad Company and the Director General of Railroads appeal. Award affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Cantwell & Cantwell, of Malone, for appellants.

William St. Mary, of Malone, for respondent.

Charles D. Newton, Atty. Gen., and Bernard L. Shientag, of New York City (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

LYON, J. [1] This is an appeal from an award of the State Industrial Commission made to claimant for the proportionate loss of the use of the left hand. He was a millwright in the employ of the defendant, and was engaged in ripping a piece of timber when he sustained the injury. Malone was a terminus of a run between Alburg, Vt., and Malone, N. Y. A caboose had been operated on this run that day and for some time. The claim agent and the general foreman of the Rutland Company make affidavits that the piece of timber, when ripped, was to be used in repairing this caboose. That the work was ever completed, or that the piece of timber was ever so used, does not appear. The commission found that the claimant was not engaged in interstate commerce, finding against the intended use.

Section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67) provides that the presumption is, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the Compensation Law. The stick could not be said to be an instrumentality of interstate commerce until it was at least on its way to be incorporated in the car, or on being placed therein. In *New York Central Railroad Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1 Ann. Cas. 1917D, 629, the court says:

"The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the federal act. The test is: 'Was the employé at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?' *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558 [36 Sup. Ct. 188, 189, 60 L. Ed. 436, L. R. A. 1916C, 797]. Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152 [33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153]. And see *Chicago, Burlington & Quincy R. R. Co. v. Harrington*, 241 U. S. 177, 180 [36 Sup. Ct. 517, 60 L. Ed. 941]; *Raymond v. Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43 [37 Sup. Ct. 268, 61 L. Ed. 583]."

In *Atlantic Coast Line Co. v. Woods*, 252 Fed. 428, 164 C. C. A. 352, cited by appellant, the yoke or bolt was taken off, and, after being re-threaded, again put on the engine hauling interstate trains. In *Pedersen v. Delaware, Lackawanna & Western R. R. Co.* the plaintiff was injured while carrying bolts to be used in repairing a bridge used in interstate commerce. In *Grybowski v. Erie Railroad Co.*, 88 N. J. Law, 1, 95 Atl. 764, affirmed 89 N. J. Law, 361, 98 Atl. 1085, the claimant was engaged in cleaning the ash pit to be used in interstate commerce, at the time he was injured. In *Guida v. Pennsylvania Railroad Co.*, 183 App. Div. 822, 171 N. Y. Supp. 285, the claimant was engaged in cleaning boilers to be used in interstate commerce.

[2] If the claimant at the time he was injured had been engaged in putting the piece of timber into the caboose, a different question might be presented. There is nothing showing that the plank was actually used in repairing the caboose. It was within the knowledge of the employers what use, if any, was made of the plank. The burden was on them, if application be claimed, to prove an actual application.

[3] As to the claim that the award should have been made against the Director General, as the Rutland Railroad was then being operated

by him, the matter was passed upon adversely by this court in *Bryant v. Pullman Co.*, 188 App. Div. 311; 177 N. Y. Supp. 488. Furthermore, the Rutland Railroad Company describes itself as the employer in the report of this injury which it filed with the commission.

[4] As to the authority to reopen the claim and make a larger award, this court has frequently passed affirmatively upon the right of the commission to do so. This is especially true in a case in which the previous award was for an incorrect amount. *Kriegbaum v. Buffalo Wire Works*, 182 App. Div. 448, 169 N. Y. Supp. 307.

The award should be affirmed. All concur.

(108 Misc. Rep. 284)

RICE v. VON DER LIETH et al.

(City Court of New York, Trial Term. July, 1919.)

1. ANIMALS §74(3)—LIABILITY OF OWNER OF RUNAWAY HORSE.

In action by policeman for personal injury in an attempt while on duty to stop a runaway horse, harnessed to a wagon with no one in control, wherein it was neither alleged nor claimed that defendant owner had notice of any particular vice or previous predisposition of the animal which would account for its flight, it was not necessary to allege and present evidence of notice, but the burden was on plaintiff to allege and prove negligence.

2. ANIMALS §74(5)—POLICEMAN'S ACTION FOR INJURIES IN STOPPING RUNAWAY PRIMA FACIE AGAINST OWNER OF HORSE.

In action by policeman for personal injury in an attempt while on duty to stop a runaway horse harnessed to a wagon with no one in control, proof either that the horse was left unattended or unguarded at the place from whence it started contrary to Police Regulations, art. 8, or that defendant failed to observe the necessary precautions because of the natural propensities of the horse would make out a prima facie case.

3. ANIMALS §74(8)—NEGLIGENCE OF OWNER OF RUNAWAY HORSE QUESTION FOR JURY.

In action by policeman for injury in an attempt while on duty to stop defendant's runaway horse, even if the natural disposition of the horse was shown to be such as to cause it, in view of the circumstances, to run away, a case would be presented for the jury, irrespective of Police Regulations, art. 8, against leaving horse unattended in street, etc.

4. ANIMALS §74(2)—INJURY TO POLICEMAN FROM RUNAWAY HORSE.

In action by policeman for personal injury while attempting on duty to stop defendant's runaway horse, plaintiff must plead and prove that flight was either the cause of horse's vicious propensities of which defendant had notice, or that runaway would not have occurred but for defendant's negligence in its use or management, in view of Police Regulations, art. 8, as to leaving horses unattended in streets, etc.

Action by Francis O. Rice against Henry Von Der Lieth and others. On motion to reconsider the dismissal of complaint. Motion denied.

Ralph Gillette, of New York City, for plaintiff.

Elfers & Abberley, of New York City, for defendants.

LA FETRA, J. [1] This is an action by a police officer, who, in the discharge of his duties August 6, 1916, stopped a horse running in full flight through the public streets of this city. In doing so he was

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thrown to the roadway and seriously injured. The animal was fully harnessed to a wagon, with no one then in control of its movements. Whether, before it started, it was unattended or unguarded, contrary to certain police regulations of this city, how far it had run, and what caused it to start do not appear. It was neither alleged nor claimed the defendants had notice of any particular vice or predisposition of the animal which might have accounted for its flight. The action was not of that class where it was necessary to allege and present evidence of notice, often with less accuracy called scienter.

[2] The burden was nevertheless upon the plaintiff to allege and prove negligence. In this particular instance the burden upon plaintiff was to show the animal was left unattended or unguarded at the place whence it started, contrary to the police regulations. Either evidence of a violation of the regulation or proof of failure to observe the necessary precautions considered advisable because of the natural propensities of the horse would have made out a prima facie case. The regulation (article 8, section 1) adopted by the police authorities, and read in evidence (Greater New York Charter, §§ 298, 315 [Laws 1901 c. 466]), is as follows:

"A horse shall not be unbridled nor left unattended in a street or uninclosed space without being securely fastened, unless harnessed to a vehicle with wheel so secured as to prevent its being dragged faster than a walk."

The mere flight, without further proof, was insufficient. *Macauley v. New York*, 67 N. Y. 602.

[3] Even if the natural disposition of the horse had been shown to be such as to cause it, taking into consideration the surrounding circumstances, to take flight and thus run away, irrespective of the regulation, a case would have been presented for the jury's consideration. *Dickson v. McCoy*, 39 N. Y. 400.

[4] Except as thus modified, plaintiff must plead and prove the flight was either because of the vicious propensities of the animal, of which the defendant had notice, or that the running away would not have occurred, but for the defendant's negligence in its use or management. The regulation recognizes the tendency of horses to take flight because of the unusual noises so frequently occurring in our city streets, and prohibits leaving them without taking the proper precautions pointed out, and that irrespective of their age, disposition, gentleness, or training. If mere proof of flight be sufficient, defendant would be compelled to counteract a presumption, at times impossible, because of the unavoidable character of many such accidents. The plaintiff would then be relieved of a common-law burden and the defendant forced to assume one not theretofore recognized. In *Unger v. Forty-Second St. & Grand St. F. R. Co.*, 51 N. Y. 497, there was a mere scintilla of evidence to the effect that the horses were unattended and unfastened to the car when they started and ran away. The defendants proved precisely how the horses became detached, that they were then under the control of the driver, and the cause of their running away. As there was nothing to cast suspicion upon the truthfulness of the testimony of the defendant's witnesses, the court took their evidence as true. A ver-

dict in favor of plaintiff was promptly set aside at Trial Term and affirmed in an opinion by Judge Earl. He said:

"It thus appears that the horses got loose and ran away without any fault whatever of the driver, and I can perceive no principle upon which the defendant can be held liable. A person driving horses through a street is not bound absolutely to keep them under control. He is bound to exercise that reasonable degree of diligence and care which a man of ordinary prudence and capacity might be expected to exercise under the same circumstances."

The cases cited by plaintiff are readily distinguishable from the one at bar. As for instance, in some the question was submitted to the jury without objection, while in others the court merely used expressions or followed decisions based upon dicta. 3 C. J. 87; 2 S. & R. Neg. 634, 644; Gottwald v. Bernheimer, 6 Daly, 212; McGahie v. McClennen, 86 App. Div. 263, 83 N. Y. Supp. 692; Gray v. Tompkins, 15 N. Y. Supp. 953; Doherty v. Sweetser, 82 Hun, 556, 31 N. Y. Supp. 649; Norris v. Kohler, 41 N. Y. 42; Kelly v. Adelmann, 72 App. Div. 590, 76 N. Y. Supp. 574; Manthey v. Rauenbuehler, 71 App. Div. 173, 75 N. Y. Supp. 714; Hollaran v. City of New York, 168 App. Div. 469, 153 N. Y. Supp. 447; Howley v. Kraemer, 36 Misc. Rep. 190, 73 N. Y. Supp. 142; Davis v. Kallfelz, 22 Misc. Rep. 602, 50 N. Y. Supp. 928; Pearl v. Macaulay, 6 App. Div. 70, 39 N. Y. Supp. 472; Brand v. Borden's Condensed Milk Co., 89 App. Div. 188, 85 N. Y. Supp. 755; Unger v. Forty-Second St. & Grand St. F. R. Co., 51 N. Y. 497; Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488; Furlong v. Winne & McKain Co., 166 App. Div. 882, 152 N. Y. Supp. 245; Hackett v. Lenox Sand & G. Co., 187 App. Div. 211, 175 N. Y. Supp. 361; Farber v. Roginsky, 123 App. Div. 38, 107 N. Y. Supp. 755; Amberg v. Kinley, 214 N. Y. 531, 108 N. E. 830, L. R. A. 1915E, 519; Stapleton v. Butensky, 188 App. Div. 237, 177 N. Y. Supp. 18. The motion to reconsider the direction dismissing the complaint is denied.

Motion denied.

(108 Misc. Rep. 338)

GUTTMAN v. J. H. M. CONST. CO., Inc.

(Municipal Court of City of New York, Borough of Manhattan, Seventh District. July, 1919.)

1. JURY ¶25(6)—DEMAND FOR JURY TRIAL IN MUNICIPAL COURT.

Where plaintiff, at the close of his testimony in an action in the Municipal Court of the City of New York, was permitted to amend his complaint to conform to the proof, and he rested, defendant's demand for a jury trial, served and filed with its amended answer to the amended complaint, came too late, under Municipal Court Code, § 118.

2. BROKERS ¶54, 57(1)—RIGHT TO COMMISSION ON SALE OF REALTY ON SPECIFIED TERMS.

A broker is entitled to his commissions when he produces a purchaser ready, willing, and able to buy realty upon terms specified by the owner and submitted to broker at time of his employment, and any subsequent modification, whether accepted by intending purchaser or not, cannot deprive broker of his commissions.

3. BROKERS ¶57(1)—RIGHT TO COMMISSION ON MODIFICATION OF TERMS.

Where a broker, suing to recover commissions, proved that the proposed purchaser was ready, willing, and able to accept, and did accept, the

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terms as modified by the seller in negotiations relating to the sale of real property, the broker was entitled to judgment in his action for commissions.

Action by Adolf Guttman against the J. H. M. Construction Company, Incorporated. Judgment for plaintiff.

Henry M. R. Goodman, of New York City, for plaintiff.
Bernard Gordon, of New York City, for defendant,

GENUNG, J. The action is brought by a real estate broker for commissions for securing purchaser for property in the Bronx. The answer was general denial.

The case came on for trial by the court without a jury. The plaintiff finished his case and rested. The testimony tended to show that the plaintiff procured a purchaser ready, willing, and able to purchase the property at the price and on the terms offered by the defendant. The testimony established that during the negotiations the price demanded was raised from \$85,000 to \$86,000, and the terms were changed so as to require payment of \$10,000 in cash, instead of taking second mortgage for \$10,000, and in return for this increase in amount of cash to be paid the defendant would allow a reduction of \$1,250 on purchase price. The plaintiff moved to amend the complaint to conform to the proof, and the motion was granted; the plaintiff specifying the amendments desired.

[1] The defendant moved to dismiss the complaint, and the motion was denied. The defendant asked for adjournment to plead to the amended complaint, and asked to have copy of the amended complaint served upon it. With the consent of the plaintiff, the court directed the amended complaint to be served the following day, and allowed the defendant five days thereafter to serve an amended answer, and adjourned the case until the day following the time allowed the defendant to serve its amended answer, and stated the case would proceed without a jury. The amended complaint was served, and five days later the defendant served and filed an amended answer and a demand for trial by a jury of 12 men, and paid the jury fee. When the trial was resumed on the adjourned day, the defendant demanded trial by a jury of 12 men as a matter of right, and the application was denied. The defendant asked for adjournment to secure a bill of particulars, and the application was denied. The defendant refused to offer any testimony or to proceed with the case. Thereupon the court directed judgment in favor of the plaintiff for the amount demanded in the amended complaint.

The Municipal Court Code provides (section 118, Laws 1915, c. 279) that either party at the time of pleading, or within three days of the joining of issue, may demand trial by jury, and that the court may in its discretion, at any time before or during the trial, direct that a trial be had by jury. The amended complaint alleged the same cause of action as the original complaint, and only specified the respects in which the original offer of the property was modified, and, as modified, accepted by the purchaser. The amended answer simply alleged a general denial. Under these circumstances it cannot be said

the defendant was entitled to a trial by jury. It cannot be said to have been the purpose of the Legislature to permit a party, after a plaintiff has finished his testimony, and amended his pleadings to conform to the proof, and rested his case, to serve an amended answer and a demand for a trial by jury, which he has absolutely waived by his failure to demand a trial by jury at the time of joinder of the original issue, or within three days thereafter, and thereby secure a new trial before a jury. To permit such practice would allow either party, after joinder of issue and expiration of three days thereafter, to secure a trial by jury, simply by offering or moving to amend his pleadings, theretofore interposed, without altering the cause of action or presenting a new defense. Such practice must, of necessity, unduly delay the trial of causes in the Municipal Court, as it is a well-known fact that trials by jury cannot be had as speedily as trials without a jury.

[2, 3] In any event, the defendant has been deprived of no right whatsoever, as it is an elementary rule, repeatedly stated in the decisions, that a broker is entitled to his commissions upon securing and producing a purchaser, ready, willing, and able to buy upon the terms specified by the seller and submitted to the agent at the time of his hiring. Any subsequent modification of these terms by the seller, whether or not accepted by the purchaser, cannot deprive the broker of his commissions. Furthermore, in this case, the plaintiff clearly established that the proposed purchaser was ready, willing, and able to accept, and did accept, the terms as modified by the seller in the negotiations between the seller, the purchaser, and the plaintiff.

The defendant was given ample opportunity to proceed upon the adjourned date, and refused to offer any testimony. The testimony of the plaintiff and the purchaser was conclusive, and bore the earmarks of truth and veracity, and was not shaken or weakened in the least on cross-examination. The plaintiff is therefore entitled to recover judgment against the defendant in the sum of \$847.50, with costs and disbursements.

Judgment accordingly.

(108 Misc. Rep. 425)

In re TUCKER'S ESTATE.

(Surrogate's Court, New York County. August 1, 1919.)

1. TAXATION ~~§~~867(1)—VOID ORDER FIXING INHERITANCE TAX ON PROPERTY OF NONRESIDENT.

Property of nonresident decedent situated within New York is not taxable under Laws 1885, c. 483, imposing a collateral inheritance tax.

2. COURTS ~~§~~202(4)—VACATION BY SURROGATE'S COURT OF DECREE VOID FOR WANT OF JURISDICTION.

In the absence of legislative restrictions on the exercise of its power, the Surrogate's Court, without regard to lapse of time, may vacate a decree void for lack of jurisdiction.

3. TAXATION ~~§~~900(3)—MOTION TO VACATE VOID ORDER FIXING TAX.

The Surrogate's Court, on motion by beneficiaries under a will to vacate for want of jurisdiction the court's prior void order, fixing the collateral inheritance tax on the property passing to them under the will, is not concerned with the fact that the beneficiaries cannot recover the money paid to the state pursuant to the void order.

In the matter of the estate of Robert A. Tucker! On application of the beneficiaries under the will to vacate an order fixing inheritance or transfer tax. Application granted.

Joseph F. McCloy, of New York City (Thomas A. S. Beattie, of New York City, of counsel), for petitioners.

Lafayette B. Gleason, of New York City (Schuyler C. Carlton, of New York City, of counsel), for the State Comptroller.

COHALAN, S. This application is made by two beneficiaries under the will of the decedent to vacate an order of this court dated July 13, 1888, fixing the tax on the inheritance or transfer to them under said will.

The decedent died December 9, 1886, a resident of the island of Bermuda, leaving personal property within this state. His will was admitted to probate in this county as that of a nonresident. One of the executors filed a petition dated February 15, 1888, addressed to this court, praying that the amount of the "collateral inheritance tax," if any, due the state, be ascertained. An order was entered appointing an appraiser, who filed his report, in which he found that each of the petitioners herein received an interest from the estate of decedent in the sum of \$76,552.63, and that a tax of \$3,827.63 was due on each share. Thereafter the report of the appraiser was confirmed by an order dated July 13, 1888, to vacate which this application is made. The tax was subsequently paid.

[1] The statute under which the proceeding to determine the tax was instituted was chapter 483 of the Laws of 1885. The Court of Appeals held in *Matter of Enston*, 113 N. Y. 174, 21 N. E. 87, 3 L. R. A. 464, that the property within this state of a nonresident decedent was not taxable under the Act of 1885. This court had therefore no jurisdiction in the matter, and the order assessing the tax was void.

[2] In the absence of legislative restrictions on the exercise of its power the court may, without regard to the lapse of time, vacate a de-

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decree which is void for lack of jurisdiction. *Kamp v. Kamp*, 59 N. Y. 212. My attention has not been called to any provision of law which limits the time within which this court may set aside a decree which was granted because the court had no jurisdiction over the subject-matter.

It is urged by the state comptroller that the granting of this application would be a futile act, since the petitioners herein could not obtain a refund of the tax. The decision of the Court of Appeals in *Matter of Hoople*, 179 N. Y. 308, 72 N. E. 229, is cited to show that section 6 of article 7 of the state Constitution presents an insuperable obstacle to the recovery of the money from the state.

[3] I do not think that the court, on this motion, is concerned with the subsequent plans of the petitioners herein to recover the money paid pursuant to the void order. If, as contended by the state comptroller, it will be impossible for them to succeed in obtaining the refund, then it is obvious that the interests of the state are not prejudiced by the granting of the application. I think the discretion which this court undoubtedly possesses to grant the relief should be exercised in favor of the petitioners.

The application to vacate the order fixing the tax is granted. Settle order on notice.

(106 Misc. Rep. 535)

IN RE PRESTON'S ESTATE.

(Surrogate's Court, Saratoga County. September, 1919.)

1. TAXATION §900(2)—WHEN EXECUTOR MAY MOVE FOR MODIFICATION OF ORDER ASSESSING TRANSFER TAX.

Where an erroneous transfer tax order has been imposed on the estate of a deceased person, the executor of the estate is not limited to his remedy by appeal to obtain relief, but may have the order modified on motion.

2. TAXATION §865—INVESTMENTS SUBJECT TO TRANSFER TAX.

Tax Law, § 221b, imposing a tax on the investments, defined in article 15, of 5 per cent. in addition to that imposed by section 221a, is expressly limited to the investments defined in such article.

Proceeding to appraise the estate of Caroline L. Preston, deceased, for the purpose of imposing a transfer tax. On application to modify a transfer tax order. Motion granted.

Corliss Sheldon, of Saratoga Springs, for executor.

Burton D. Esmond, of Ballston Spa, for state comptroller.

OSTRANDER, S. This is an application to modify a transfer tax order made in this proceeding February 4, 1919. The grounds of the motion alleged are a mistake in law and lack of jurisdiction of the surrogate to make the order fixing the cash value of certain mortgages and a tax thereon.

The properties alleged to have been erroneously assessed are: (1) A bond and mortgage from Harriet Rowley et al. to Emma Arnold, dated November 2, 1901, \$311.25, covering lands in New York state. (2) A bond and mortgage from Strenstrom and wife to Lucy E. Wag-

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man, dated May 1, 1906, \$516.67, covering lands in New York state. (3) A bond and mortgage from James Losee and wife to said deceased, dated April 2, 1906, \$1,319.50, covering lands in Ohio. These were assessed 5 per cent., \$107.37, under section 221b of the Tax Law (Consol. Laws, c. 60). On June 6, 1919, the executor moved to modify and correct the taxing order by striking out this assessment and for general relief.

[1] The comptroller urges that the executor has no relief except by appeal. This contention seems to be met by *Matter of Morgan*, 164 App. Div. 854, 149 N. Y. Supp. 1022, affirmed 215 N. Y. 703, 109 N. E. 1084, and by the *Sillman Case*, 79 App. Div. 98, 80 N. Y. Supp. 336, affirmed 175 N. Y. 513, 67 N. E. 1090, therein cited.

[2] Upon the merits, the executor claims that these securities are not taxable under section 221b of the Tax Law, and that the surrogate had no jurisdiction to make the taxing order. Section 221b imposes a tax upon the investments defined in article 15 of the Tax Law, of 5 per cent. in addition to that imposed by section 221a, with certain exceptions. The securities enumerated and defined in said article 15 do not include the securities involved in this application.

The comptroller urges that the legislative intent must have been to include such securities, because the Tax Law provides that realty mortgages recorded subsequent to July, 1906, shall not be liable to further personal property tax, and that holders of such mortgages recorded prior to July, 1906, may pay the mortgage tax and thereupon the bond secured by such mortgage shall be entitled to all the privileges of those recorded prior to July, 1906. This does not follow. The imposition of a tax is a taking of property in invitum, and should be clearly justified by the language of the statute authorizing it. It should never be permitted by any stretching of construction of the language of an act, nor by any implications of intent not clearly expressed. To pay a tax lawfully imposed is a patriotic duty—to resist one not clearly imposed is equally a patriotic duty. There should be no laxness in refusing the sovereign's demand for tribute not clearly of right, a principle to establish which much blood has been shed. Nor should any latitude be extended to indirect taxation which strongly tends to extravagance in public expenditures. The safest government will always be the one which depends upon an alert and critical management of the purse strings and a frequent call upon the taxpayer for authority to spend his money.

Here the Legislature might have imposed a tax upon the class of securities in question, but failed to do so. On the contrary, it expressly limited the subject of this 5 per cent. tax to the investments defined. There is no authority of law for the assessment of this tax, and the taxing order must be modified, by striking out the assessments in question.

Motion granted, with \$10 costs.

(189 App. Div. 425)

PERLIS v. LEDERER.

(Supreme Court, Appellate Division, Third Department. November 21, 1919.)

MASTER AND SERVANT — 368—WORKMEN'S COMPENSATION; CONTRACT TO BE PERFORMED IN ANOTHER STATE.

Contract with defendant through an agent at an employment office in the city of New York for services to be performed wholly in Pennsylvania does not give employé a right to compensation under the New York Workmen's Compensation Law.

Appeal from State Industrial Commission.

Proceeding for compensation by Catherine Perlis, employé, opposed by Arthur Lederer, employer. The State Industrial Commission made an award in favor of the employé, and the employer appeals. Reversed, and claim dismissed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Bullowa & Bullowa, of New York City (Lawrence E. Brown, of New York City, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The claimant entered into a contract of employment with the defendant through an agent at an employment office in the city of New York, the services to be performed at Forest Park, Pa. She was to perform the duties of a waitress at a summer hotel at the place mentioned, and no other services were contemplated or contracted for. She was injured in a laundry connected with the hotel, and the State Industrial Commission, on the supposed authority of *Matter of Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, has made an award for such injuries. In that case the hazardous business was conducted in the state of New York, and the employé was injured while temporarily employed away from the plant of the employer in New Jersey, but it was not held that the mere fact that the contract was made in New York was the controlling factor. It was based upon the proposition that the hazardous employment carried on by the employer was within the state of New York; the employment within the state of Pennsylvania away from the plant of the employer being merely incidental. The recent case of *Matter of Smith v. Heine Boiler Co.*, 224 N. Y. 9, 121 N. E. 878, Ann. Cas. 1918D, 316, puts the matter clearly, and there is no doubt that a contract made within the state of New York for services to be performed wholly in a sister state is without the police power of the state of New York, and does not give a right to compensation under our Workmen's Compensation Law (Consol. Laws, c. 67).

The award should be reversed, and the claim dismissed. All concur.

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NIAGARA FIRE INS. CO. v. NATHAN.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

1. BAILMENT §1—ONE TAKING CAR WITHOUT PERMISSION NOT BAILEE.

One not connected with a garage or the owner of a car kept therein, who took the same out with the intent of assisting another person in obtaining a priest and doctor to attend such other person's wife, who was critically ill, was not a bailee, but only an interloper.

2. NEGLIGENCE §89(1)—COLLISION DUE TO NEGLIGENCE OF THIRD PERSON.

Where a third person, not connected with a garage or the owner of a car kept in such garage, took such car with intent to assist another person in obtaining a doctor for one who was critically ill, and there was a collision between the car taken and defendant's car, and the drivers of both cars were negligent, the owner of the car taken from the garage was entitled to recover damages from defendant, not being responsible for the consequences of the interloper's acts.

3. NEGLIGENCE §61(2)—OF THIRD PERSON.

One who sustains injury without any fault of his own may recover damages from one whose neglect of duty caused the injury, although the negligence of a third person, not subject to his control or direction, may have contributed thereto.

4. APPEAL AND ERROR §1177(2)—NEW TRIAL WHERE TRIED ON WRONG THEORY.

In an action for damages to an automobile in a collision with defendant's automobile, where the court tried the case on the theory that the driver of plaintiff's automobile was a bailee of the car, when he was in fact only an interloper, on reversal of judgment in his favor, defendant will be allowed a retrial, although the court decided that both parties to the action were negligent, being under the impression that plaintiff could not recover if the drivers of the several cars were both negligent, and there being evidence which would sustain a finding that defendant was not negligent at all.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Niagara Fire Insurance Company against Arthur C. Nathan. From judgment for defendant after trial without a jury, and from an order denying a new trial, plaintiff appeals. Reversed, and new trial granted.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

William Butler, of New York City (R. Waldo MacKewan, of New York City, of counsel), for appellant.

Fox & Weller, of New York City (Robert J. Fox and Robert P. Schur, both of New York City, of counsel), for respondent.

DELEHANTY, J. This action arises out of a collision between two automobiles, occurring at 105th street and Amsterdam avenue, in the city of New York on the night of October 15, 1918. The cars were owned, respectively, by one Raftes, insured under a policy issued by the plaintiff, and one Nathan, the defendant. The defendant has conceded that Raftes' car was damaged in the sum of \$1,000, the

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amount paid to Raftes by plaintiff, who claims subrogation herein. At the time of the accident Raftes' car was being driven by one Carroll, who had taken it from the garage on West Ninetieth street, where it was kept by Raftes. Carroll took the same with the intent of assisting one Faughman in obtaining a priest and a doctor to attend Faughman's wife, who was critically ill. It appears that Carroll was not employed by the garage or by Raftes, and that Raftes knew nothing about the use of his car. In other words, so far as Raftes is concerned, Carroll was an interloper, and not an agent, servant, or even a bailee, as the parties assumed in the court below.

[1-3] The court decided the case upon the theory that, if both Carroll and the defendant were negligent, the plaintiff could not recover, and held that both parties to the collision were negligent. The rule of law governing such a situation is that one who sustains an injury without any fault of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his acts, may look for compensation to any other person whose neglect of duty caused the injury, although the negligence of a third person, with whom he did not sustain the above relations, may have contributed thereto. *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; *Robinson v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1. The case, however, must be sent back for a new trial, for the reason that this court is unable from the conflicting testimony to determine that the defendant was actually negligent, or that he was entirely free from negligence. It is true that the court below stated in rendering its decision that—

"The defendant in my opinion has told a straightforward and probable story as to the manner in which the accident occurred, in which he was not shaken upon cross-examination. * * * The defendant might very well, under the evidence, be freed from negligence entirely."

But it is also true that the court decided both parties to the accident were negligent. Under the circumstances we think that the rights of those concerned herein will be best conserved by a retrial of the cause under the proper rules of law.

Judgment reversed, and a new trial granted, with \$30 costs to appellant to abide the event. All concur.

(189 App. Div. 306)

In re COLE.

COLE v. FLEISCHMANN MFG. CO. et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

MASTER AND SERVANT §375(1)—DEATH WHILE EXTINGUISHING FIRE—"ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

An associate member of a volunteer fire department, who was killed while assisting in extinguishment of a fire under chief engineer of fire department, having full control, under Laws 1859, c. 62, §§ 23, 24, Laws 1883, c. 117, tit. 6, §§ 2, 4, Village Law, § 208, Penal Law, § 1901, and for

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whose death village made payment under General Municipal Law, § 205, providing therefor in case of death of active member of volunteer fire company, was not killed by accident arising out of or in course of his employment, nor incidental thereto, though fire was on his employer's premises and broke out 20 minutes after he had ceased working.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act (Consol. Laws, c. 67) by Mary Cole for compensation for death of Walter Cole, opposed by the Fleischmann Manufacturing Company, employer, and the Royal Indemnity Company, insurer. From an award of the State Industrial Commission for claimant, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Frank J. O'Neill, of New York City (Barnett Cohen, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. Walter Cole, the deceased employé, ceased working at 20 minutes after 11 o'clock in the evening. Twenty minutes thereafter a fire broke out in one of the buildings of the employer's plant and burned all night. About 4 o'clock in the morning Cole was assisting other firemen to extinguish the fire, when the walls of the building collapsed and he was buried thereunder and killed. Compensation has been awarded to his mother, and is resisted on the ground that the accident did not arise out of or in the course of the employment.

The commission has made inconsistent findings. It has found that Cole did not leave the premises of the employer after he ceased his usual employment on the night in question. It also adopts as part of its findings the facts stated in the opinion of the commission. In such opinion it is stated that it cannot be definitely ascertained whether or not the fire was discovered before the deceased left the premises, and that it must be assumed that he was either on the premises or not far therefrom when the fire was discovered. The evidence, however, is absolutely silent as to the whereabouts of Cole intermediate the time when he stopped work and the time when he was killed, more than four hours thereafter. The evidence shows conclusively that it did not require more than five minutes for him to leave the premises after he stopped working. The only permissible inference is that he had left the premises before the fire occurred, and no inference can be drawn as to when he returned before 4 o'clock on the following morning.

Cole was an associate member of a volunteer fire department in the village of Peekskill, where the fire occurred. When a vacancy occurred in the active membership of the department, it was filled by one of the associate members. Associate membership conferred certain privileges, but did not involve the obligation of responding to

alarms of fire. Such members, however, frequently did render voluntary assistance in fighting fires, and their usefulness in that particular enhanced the probabilities of their appointment to active membership when vacancies occurred in the latter body. It appears that after the death of Cole the village paid the sum of \$1,500 under section 205 of the General Municipal Law (Consol. Laws, c. 24), which provides for such payment in the case of an active member of a volunteer fire company who "dies from injuries incurred while in the performance of his duties as such fireman." As stated, Cole was not an "active" member of the company; but the village recognized the fact that he was performing the duties of an active member and acknowledged its liability accordingly.

Reliance is placed by the respondent on the case of *Matter of Grieb v. Hammerle*, 222 N. Y. 382, 118 N. E. 805. In that case emphasis is given to the fact that the employer specially requested the particular service which the employé was rendering out of his regular working hours at the time when he was injured, and which was of the same nature he was accustomed to perform for his employer. Here there was no request. The employer was not at liberty to make such a request, nor to accept or reject the services of any person in extinguishing the fire when Cole met his death. Operations at the fire were under the control of the chief engineer of the village fire department. He alone had the power to give orders. He was not subject to interference, even by the owner of the property. He so testified at the hearing before the commission. Independently of his testimony, such is the law. Laws 1859, c. 62, §§ 23, 24; Laws 1883, c. 117, tit. 6, §§ 2, 4; Village Law (Consol. Laws, c. 64) § 208; Penal Law (Consol. Laws, c. 40) § 1901. The case cited, therefore, has no application.

It seems to me that the accident to Cole did not arise out of or in the course of his employment, nor was it incidental thereto. The accident occurred while he was rendering services as a fireman, and while he was subject to the control and direction of the chief engineer of the fire department, and not of his employer. The fact that the fire occurred on the premises of his employer was a coincidence. If it had occurred elsewhere the legal aspect of the case would not be different. Cole may have responded more willingly because the fire was on his employer's premises. It is impossible to determine whether he did or not. It is immaterial. No duty required him to act. No request to do so came from his employer. His allegiance and duty were to the organization with which he was acting, and to the orders, direction, and control of its chief engineer alone he was subject.

We do not hold that if the deceased, pursuant to a request of his employer, had acted as a fireman, with the acquiescence of the chief engineer of the fire department and subject to his orders, liability would not exist on the part of the appellants. But such request by the employer was not expressed, and the circumstances clearly are not such as to justify an inference of an implied request, even assuming that an implied request would create liability against the appellants.

It appears, furthermore, that the employer paid the family of the

deceased \$1,000 after the accident, which was not considered in making the award. But, independently of that fact, for the reasons heretofore stated, the claim should be dismissed.

Award reversed, and claim dismissed. All concur, except JOHN M. KELLOGG, P. J., who dissents.

(189 App. Div. 204)

SAXE v. SUGARLAND MFG. CO.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

CORPORATIONS ¶668(4)—**SERVICE OF PROCESS AGAINST FOREIGN CORPORATION ON SECRETARY OF STATE.**

Under General Corporation Law, § 16, in force when a foreign corporation, which had obtained authority to do business in the state, and had designated a person on whom process against it might be served, attempted to surrender such authority, and such person filed revocation of his consent, summons against the corporation, in an action on a liability theretofore incurred in the state, could be served on the secretary of state.

Appeal from Special Term, New York County.

Action by Eugene Saxe against the Sugarland Manufacturing Company. From an order denying its motion to vacate the service of summons, defendant appeals. Affirmed.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Walter J. Vreeland, of New York City (Henry T. Hornidge, of New York City, of counsel, and Alfred W. Kiddle, of New York City, on the brief), for appellant.

Hastings & Gleason, of New York City (Mervyn Mackenzie, of New York City, of counsel), for respondent.

LAUGHLIN, J. Defendant is a corporation, incorporated under the laws of Texas. The cause of action alleged in the complaint is on an express contract alleged to have been made by defendant with the plaintiff in this state, by which, in consideration of plaintiff's procuring for the defendant a contract in writing bearing date the 6th day of March, 1916, whereby Marden, Orth & Hastings Company, Incorporated, a corporation organized and existing under the laws of Maine, should purchase from defendant, during the year 1916, 9,500 tons of sulphuric acid, the defendant agreed to pay the plaintiff a commission of \$2 per ton of the sulphuric acid, to be paid in monthly installments covering the shipments made by defendant to the purchaser each month. It is alleged that the plaintiff procured the contract which was entered into between said Marden, Orth & Hastings Company and the defendant, and that the defendant shipped a small quantity of sulphuric acid, which was not of the kind, description, or quality called for by the contract, and that the defendant wholly failed and refused to perform the contract, although the purchaser was at

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all times ready, willing, and able to perform and to accept and pay for the sulphuric acid at the prices and according to the terms of the contract. Judgment is demanded for \$19,000, being the amount of the plaintiff's commissions on the 9,500 tons, and interest thereon from the 1st of January, 1917, together with costs.

The defendant duly obtained a certificate from the secretary of state in the year 1916, pursuant to the provisions of section 15 of the General Corporation Law (Consol. Laws, c. 23), authorizing it to do business here, and its attorney on the appeal, Walter J. Vreeland, was duly designated as the person upon whom service of process might be made. Defendant, however, filed with the secretary of state on the 20th of July, 1917, an instrument in writing, executed in its name by its president and under its corporate seal by the authority of its board of directors, purporting to revoke the designation of Vreeland and reciting that the corporation had not been engaged in business in this state for one year prior to the 7th day of July, 1917, and purporting to surrender its certificate of authority to do business here, which was annexed thereto, together with a certificate signed by Vreeland consenting to the revocation, which was duly acknowledged.

The summons and complaint were served by delivering two copies thereof to the secretary of state on the 3d day of February, 1919, and by paying to him at the same time \$2, being the statutory fee therefor. The secretary of state forwarded one copy of the summons and complaint to the defendant at its post office address in Texas. It evidently transmitted them to Mr. Vreeland, for on the 14th of February, 1919, he wrote plaintiff's attorneys stating that he had received them from the defendant, but that he had had no opportunity of knowing the facts or looking into the merits of the case, and requesting that the defendant be given opportunity so to do by granting a reasonable extension of time. It appears that a formal stipulation extending the defendant's time to plead to and including the 10th day of March, 1919, was signed by the attorneys for the plaintiff and by Vreeland as attorney for the defendant, on that day, and a like stipulation was signed by them, further extending the time until the 17th day of March. On said 17th day of March, Vreeland as attorney for the defendant, appearing specially for the motion, served notice of the motion to vacate the service of the summons upon the ground that the service upon the secretary of state was not service upon the defendant for the reason that it had withdrawn its business from the state and had no property therein and had revoked its designation of an agent.

The motion was made on the summons and complaint and an affidavit made by Vreeland, stating that on or about the 1st day of July, 1917, defendant withdrew its business and property from the state and revoked its designation of its agent for the service of process, and surrendered to the secretary of state its certificate of authority to do business here, and that it had not been engaged in business in this state for one year prior thereto, and that none of its officers or representatives were within the state. The plaintiff in opposition to the motion presented affidavits showing that his cause of ac-

tion was on a contract with defendant duly made and performed here, and that it accrued before the attempted surrender of defendant's certificate of authority to do business here, and setting forth the record evidence with respect to the defendant's attempted surrender of its authority and revocation of the designation of Vreeland. The memorandum opinion denying the motion predicates the denial thereof on the letter of defendant's attorney asking for the extension of time and on the stipulations which, it was held, constituted a submission to the jurisdiction of the court.

In the view we take of the case, we do not deem it necessary to pass upon that point, the soundness of which may well be doubted, for we are of opinion that the service was good. At the time the defendant obtained authority to do business here, and when it attempted to surrender the same, the statute contained no limitation with respect to the period during which the authority to do business here duly conferred upon a foreign corporation should continue, and contained no provision for surrender of such authority; but by section 16a, added by chapter 193 of the Laws of 1918, authority to surrender such a certificate was conferred. That section expressly provides that, notwithstanding the surrender of the authority to do business here and the revocation of the designation of the person upon whom the process might be served, process against the corporation "in an action upon any liability incurred within this state before the filing of such a certificate of surrender of authority, may, after the filing thereof, be served upon the secretary of state," and provides that at the time of the service plaintiff shall pay to the secretary of state \$2, and that the secretary of state shall forthwith mail a copy of the process to the corporation at its address or the address of any officer thereof known to him. I deem it quite clear that the service upon the secretary of state was good for the reason that section 16 of the General Corporation Law, in force at the time of the attempted surrender of authority, authorized the filing of a revocation of consent by the person designated for the service of process, and provided that in the event of the death or removal from the place where the corporation has its principal place of business within the state of the person so designated, or of the filing of a revocation of his consent, if the corporation failed to file another designation, the secretary of state might revoke its authority to do business here, and that process against it in an action upon any liability incurred here before the revocation, or after the death or removal or revocation of consent and before another designation was made, might be served upon the secretary of state, to whom \$2 was required to be paid, and it then became his duty to mail a copy of the process to the corporation at its address or the address of any of its officers known to him. It was therefore competent for Mr. Vreeland to revoke the consent to have process served upon him by plaintiff after having obtained authority to do business here; but the authority of the secretary of state to receive service of process in an action upon a liability theretofore incurred within this state could not be withdrawn, for even if, under the statute, the secretary of state had revoked defendant's authority for its failure to make another

designation, service could still be made upon him in an action upon any liability incurred here before such revocation. It is not necessary to decide whether the attempted surrender of the defendant's authority was effectual for any purpose, for in any event it could not be effectual to withdraw the authority of the secretary of state to receive service concerning liabilities already incurred, in the absence of express statutory authority therefor. See *Badger v. Helvetia Swiss Fire Insurance Co.*, 136 App. Div. 31, 120 N. Y. Supp. 161; *Hunter v. Mutual Reserve Life Ins. Co.*, 184 N. Y. 136, 76 N. E. 1072, 30 L. R. A. (N. S.) 677, 6 Ann. Cas. 291; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Mutual Reserve Fund Life Ins. Co. v. Phelps*, 190 U. S. 147, 26 Sup. Ct. 707, 47 L. Ed. 987; *Birch v. Mutual Life Ins. Co.*, 91 App. Div. 384, 86 N. Y. Supp. 872, affirmed 181 N. Y. 583, 74 N. E. 1115.

It follows that the order should be affirmed, with \$10 costs and disbursements. Order filed. All concur.

(189 App. Div. 258)

HENRI GUTMANN SILKS CORPORATION v. REILLY.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

CORPORATIONS — 294 — DISCHARGED ASSISTANT MANAGER ENJOINED FROM ACTING AS SUCH.

Assistant manager of corporation, who has been discharged prior to completion of term for which he was employed, because of antagonism toward the president and general manager, will be enjoined from acting or claiming to act as assistant general manager, or from performing or attempting to perform any act or acts similar to those performed by him as assistant general manager prior to his discharge.

Appeal from Special Term, New York County.

Action by the Henri Gutmann Silks Corporation against Michael J. K. Reilly. From an order denying motion for an injunction pendente lite, plaintiff appeals. Reversed, and motion granted.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

See, also, — App. Div. —, 179 N. Y. Supp. 926.

Alexander & Ash, of New York City (Francis M. Scott, of New York City, of counsel, and Mark Ash, of New York City, on the brief), for appellant.

Satterlee, Canfield & Stone, of New York City (R. Randolph Hicks, of Norfolk, Va., of counsel), for respondent.

PHILBIN, J. The defendant was employed by the plaintiff corporation, a dealer in silks and other textiles, as assistant general manager at a salary of \$5,000 per year and 5 per cent. of the net profits, the latter to be paid at the end of the term of employment. The defendant was also a director and vice president of plaintiff. It was stated on the argument that his term of office as such would expire in January next. The defendant was discharged on June 12, 1919, pursuant to a resolution by the directors of the plaintiff, which recited

in brief that defendant had made an unwarranted attack upon the character of the president and general manager. It was resolved that because of that, and defendant's refusal to work with the manager, he should be discharged. The complaint sets forth that, after defendant was discharged, he declared to plaintiff that he would disregard the resolution and would continue to come to the premises and engage in business there until his contract of employment ended on November 1, 1920; that defendant has done so, attending at plaintiff's premises from 9 a. m. to 5 p. m. daily, and has assumed to act as when employed. It is further alleged that his presence interferes with the president and general manager in the discharge of his duties; that defendant's attendance tends to destroy the efficiency and discipline of plaintiff's sales force and employes; that if defendant is not restrained there will be a loss in sales and of customers, and breach of duty by other employes causing irreparable damage; that defendant has an adequate remedy at law for damages for alleged wrongful discharge, as plaintiff has a paid-up capital of \$250,000. It is further alleged that defendant, as vice president, is, under the by-laws, only to perform such duties "as may be assigned to him by the board of directors"; that no duty has been assigned.

While the defendant denies in his answering affidavit that he made the statements upon which the resolution discharging him was based, it is obvious from a reading of his affidavit that he is antagonistic, to express it conservatively, to the president and general manager. Defendant denies that his attendance at the plaintiff's place injures the business or tends to disrupt it. It clearly appears that he insists upon fulfilling his former duties, notwithstanding his discharge. He should not be permitted to ignore the discharge, and he should be restrained from doing so. *Star Fire Insurance Co. v. Ring*, 118 App. Div. 107, 103 N. Y. Supp. 137.

The order should provide that the defendant be restrained from acting or claiming to act as assistant general manager, and from performing or attempting to perform any act or acts similar to those performed by him by virtue of his employment as said assistant general manager prior to his discharge on June 12, 1919, but not restraining him from performing his duties as director. In permitting the defendant to act as director we recognize the fact that there is more to the duties of such office than merely attending directors' meetings. Nevertheless, we do not anticipate that the defendant will be unwise enough to seek to nullify the effect of the injunction by interfering with the conduct of plaintiff's business under the guise of performing his duties as director.

The order denying plaintiff's motion should be reversed, with \$10 costs and disbursements, and the motion granted, as above stated, with \$10 costs. Order filed. All concur.

(189 App. Div. 255)

O'NEIL V. MCKINLEY MUSIC CO.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. EVIDENCE $\S$ 442(4)—PAROL EVIDENCE SHOWING DETAILS AFFECTING WRITING ADMISSIBLE.

The written contract being merely defendant's letter agreeing, in consideration of plaintiff's suggesting and putting into operation his plan of leasing or selling phonograph "which is furnished with the Root Popular Music Assortment," to pay him a commission on all moneys collected for said rental and sale, defendant, to show the full agreement, could introduce the details of plaintiff's plan as worked out by himself in writing.

2. EVIDENCE $\S$ 442(4)—PAROL EVIDENCE OF CONVERSATION PRIOR TO OR CONTEMPORANEOUS WITH WRITING.

Conversations between the parties, prior to defendant signing a letter agreeing, in consideration of plaintiff's plan of leasing or selling the phonograph furnished with a certain music assortment, to pay him a commission on money collected for said rental and sale, are admissible; they not varying the terms of the letter, but merely augmenting the effect of the writings, which plaintiff had made, in disclosing the full nature of the plan.

3. CONTRACTS $\S$ 175(2)—EVIDENCE SHOWING PRACTICAL CONSTRUCTION ADMISSIBLE.

Evidence showing the practical construction placed on the agreement while the parties thereto were working under it is admissible in action on it.

Appeal from Special Term, New York County.

Action by Liana R. O'Neil against the McKinley Music Company. From a judgment on a verdict for plaintiff, and from an order denying a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Young & Hughes, of New York City (James A. Hughes, of New York City, of counsel, and James I. Cuff, of New York City, on the brief), for appellant.

Samuel J. Rawsk, of New York City, for respondent.

PHILBIN, J. This is an action by the assignee of an employé against employer for commissions alleged to be due. The plaintiff relied upon the following letter addressed to her assignor and admittedly signed by the defendant:

"Chicago, Feb. 23, 1916.

"R. L. O'Neil, New York, N. Y.—Dear Raymond: In consideration of your suggesting and putting into operation your plan of leasing or selling the phonograph which is furnished with the Root Popular Music Assortment, we agree to pay you, over and above your present salary of \$6,000 per year, 50 per cent. of all moneys collected for said rental and sale of said phonograph after deducting our salesmen's commissions on the same. We will make a settlement with you on this phonograph a/c at least once a year.

"Yours truly,

McKinley Music Company,

"Wm. McKinley, Pres."

[1] The plaintiff alleged in her complaint that her assignor had suggested and put into operation the plan referred to in the foregoing

letter. The assignor on the trial testified that he had done so, and also testified as to what the plan was. Notwithstanding such testimony, when the defendant sought to introduce certain evidence, hereinafter discussed at length, in order to show its version of the plan, the trial court declined to allow the evidence to be received. As a result, only plaintiff's version was before the court, and a verdict was directed in her favor. We have reached the conclusion that reversible error was committed in thus closing the door to the defendant.

Except in barest outline, the letter of February 23d gives no explanation of the assignor's plan. Nor is the meaning of the phrase "Root Popular Music Assortment" made clear. The two sheets of paper sought to be introduced in evidence by the defendant, not only reveal certain calculations made by the assignor, but also tend to show that the said music assortment included 950 sheets of music, 19 phonograph records, 1 phonograph, 15 wire pockets, and 250 catalogues. They also tend to show that the defendant had in operation a selling plan that netted it a gross profit of \$31.86, and that part of that plan involved a gift of the phonograph to the purchaser of the assortment. They also reveal the new plan of plaintiff's assignor. That plan contemplated the selling or leasing of the phonograph, instead of giving it away, the increase of the sale price of the assortment from \$76 to \$106, the increase of salesmen's commissions from \$10 to \$17.50, the increase of defendant's profit, and the dividing of the increased profit equally between the defendant and the assignor. Such evidence does not tend to vary or contradict the terms of the letter, but, on the contrary, puts us into the position occupied by the employé and employer at the time the letter was written, defines and discloses the scope of the plan, and enables us better to understand the subject-matter of agreement.

It is the claim of the plaintiff that her assignor was entitled to a commission on phonographs sold or leased, irrespective of the make-up of the assortment. On the other hand, defendant claims that the sale or leasing of the phonographs was merely incidental to the sale of the assortment, and that each assortment was to contain not less than 950 sheets of music. The letter in question does not make clear which contention is correct. Nor is either contention at variance with the terms of the letter. In such case it is proper that the details of the assignor's plan, as worked out by himself in writing, should be introduced in evidence, in order to show the full agreement. *Ragette v. Maxwell Co.*, 188 App. Div. 715, 177 N. Y. Supp. 225; *Leifer v. Scheinman*, 179 App. Div. 665, 167 N. Y. Supp. 105.

[2] Defendant also sought to introduce testimony of conversations between the assignor and defendant's president. Such conversations were excluded on the ground that they occurred prior to, or contemporaneous with, the signing and delivery of the letter of February 23d, and were merged therein. By that ruling the defendant was prevented from showing that the "Root Popular Music Assortment" was to be continued as an assortment of 950 sheets of music, that such assortment was thereafter in all cases to be sold at not less than \$106, and that the increase to that fixed price was the inducement for de-

fendant's promise to pay the assignor (in addition to a fixed salary of \$6,000 a year) one-half of the increased profits. Such facts would not operate to vary the terms of the letter, but merely to augment the effect of the two written sheets in disclosing the full nature of the plan. The conversations should therefore have been admitted.

[3] Any evidence, such as Defendant's Exhibits for Identification B and C, which shows the practical construction placed upon the agreement by the defendant and the assignor, while the latter was working under the agreement, should also be admitted on the new trial.

The judgment and order should be reversed, and a new trial ordered, with costs to appellant to abide the event. Order filed. All concur.

(109 Misc. Rep. 243)

PALMER et al. v. ROTARY REALTY CO., Inc., et al.

(Supreme Court, Special Term, Kings County. November 10, 1918.)

1. DISCOVERY $\S$ 41—SCOPE OF EXAMINATION BEFORE TRIAL.

In an action involving realty, where plaintiffs claimed that a deed was in fact a mortgage, *held* that, though they were entitled to examine defendants before trial, the examination should not extend to the receipts and disbursements made by defendants with respect to the realty, for plaintiffs would not be entitled to an accounting until they established their right to an accounting.

2. COURTS $\S$ 481—POWER OF JUDGE OF ONE COURT TO VACATE ORDER OF JUDGE OF ANOTHER COURT.

In an action begun in Kings county, in which an order was entered for the examination of defendants before trial, such examination was directed to be held in New York county, in which the defendants resided, *held* that, as the judge before whom such examination is held sits as a judge out of court, under Code Civ. Proc. $\S$ 873, such judge could not, under sections 772, 769, vacate the order entered by the court of Kings county.

Action by Rose M. Palmer and another against the Rotary Realty Company, Incorporated, and others. On motion to vacate or modify an order made by Justice Cropsey for defendants' examination before trial. Order modified and affirmed, and order entered by Mr. Justice Hendrick vacated.

Bernard H. Arnold, of New York City, for the motion.

Rose M. Palmer, of Brooklyn, opposed.

BENEDICT, J. This is a motion to vacate or modify an order made by Mr. Justice Cropsey for defendants' examination before trial.

[1] I think the plaintiffs are entitled to examine the defendants before trial with respect to all the matters specified in the order, except the items of receipts and disbursements for the property mentioned in said order. Those are matters into which plaintiffs are privileged to inquire only after they have established their right to an accounting. If, on the trial, the court shall determine that the deed given by the plaintiffs to the defendant Rotary Realty Company, Incorporated, was in fact a mortgage, then an accounting will be directed by interlocu-

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tory judgment, on which all matters respecting defendants' receipts and disbursements on account of the premises in question can be inquired into.

So far as the direction for the production of books and papers is concerned, I cannot see that the books and papers mentioned in the order, or in the affidavit on which it was granted, will be helpful to plaintiffs in proving any of the matters which they must prove in order to obtain an interlocutory judgment for an accounting.

A question of practice is, however, presented, which I think should be fully discussed, because by lack of attention to certain plain and simple rules of procedure a situation has been created which ought not to be possible in any orderly system of jurisprudence.

[2] Because the persons to be examined were not residents of Kings county, the examination was directed to be held before the justice of this court holding Special Term, Part II, in New York county. On the return day of the order, defendants' attorney applied to Mr. Justice Hendrick, who was there sitting, to vacate or modify the order, and he made, it is stated, an oral decision, directing a modification of the order by striking out the two paragraphs hereinbefore referred to. An order was made by him in the form of a court order, dated October 18th or October 20th (it is not clear which), striking out only one paragraph of the order directing the examination, leaving in the paragraph relating to the books, and directing the examination to proceed on October 20th. On the latter date, on motion of the defendants' attorney, Mr. Justice Hendrick vacated this order, and made another order striking out both of said paragraphs, and setting the examination for the 22d. On the 24th he made another order vacating the order of October 20th, which vacated the order of October 18th. It would seem, therefore, that he intended to restore the order of October 18th, which struck out only one paragraph of Mr. Justice Cropsey's order. None of these several orders appears to have been entered in Kings county, where this action is triable. On the several occasions when the parties appeared in court, defendants' attorney refused to proceed with the examination, and finally made a motion, on order to show cause containing a stay, returnable at Special Term, Part I, in New York county to vacate Mr. Justice Cropsey's order. This he was allowed to withdraw, and he subsequently brought on the motion now before the court.

The doubt presented is whether I should entertain a motion which was apparently made and passed upon by Mr. Justice Hendrick, and whose order, that of October 18th, apparently still stands. I think, however, that the action to vacate was improperly made before Mr. Justice Hendrick. The Civil Code provides that an order made by a judge of the court out of court may be vacated or modified without notice by the judge who made it, or upon notice by him, or by the court. Section 772. It is also provided that a motion on notice must be made in a county within the judicial district containing the county in which the action is triable, or in a county adjoining the county in which the action is triable, and that a motion upon notice cannot be made in the First judicial district in an action triable elsewhere. Section 769. The

judge before whom the examination is held sits as a judge out of court. Section 873. Hence no application could properly be made on the return day to Mr. Justice Hendrick to vacate or modify Mr. Justice Cropsey's order. If the motion made before Mr. Justice Hendrick can be regarded as addressed, not to him, as a judge out of court, but to the court, and if, further, plaintiffs may be deemed to have waived the requirement that it be made on notice, it was still improper to make it, because it was a motion which could only be made in Kings county, or in some county of the Second judicial district, and not in the First judicial district.

Hence I conclude that Mr. Justice Hendrick, whether sitting as a judge out of court, or sitting in court, had no power to entertain the motion to vacate or modify Mr. Justice Cropsey's order, and his order, which still stands, is void. *Harris v. Clark*, 10 How. Prac. 415, 424. Part of the relief asked on this motion is the vacation of that order, the first one made by Mr. Justice Hendrick, which relief is granted.

The motion to vacate Mr. Justice Cropsey's order is denied, with \$10 costs to the plaintiffs. Mr. Justice Cropsey's order will, however, be modified, by striking out the following provisions:

"The items of receipts and disbursements for property Nos. 1594-1596 Eastern Parkway, borough of Brooklyn, city of New York.

"Further ordered: That the defendant Rotary Realty Company, Incorporated, produce at the examination before trial all books of account, check books, vouchers, paid bills, or other papers concerning the above premises."

The examination will proceed on November 13, 1919, before a justice of this court sitting at Special Term, Part II, in New York county. Submit order in conformity with this decision.

(108 Misc. Rep. 438)

**COOK v. WILSON et al.
ACTORS' EQUITY ASS'N'S CASE.**

(Supreme Court, Special Term, New York County. August, 1919.)

1. INJUNCTION ☞101(1)—INTERFERENCE WITH PROPERTY RIGHTS BY STRIKING EMPLOYÉS.

The right of one who is conducting a theater to have the public allowed free, unobstructed, access to such theater, and to have an unrestricted privilege to deal with them, is a property right, interference with which will be protected by injunction as against the acts of striking employées.

2. MASTER AND SERVANT ☞339—CONSPIRACY TO PROCURE BREACH OF CONTRACT.

It is unlawful for an association of actors to conspire to procure other actors to break valid existing contracts with the managers of theaters, regardless of the means or persuasion employed, whether legal or illegal.

3. INJUNCTION ☞101(1)—CONSPIRACY TO INDUCE BREACH OF CONTRACT BY EMPLOYÉS.

Although courts will not enforce performance of contracts for personal services, theatrical managers as individuals may, by injunction, restrain the members of an "actors' equity association" from conspiring to compel or induce employées to violate valid subsisting contracts, for the purpose of obtaining recognition of such association by theatrical managers.

Action by Charles Emerson Cook against Francis Wilson, individually and as president of the Actors' Equity Association, and others, for an injunction. Injunction granted.

Davies, Auerbach & Cornell, of New York City (Bainbridge Colby, Charles H. Tuttle, William Klein, and Carl E. Peterson, all of New York City, of counsel), for plaintiff.

Paul N. Turner, of New York City (Justus Sheffield, M. E. Harby, and Martin W. Littleton, all of New York City, of counsel), for defendants.

HENDRICK, J. This is one of several actions brought by various individuals against the defendant Wilson and others, to restrain the defendants in these several actions from conspiring together to compel or induce employes of the various plaintiffs to violate subsisting contracts, and to leave the employ of the plaintiffs while such contracts are in force, to the end that the plaintiffs may be compelled to recognize the Actors' Equity Association in their dealings with actors. This is not in any phase an action between the so-called Managers' Association and the defendants. The Managers' Association is not a party to these actions.

The actions are brought by individual employers, based on the allegations in the complaint that valid personal contracts exist between the various plaintiffs and the individual actor defendants, which individual contracts, at the time of the beginning of these actions, were in force and had not expired. The plaintiffs are individual managers of their own business, and it is claimed by them that these contracts are valid, existing contracts between a person in the theatrical business (known as a manager) and a player, by which contracts, in general terms, the player has contracted for a specified sum to render his personal service for a stated time, which had not expired at the time of the beginning of these actions. These employers ask an injunction to restrain the defendants whose contracts have not expired by their terms, and to restrain the defendant, the Actors' Equity Association, from in any way interfering, by persuasion or threat or intimidation, or by any other means, between the employer and his employé, to the end of inducing or compelling, by intimidation or otherwise, the employé to violate his contract with his employer, to the end that by accomplishing the breaking of individual contracts which are in force, and by doing that generally, in relation to all individual contracts between the individual actor and the individual employer, it may compel another outside organization, not a party to these suits, but composed of the managers, and known as the Producing Managers' Association, and also employers of actors generally, to recognize the Actors' Equity Association, and to deal with actors in relation to future and to present contracts only through the Actors' Equity Association.

In applying for a temporary injunction the plaintiffs set forth, by affidavit, a great many acts which they claim are illegally participated in by the individual defendants, and also participated in by a third agency, which is not a party to these contracts, namely, the Actors' Equity Association, which acts, they claim, are not only illegal and unjustifiable, but are done for the purpose of compelling the Managers'

Association and the managers generally and individually to recognize the Actors' Equity Association, and to compel managers to deal in relation to the employment of actors and actresses through and with the sanction of the Actors' Equity Association. They allege that in pursuance of that plan to compel the recognition of the Actors' Equity Association the Equity Association has induced these individual defendants to violate their present subsisting contracts in pursuance of a scheme to induce or coerce generally actors and actresses into a violation of their contracts, to the end that they may cripple the business of the employers to such an extent that they will be forced, in order to avoid irreparable damage and loss, to recognize the Actors' Equity Association.

We do not need to go into the details of the facts that have been set forth to enlighten the court as to the things that have been done, so that the court may reach a conclusion that it is for the purpose above named that these actors have violated their contracts, and that it is for this purpose that the strike now going on is being conducted. In other words, the fundamental fact here is, as it appears to me, that there is an effort on behalf of an organization not a party to these contracts to compel managers to recognize that association. Now, that being the undisputed fact, there is no question of the illegality, not only of the acts of these actor defendants, but of the Actors' Association. Before me there are no papers and no allegations of any illegal act on the part of the manager plaintiffs or employers in these cases. There is nothing before me to indicate any illegal act by them which could by any means be construed as a violation of the existing contracts between them and their employes, the actors, who are involved in these separate actions. I have before me simply the proof of legal subsisting contracts which have been breached by the defendant actors. There is nothing to controvert that. No opposing affidavits are filed, and there is nothing before me to controvert the truth of the various affidavits that have been filed in support of this motion. So that, as the facts alleged by the plaintiffs are not controverted by the defendants, it comes to me only to declare the law governing these actions, and to provide for the enforcement of the law.

[1] This legal situation seems almost to dispose of itself. The law is too well settled to admit of argument. The actions of the actors and of the Actors' Association, which have for their object the obstruction of the public in going to the theaters peacefully and freely and without molestation, are unlawful; the acts of the strikers, as they are called, which interfere with that right, and with the right of the managers to have the public come freely to them, and to trade with them without obstruction, whether those acts be acts of threat or persuasion, of themselves are a violation of law. The right of a man to do business, the rights founded on private contract between individuals, are property rights. It is a property right for these men who are running theaters to have the public allowed free, unobstructed access to their theaters and an unrestricted privilege to deal with them. That is as much a property right as is the ownership of the theaters themselves; and if there be any interference, by obstruction or otherwise, with

that property right which leads to the destruction of the manager's business, such interference is illegal as much as would be the act of a person who took a lighted torch and applied it to the theater and burned it down.

The very recent case of *Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 124 N. E. 97, was one very similar to the case under consideration, and in that the law, which has been so frequently stated by the courts, was reiterated, namely, that interference between the public and the plaintiff is interference with a property right, is illegal, and will be enjoined. I wish to emphasize the clear distinction between the right of an employ   to decline to enter into a contract, which he may do for any reason, and the right of employ  s to conspire together to destroy the business of their employers, to the end that they may compel those employers to recognize any outside agency in the transaction of business between them. If an actor breaks his contract with his employer, a court of equity will not interfere between the employer and the employ  , to the end of compelling the employ   to fulfill his contract.

The courts will not seek to enforce the performance of a contract for personal services, but will leave the person aggrieved to his remedy at law. The actors may break their contracts, individually or all of them, with or without reason. That is between themselves, their consciences, and their employers. The court will not interfere to compel them to fulfill their contracts. The reason is that the law recognizes the fact that it is usually impossible to compel the performance of a contract for personal services. Obviously a court cannot make an actor act, and so, if an actor breaks his contract, the manager is left to his action for damages or to an equity action to restrain the actor from performing under employment from another during the term of the broken contract; and in those cases, which are recognized by the courts, where the services of the actors are of an unusual, unique character, the courts will enjoin such actor who has violated his contract from appearing in other employment. The actors have a perfect right to combine together, to form a union, to join a society such as the Actors' Equity Association, for the purpose of promoting the welfare of the actors generally or individually. They may unite in saying that they will not work for an employer who does not recognize such society. They have a right to make their own conditions for their own employment, and they are at liberty to do so, and if their acts conform with the law in effecting that purpose, such organization is perfectly lawful, and not only would not be criticized, but I think it would be approved generally by the citizens, and certainly by the courts. That applies to contracts and to efforts to obtain contracts in the future.

[2] But when valid contracts exist between individuals, those contracts are sacred, and to induce a person to violate them for any purpose is an unlawful act, and that no matter what the means of persuasion be, whether legal or illegal. It is unlawful for one by legal means to persuade another to do an unlawful act, and the violation of a contract is an unlawful act. So that if this Actors' Equity Associa-

tion, or these actor defendants, counsel or aid or abet, for any purpose, an individual actor to the end that he may violate his existing contract for the purpose of accomplishing some ulterior object, such action is illegal, no matter what the ulterior purpose be. The end does not justify the means. The general purpose of the Actors' Equity Association is to improve the condition of the actors, to get better terms, higher wages, and equitable contracts from the managers. This they have every right to do. It is a legal and justifiable and a praiseworthy object, and there are ample means of accomplishing those objects through the agency of the association, without resorting to illegal methods. An appeal to an actor on the ground that he should violate his contract with his employer, because there is an alleged moral or any other kind of an obligation higher than his contract, is an immoral and illegal act. An appeal to any employé to violate the law on the ground of a higher moral obligation, either to his fellow actors or to his association, is not only illegal, but it is un-American, opposed to our principles of government, which is founded largely on the sanctity of contracts and the right of the individual to contract for himself. An appeal to an employé to violate the law because of an alleged superior moral obligation to any society is illegal. It is anarchy, pure and simple, to assert in practice that the obligation of any member of an organization to that organization is higher than his obligation to obey the law.

No fact in these actions is controverted. The defendants submit no affidavits; nothing, in fact, to show me that all the allegations of the complaint, as fortified by the accompanying affidavits, are not true. It is established without contradiction that the subsisting contracts are valid individual contracts between individuals, and that for the purpose of forcing the plaintiffs to recognize the Actors' Equity Association illegal means are being employed to induce or to coerce actors into a violation of their contracts. As to future contracts, as I have said, the actors may do as they please; but subsisting contracts must not be interfered with for any ulterior purpose, either by themselves or by any third agency. This is the rule repeatedly enunciated by the United States Supreme Court and by the Court of Appeals of this state. I am announcing no new law, nor am I applying any new principles in the cases before us. The Actors' Association and the individual actors must do no act for the purpose of inducing or which tends to induce the public not to patronize the playhouses, which act would tend to destroy such patronage and thus destroy the property of the plaintiff. They must not do any act that has that for its purpose, to the end that the managers may be forced to recognize the Actors' Association. They may go on and do all legal acts—may get every actor and actress in the city to join the association, if they can. They may say that they will never work for any manager unless such manager recognizes the Actors' Equity Association; that they will never make a new contract with such managers; that they will make such terms and conditions as they like for their future employment, either as individuals or as a body; but they must not attempt to obtain the violation or cancellation of subsisting contracts.

It was suggested on the argument, by counsel for the defendants, that the Managers' Association is an illegal combination, having for its purpose the unjust denial to actors and actresses of their rights, to the end of forcing contracts upon them, and that this was accomplished by illegal means, by the power and wealth and strength of the managers' organization, which, it is alleged, puts the actors and actresses at the mercy of such association. It is enough to say that no question of that kind is before me for determination. The Managers' Association is not a party to these actions, nor to this motion for an injunction. That issue is not before me, and I do not pass upon it directly or indirectly. Whatever the facts may be in that regard will be determined on the trial of the action, if the question be raised there. But from what appears before me there has been no act on the part of these plaintiffs showing a violation by them of these contracts, and there is nothing to show, nor to suggest, that they have done any illegal act.

[3] There remains nothing, therefore, to be done except to allow an order of injunction as prayed for by the plaintiffs herein. I am not condemning the Actors' Equity Association, and I certainly am not condemning any legal steps they may take to effectuate the betterment of the condition of the actors and actresses as against the managers or any one else. They have a perfect right so to do, and it is a laudable end which is sought to be accomplished. As long as they work to that end in accordance with the laws, the court will have nothing but aid to give them. An order will be entered in accordance with the views herein expressed.

Ordered accordingly.

(108 Misc. Rep. 449)

Application of CAHILL.

(Supreme Court, Special Term, New York County. August, 1919.)

ELECTIONS ~~153~~—POWER OF BOARD OF ELECTIONS AS TO CANDIDATES AT PRIMARIES.

The board of elections of the city of New York has power to pass on the question as to whether the names of certain candidates to be voted for at the primary election shall be placed on the primary ballot.

Application by Matthew J. Cahill, under Election Law, § 56, to declare null and void a resolution of the Board of Elections of the City of New York. Denied.

Alfred V. Norton, of New York City, for petitioner.

William P. Burr, Corp. Counsel, of New York City (George P. Nicholson and Russell L. Tarbox, both of New York City, of counsel), for board of elections.

LYDON, J. This is an application to declare null and void, and of no effect, a resolution, order, or ruling of the board of elections of the city of New York, passed on August 7, 1919, and directing it to print on the official primary ballot the names of the persons designated as candidates for Democratic county committeemen in Richmond county.

The facts are undisputed. On July 28, 1919, the chairman of the

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county committee filed with the board a statement showing the number of members to be elected in each district. On August 5, 1919, petitions were filed on behalf of those chosen by the organization of the party for these places. On August 5, 1919, a written objection to the said statement was filed with the board by one Curley, upon the ground that it did not specify the correct number of members to be voted for as required by section 37 of the Election Law (Consol. Laws, c. 17). On August 7, 1919, a written objection to the said petition was filed with the board by one Rowland upon similar grounds. Notice of these objections was duly given and the same day a hearing was held by the board, at which a full opportunity was afforded to both sides to state their respective contention, and the order now attacked was adopted, as follows:

"That the portion of the primary call filed by the chairman of the Democratic committee of Richmond county that specifies the number of members of the county committee to be voted for at the primary election is defective, and not in accordance with the requirements of the Election Law, and that the names of the persons that may be thereby designated for members of the county committee of the Democratic party in Richmond county are not entitled to be placed upon the ballot."

The contention of the applicant is that the board of elections had no jurisdiction in the premises, and that its act in holding a hearing after notice of the objections filed by Curley and Rowland was illegal and void. Ever since the board of elections was created, it has undertaken to pass, in the first instance, upon all applications of this kind, and has in this way disposed of innumerable details which should not occupy the time of the courts. Its rulings and decisions are readily reviewed, if incorrect. The board is charged with the duty of executing the laws relating to all elections held within its jurisdiction. To sustain the contention of the applicant would amount to holding that the board must receive any paper filed with it, regardless of its defects, which in my opinion the Legislature never intended. In my opinion the board in this instance acted within its statutory powers.

Motion denied.

(108 Misc. Rep. 438)

In re CHANLER.

(Supreme Court, Special Term, New York County. July 27, 1919.)

1. INSAPE PERSONS ⇐29—DISCRETION ON MOTION TO DISCHARGE COMMITTEE OF PERSON AND PROPERTY.

Under Code Civ. Proc. § 2343, providing that where a person for whom a committee has been appointed becomes competent to manage himself and his affairs, the court may discharge the committee and restore the property, the wide discretion to do so should be exercised with great care and patience so as to protect the alleged lunatic against wrongful deprivation of his liberty and property, if he is competent to manage himself or his affairs.

2. INSAPE PERSONS ⇐29—DISCHARGE OF COMMITTEE OF PERSON AND PROPERTY ON RESTORATION TO COMPETENCY.

Where petitioner was duly committed to an asylum for the insane in the state of New York in 1897, and in proceeding in 1899 by two of his

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brothers a committee of his person and property was appointed, and in 1901 a competent court of Virginia, to which he had gone after his escape from the asylum in 1900, judicially declared him competent, and he had thereafter lived a sane, well-ordered life, in the enjoyment of social, religious, and public esteem, outside of the state of New York, his motion, under Code Civ. Proc. § 2343, to discharge the committee, would be granted.

Application of John Armstrong Chanler, now known as John Armstrong Chaloner, an alleged incompetent, for the discharge of a committee of his person and property. Application granted.

Kaplan, Kosman & Streusand and Frederick A. Ware, all of New York City (Howard Taylor, of New York City, of counsel), for petitioner.

Morris & McVeigh, of New York City (Charles S. McVeigh, of New York City, of counsel), for Elizabeth Winthrop Chapman, Winthrop Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Aldrich, William Astor Chanler, and Alida Beekman Emmet, appearing, but not opposing.

Evarts, Choate, Sherman & Leon, of New York City (Herbert J. Bickford, of New York City, of counsel), for committee.

FORD, J. [1] Application is made here for the discharge of a committee of the person and property of the petitioner, who was adjudged insane and committed to the Bloomingdale Insane Asylum in 1897. In 1899, as a result of a proceeding instituted by two of his brothers, a committee of his person and property was appointed, whose successor still holds the property under the order then made by this court. The alleged incompetent did not appear personally or by attorney at the hearing because of illness. The petition does not make clear just how he got out of the asylum, but it was stated on the argument, and is undoubtedly the fact, that he escaped in 1900. According to the petition, he was a legal resident of Virginia in 1897, and in 1901 a competent court of that state duly declared him to be sane and capable of taking care of himself and his estate. That adjudication also still stands. His name was legally changed from Chanler to Chaloner by court proceedings in North Carolina. This application is made under section 2343 of the Code of Civil Procedure, which reads:

"Property, When to be Restored.—Where a person, with respect to whom a committee is appointed, as prescribed in this title, becomes competent to manage himself or his affairs, the court must make an order discharging the committee of his property, or the committee of his person, or both, as the case requires, and requiring the former committee to restore to him the property remaining in the committee's hands. Thereupon the property must be restored accordingly."

That statute is the sole repository of authority for granting the relief sought by the petitioner. It is as broad and comprehensive as it is clear and precise. The procedure under it has been thus established by the Court of Appeals in *Matter of Blewitt*, 138 N. Y. 148, 33 N. E. 820:

"Section 2343 of the Code provides that, where the alleged lunatic becomes competent to manage himself and his affairs, the court must make an order

terminating the committee of his person and property. When an application is made for a supersedeas of the commission, the court must exercise its discretion. The presiding judge may cause the lunatic to be brought before him for his personal examination. He may appoint an expert to examine him and report as to his condition. He may cause the witnesses to be brought before him, and examined in open court, or he may refer the matter to a referee to take the evidence of the witnesses, and make his report thereon; or he may hear the application upon affidavits if he is satisfied to dispose of it that way. He may also, in the exercise of his discretion, although we have found no reported case in this country or England where it was done, order the question as to the sanity of the alleged lunatic to be tried before a jury. But the manner in which he will ascertain whether the alleged lunatic has become sane and competent to take care of himself and his property, rests in his discretion. In *re Hanks*, 3 Johns. Ch. 568; In *re Wels*, 16 N. J. Eq. 318. The discretion should be exercised with great care and patience, so as to protect the alleged lunatic against the wrongful deprivation of his liberty and property."

[2] Thus it is seen that very wide discretion is lodged in the court as to what proofs it may require to satisfy itself that the petitioner is "competent to manage himself or his affairs." There is no opposition to the petition, although all the brothers and sisters, his only next of kin, and the committee, had due notice. Some of the relatives appeared by attorney upon the hearing; also a letter written, addressed to the petitioner by a sister, was read, which, as I gathered, may safely be taken as a true index of the attitude of all the relatives in respect of the application. It says:

"June 9, 1919. Sylvania, Tarrytown-on-Hudson. Dearest Archie: I know that I speak for all your brothers and sisters when I tell you that they will do nothing to obstruct any steps that you may take to recover complete control of your rights and property, nor do anything to interfere with your personal freedom. Indeed, it has been for many years their wish that you should be re-established in your personal freedom and property rights. Your affectionate sister, Elizabeth."

The committee appeared by his attorney, who lightened the labors of the court by a clear exposition of the law governing the application, and collated in a concise and trenchant brief the salient features of the history of the case, covering a period of some 22 years. It appears from the petition, which stands uncontradicted, that since the Virginia court adjudged him sane and competent to manage his affairs the petitioner has resided in that state and in North Carolina, maintaining a country residence in the former, but having his legal residence in the latter, state since 1905. In both states he has properties, which he has managed successfully and methodically. He is himself a member of the bar of this state, and has taken an active part in litigation in which he has been involved. He was graduated from Columbia University, from which he took the degrees of Bachelor of Arts and Master of Arts, and has studied in three institutions of learning in France. He is recognized by his friends, neighbors, and acquaintances as a distinguished and useful member of the community in which he lives. He has been a vestryman, and is now a trustee of his church, and is a member in several of the larger and well-known fraternal organizations. In two libel suits brought by himself as plaintiff against different newspapers he obtained large verdicts. One of these cases was tried recently in this state in a federal court, and in

that case the mental condition of the petitioner was submitted for the consideration of the jury, and passed upon favorably to him, as was plainly indicated by the excessively large verdict rendered in his favor by 12 men, who for two days had been watching him in the witness chair and listening to his testimony. Thus, for upwards of 17 years since he was judicially declared competent in a sister state, we find the petitioner living a sane and well-ordered life, in the enjoyment of social, religious, and public esteem and honor outside of New York.

What more proof is needed of his competency to manage himself and his affairs in this state also? What need is there for referees, experts, or juries? Why should he be subjected to further harassment? The injunction of the Court of Appeals, *supra*, I have kept in mind and heeded, to "proceed with great care and patience, so as to protect the alleged lunatic against the wrongful deprivation of his liberty and property," and in obedience to that injunction I declare this petitioner to be sane and competent to manage himself, his property and his affairs, and entitled to go forth and mingle with his fellow men freed from the incubus which he has borne these many years. The prayer of the petitioner is granted.

Motion granted.

(108 Misc. Rep. 447)

SAWYER v. SAWYER.

(Supreme Court, Special Term, New York County. August, 1919.)

DIVORCE ⇐213—ALIMONY AND COUNSEL FEES IN ACTION FOR SEPARATION.

Where defendant in an action for separation earns \$100 a month, and his wife has nearly \$1,400 in one bank and withdrew \$450 from another two weeks before applying for alimony, a motion for an allowance of temporary alimony and for counsel fees will be denied, with leave to renew on a proper showing of destitution.

Action by Rosa Sawyer against James Sawyer for a separation. On motion for temporary alimony and counsel fees. Motion denied.

Wheaton, Leavelle & Marshall, of New York City, for plaintiff.
David C. Outlear, of New York City, for defendant.

LUCE, J. This is a motion for temporary alimony and counsel fee in an action for separation. In opposition to the motion for temporary alimony and counsel fee by the plaintiff wife, the defendant husband shows that the wife has an account in the Greenwich Savings Bank of \$1,329.26. It also appears that plaintiff had an account in the Union Dime Savings Bank amounting to \$443.53, which amount she withdrew from said bank on July 14, 1919. The order to show cause in this case was signed on July 29, 1919.

Defendant asks that the motion for temporary alimony and counsel fee be denied, because it appears, without contradiction, that the plaintiff has adequate means to employ counsel and to support herself during the pendency of the action. There is nothing in the papers before the court to contradict the showing made by the defendant that plaintiff has \$1,329.26 on deposit to her credit in the Greenwich Sav-

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ings Bank, and that up to July 14, 1919, she had \$443.53 to her credit in the Union Dime Savings Bank. It appears that the defendant earns \$100 a month as an employé of the post office department of the government. It was held in *Lake v. Lake*, 194 N. Y. 179, 87 N. E. 87, that the power of the court to require a husband to pay a sum of money to his wife to enable her to carry on or defend an action between them affecting the marriage relation is either derived from the statute (Code Civ. Proc. § 1769), or it is incidental to the statutory jurisdiction to entertain such actions. *Jones v. Brinsmade*, 183 N. Y. 258, 76 N. E. 22, 3 L. R. A. (N. S.) 192, 111 Am. St. Rep. 746, 5 Ann. Cas. 378. The court then goes on to say in the *Lake Case*:

"In either case the power of the court to make such an allowance is dependent upon the necessity therefor. *Collins v. Collins*, 80 N. Y. 1. * * *

In the *Lake Case* the court also cites with approval the rule laid down in *Collins v. Collins*, 80 N. Y. 1, namely:

"The fact that a wife is destitute of means to carry on her suit and to support herself during its pendency is as essential as any other fact to authorize the court to award temporary alimony. This is not mere matter of discretion, but a settled principle of equity."

The court in the *Lake Case* also says at page 184 of 194 N. Y., at page 89 of 87 N. E.:

"When the wife in a matrimonial action asks the court for an allowance for counsel fees, the burden is upon her to establish the facts which entitle her to it. If a wife has money under her control, which she is entitled to use, sufficient to carry on or defend such an action, the settled principles of equity will not permit the court to direct the husband to pay to her any further sum of money pursuant to an order. The necessity for the payment to enable her to carry on or defend the action is an essential legal basis for the order."

In the recent case of *Brand v. Brand*, 178 App. Div. 822, 166 N. Y. Supp. 90, decided by the First Department in July, 1917, after going into this proposition of alimony pendente lite and of a counsel fee, and after citing *Lake v. Lake*, supra, *Collins v. Collins*, supra, and *Earle v. Earle*, 147 App. Div. 930, 132 N. Y. Supp. 569, the court said:

"Many other cases might be cited to the same effect, all of which are authority for the proposition that an allowance for temporary alimony and a counsel fee is to be determined, not alone by the husband's means, but by the wife's necessities. If there be no necessity there should be no allowance."

As the papers in the case at bar do not show that the plaintiff is destitute of means to carry on her suit and to support herself during its pendency, but, on the contrary, show that plaintiff has nearly \$1,400 in one bank and had nearly \$450 in another bank on July 14, 1919, the motion must be denied, with leave to plaintiff to renew her application on a proper showing that she is without means to carry on her suit and to support herself during its pendency.

Ordered accordingly.

(189 App. Div. 355)

DELAWARE & H. CO. v. STATE.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

CANALS —17—EXPENSE OF RAISING STREET AT BRIDGE OVER RIVER.

Where claimant railroad was compelled to raise bridge over Mohawk river to conform to Barge Canal Act, the state is liable to claimant for expenses of raising street to grade established by bridge, as well as for damages paid to property owners for damage due to raising grade, though claimant before raising grade entered into agreement with village trustees to indemnify village against all claims of property owners for damage due to change of grade.

Appeal from Court of Claims.

Claim by the Delaware & Hudson Company against the State of New York. From a judgment of the Court of Claims in favor of claimant (106 Misc. Rep. 26, 175 N. Y. Supp. 316), the State appeals. Modified, and, as modified, affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Charles D. Newton, Atty. Gen. (Carey D. Davie, Deputy Atty. Gen., of counsel), for the State.

Lewis E. Carr, of Albany, for respondent.

LYON, J. The question involved on this appeal is as to the liability of the state for the expense of raising Second street in the village of Waterford, N. Y., to the grade established by the bridge over the Mohawk river, which the respondent was compelled to raise and reconstruct to conform to the Barge Canal Act. Laws 1903, c. 147.

The respondent is the successor in title of the Rensselaer & Saratoga Railroad, which was incorporated under a special act (chapter 131, Laws of 1832), and which crosses the fourth branch of the Mohawk river at the village of Waterford, N. Y. Its tracks approach both sides of the river along Second street. The street is carried over the branch of the river which is navigable, by a driveway constructed upon and supported by brackets attached to one side of the railroad bridge. The bridge was built about 1890. It was about 700 feet long and consisted of seven spans. It was supported by two abutments upon the sides of the stream and six piers located in the channel of the river. It carried a single track of railroad. The river has been a part of the canal system of the state since 1891. The title to the bed of the stream is in the state. The respondent never obtained any franchise for the construction of a bridge, aside from such rights as it obtained from its charter. The bridge as constructed did not afford sufficient clearance for the Barge Canal, and in January, 1911, the state served upon the respondent a clearance diagram showing the changes necessary to be made. In 1912 this plan was amended, and the respondent accordingly reconstructed its bridge in accordance with such amended plan.

The action as originally brought was to recover the expense incurred by the respondent in reconstructing the bridge to comply with

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the canal requirements, and the expense occasioned by the change of grade. Since the decision of the Court of Appeals in the case of *Oswego & Syracuse Railroad Co. v. State of New York*, 226 N. Y. 351, 124 N. E. 8, the defense to the part of the claim for reconstructing the bridge has been abandoned. The issue now remaining is whether the other expenses in connection with raising of the grade of Second street are properly chargeable to the state.

The bridge was elevated about 6½ feet which required raising the approaches to the bridge to conform to the new elevation. The respondent made application to the trustees of the village for permission to change the grade of the street. It executed and delivered a written agreement to indemnify and save harmless all claims of property owners to damages by reason of such change of grade. The village thereupon gave the necessary permission. After the work was performed several property owners filed claims against the village for damages sustained by them by reason of such change of grade. Commissioners were appointed under the Village Law, of which the respondent had notice, and it in turn claims to have notified the state. The commissioners awarded damages against the village. The village then brought an action against the respondent to recover the amount of the award. The respondent interposed an answer, which was stricken out. Judgments were then entered against the respondent. The remaining lot owners brought action against respondent under the authority of *Rigney v. N. Y. C. R. R.*, 217 N. Y. 31, 111 N. E. 226, in which actions judgments were entered against the respondent. The judgments amounted, together with \$500 paid to an attorney of the village for services in the proceedings, and \$25 paid to an expert, to \$39,658.39. These judgments the respondent paid. For that amount, with interest from the time of the payments, with the expenditures for the elevating and reconstruction of the bridge, with interest, this claim was made. Judgment was entered in respondent's favor against the state upon an award by the Court of Claims for \$143,222.05, February 13, 1919, from which award this appeal is taken.

The state bases its claim of nonliability for the expense occasioned by the change of grade of Second street upon the respondent having executed an agreement whereby it assumed and agreed to indemnify the village against all claims for damages to property occasioned by such change of grade, claiming that the state was not a party to such agreement, and had no connection with, participation in, or knowledge of the transaction. The village of Waterford is governed by the Village Law of the state. Its board of trustees has supervision of its streets. It had the right to grant to the railroad company the power to raise the grade of Second street. This it did upon the condition that the company should pay such damages as the lots abutting on the street should sustain by such elevation of the railroad tracks. The railroad had no option. It had to accept the conditions. It is no defense that the state might have raised the grade of the street without any liability for damages. Under the agreement between the railroad company and the village, the company elevated its tracks to the level of the bridge. Twelve lot owners filed claims for damages. The vil-

lage called upon the railroad company to defend them. This it did. The defense resulted in judgment against the railroad company. The remaining 12 lot owners sued, and these suits also resulted in recoveries.

When the state was called upon to reimburse the railroad, it interposed three defenses: First, that the Mohawk river was navigable, and the title in the state; second, that the state was not notified of these claims of lot owners, and had no chance to defend them; and, third, that the claims were not filed in the time prescribed by law, and the Court of Claims had no jurisdiction to hear them. The first and third defenses are disposed of by the case of *Oswego & Syracuse Railroad Co. v. State*, 226 N. Y. 351, 124 N. E. 8.

As to the second defense. Under the agreement which the railroad company was compelled to execute as a condition of its raising the grade of the approaches, it was obliged to pay the sums adjudicated against it in the proceedings by the village and the lot owners. The Court of Appeals held in *Lehigh Valley R. R. Co. v. Canal Board*, 204 N. Y. 471, 477, 97 N. E. 964, Ann. Cas. 1913C, 1228, that the bridge included the approaches thereto for a reasonable distance to enable the trains to reach the elevation of the new structure; hence the obligation rested upon the state to pay for the approaches as well as for the bridge. "The duty of the state was to build another bridge at its own cost to replace the one destroyed. It refused to fulfill that duty and put the burden on the owner, who yielded under protest. Reparation in damages must now atone for the wrong of the state in refusing reparation in specie." *Oswego & Syracuse Railroad Co. v. State*, supra. Such damages are what it cost the respondent.

The judgment contains an award for \$525, with interest thereon from May 13, 1916, to February 13, 1919, amounting to \$86.63. Concededly this item consisted of \$500 paid to the village of Waterford upon its claim for disbursements and services of its attorney in reference to the proceedings for the recovery of damages caused by the change of grade of Second street; \$25 was paid by the respondent to an expert for services. The court found, at the request of the state, that the claimant was not entitled to recover any such sum, or any other sum, on that account. State's Finding 51, fol. 953. The court inadvertently included said sum and interest in the amount of \$39,658.39, which it found to be the cost of the approaches.

The judgment should therefore be modified, by deducting the sum of \$611.63, and, as so modified, affirmed. All concur.

(189 App. Div. 330)

ROSENBERG v. OCCIDENTAL TRADING CO.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. ATTACHMENT ~~§~~61—CREDIT AT BANK WHEN NOT SUBJECT TO.

Where one bank authorized another bank to pay certain company up to certain amount upon presentation of bills of lading indorsed to first bank's client, such credit was not subject to attachment under Code Civ. Proc. § 648, in action against such client; no credit being given until presentation of proper documents, and the money under no circumstances being payable to such client.

2. ATTACHMENT ~~§~~291—RIGHT TO MOVE TO SET ASIDE.

Where one bank authorized another bank to pay certain company up to certain amount upon presentation of bills of lading indorsed to first bank's client, and the credit so established was sought to be attached in action against client, client was sufficiently interested to move to set aside attachment and summons and complaint, being entitled to removal of any cloud created by levy as affecting client's ultimate liability for reimbursement to first bank.

Appeal from Special Term, New York County.

Action by Benjamin S. Rosenberg against the Occidental Trading Company. From an order denying motion to vacate and set aside the service of the summons and complaint, and to vacate and set aside claimed levy under warrant of attachment, defendant appeals. Order reversed, and motion granted.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Root, Clark, Buckner & Howland, of New York City (Maxwell Steinhardt, of New York City, of counsel, and Emory R. Buckner, of New York City, on the brief), for appellant.

Slade & Slade, of New York City (Maxwell Slade, of New York City, of counsel, and David H. Slade, of New York City, on the brief), for respondent.

SMITH, J. The plaintiff sues as assignee of a Connecticut corporation, the United Smelting & Aluminum Company, Incorporated, of which the plaintiff is the manager of the New York office. The defendant is a corporation organized and doing business in the state of Oregon. The plaintiff only claims jurisdiction of the defendant through this attachment, the assumed levy under which the defendant is here seeking to set aside. The plaintiff claims to have attached, as property of the defendant, a credit in the National Park Bank, which credit was organized under the following conditions:

Upon the 5th day of October, 1918, the National Park Bank received from the Ladd & Tilton Bank, of Portland, Or., the following telegram:

"Against documents and conditions as below set out please pay United Smelting and Aluminum Company Incorporated up to an aggregate amount of fifty-seven thousand dollars stop bills of lading covering all shipments of prime Western spelter must be dated and presented to us so as to reach us not later than October thirty-first nineteen eighteen stop documents to consist of one negotiable and two extra copies non-negotiable railway domestic bills of

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lading marked for export showing fifty gross tons prime Western spelter consigned to Mitsui Bussan Kaisha Limited Yokohama Japan notify Mitsui Bussan Kaisha Limited Tokio Japan applying shipments against license number thirty-two fifty-nine sixty-five stop show this license number on all documents including bills of lading for this lot mark M B K Tokio stop two hundred gross tons prime Western spelter consigned to Mitsui Bussan Kaisha Limited Kobe Japan notify Mitsui Bussan Kaisha Limited Osaka Japan applying shipments against license number thirty-two fifty-nine sixty-six stop show this license number on all documents including bills of lading stop for this lot mark M B K Osaka stop all bills of lading for above two hundred fifty gross tons prime Western spelter must show cars shipped to port Commission Smiths Cove Dock Seattle Washington in care of James Griffiths and Sons stop show on all documents including bills of lading both lots ocean freight contract number eight sixty-eight with James Griffiths and Sons Seattle Washington stop J E A railway permit number will be telegraphed later separately stop price ten cents per pound f o b cars East St. Louis Missouri stop not less than minimum carload shipment to be made stop all freight charges collect and to follow shipment stop shippers to make out all bills of lading to their own order and endorse to the Occidental Trading Company Portland Oregon stop all bills of lading must reach us on or before October thirty-first nineteen eighteen stop invoices in triplicate direct to the Occidental Trading Company stop instructions must be met absolutely and no cars are to be forwarded as regular domestic shipments."

Upon the 8th day of October, 1918, the National Park Bank received a further telegram from the Ladd & Tilton Bank:

"Your telegram fifth United Smelting and Aluminum Company and further referring our telegram October fourth credit irrevocable against presentation documents but must be in our hands by October thirty-first nineteen eighteen account expiration export license stop bills of lading to be made out to United Smelting and Aluminum Company endorsed to Occidental Trading Company but instead of consigned to Mitsui Bussan Kaisha Limited at destination shown in our telegram fourth we will accept on fifty tons primes Western spelter notify Mitsui Bussan Kaisha Yokohama and Tokio stop on two hundred tons prime Western spelter we will accept notify Mitsui Bussan Kaisha Kobe and Osaka."

Upon the 11th day of October, 1918, the National Park Bank received still a further telegram which reads as follows:

"Referring our night letter October fourth setting up credit United Smelting and Aluminum Company Incorporated for account Occidental Trading Company advise that Smelting Company have not accepted terms of credit according to wires received by Occidental Trading Company also ourselves stop all terms our credit must be complied with stop documents must be forwarded under requirements of letter of credit so as to arrive here not later than October thirty-first stop we understand embargo on export shipments into Seattle stop our client cannot furnish J A E Railway permit number as government order prevents export shipments through Seattle stop United Smelting and Aluminum Company persist wire us direct to allow middle November for arrival of documents but no change in terms our letter possible stop cannot handle straight domestic shipments without bills lading marked for export and without J E A permit number."

Pursuant to the directions so given, the National Park Bank opened a credit to be drawn against under the terms specified in the telegrams.

The Code of Civil Procedure, by section 648, authorizes an attachment to be served upon a cause of action arising upon a contract. It has thus been held that this cause of action constitutes a debt, which, if owing upon the cause of action, is attachable property as against a creditor.

In Drake on Attachments (4th Ed.) § 544, in speaking of garnishments, it is said:

"That upon which the garnishment operates in this class of cases is credits. The term 'credit,' in this connection, is used in the sense in which it is understood in commercial law, as the correlative of debt. Wherever, therefore, there is a credit, in this sense, there is a debt, and without a debt there can be no credit."

It may be held that an unrestricted credit, subject unconditionally except as to amount to any draft drawn by the person to whose favor the credit is given may constitute a debt, which is subject to attachment. The plaintiff here meets two difficulties, however. In the first place, this is not a credit given to the defendant. The defendant is entitled to the moneys under no possible circumstances. The moneys are to be paid to the United Aluminum Company upon presentation of certain documents. In the second place, this credit was not unrestricted. The moneys were payable by the National Park Bank only upon presentation of certain documents which confessedly were never presented. In fact, no credit is given, until the proper documents are presented. So there never was in the National Park Bank any credit which could be drawn against by any one, or which was subject to attachment.

It is claimed, however, that this defendant is not interested to set aside this attachment, if, as it claims, upon this motion, there is no credit in the National Park Bank upon which the attachment operates. But this is not a species of property which can be owned by any other person, and which that person could protect. It is a property concerning which, if by any chance the attachment be held good, a liability might be claimed to be created, first, against the Ladd & Tilton Bank; and, secondly, with the ultimate liability of this defendant to pay the same. The natural inference is that the defendant has either deposited securities with the Ladd & Tilton Bank or has pledged its credit, and the attachment has thus become a cloud upon the title of those securities, or upon the credit pledged which the defendant is interested to remove. The motion is not only to set aside the attachment, but to set aside the summons and complaint, and the interest of the defendant is in my judgment sufficient to authorize the making of the motion to remove any cloud, created by the levy, as affecting defendant's ultimate liability for reimbursement to the Ladd & Tilton Bank. See *Bridges v. Wade*, 113 App. Div. 350, 99 N. Y. Supp. 126.

The order should be reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. Order filed. All concur.

(189 App. Div. 303)

In re LAUTERBACH.

LAUTERBACH v. JARETT et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

MASTER AND SERVANT ~~§~~375(1)—WORKMEN'S COMPENSATION LAW; INJURY WITHIN SCOPE OF EMPLOYMENT.

Where an apartment building janitress, who received a small wage and the free use of an apartment, was injured by falling plaster as she was about to sit down to breakfast in her own apartment, the accident was not within the scope of her employment, within the Workmen's Compensation Law.

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

In the matter of the claim of Mrs. Yetta Lauterbach, under the Workmen's Compensation Law, against Sophie, Hattie, Robert, and Harry Jarrett, employers, and the Zurich General Accident & Liability Insurance Company, Limited, insurance carrier. From an award of the Industrial Commission in favor of claimant, the employers and insurer appeal. Award reversed, and claim dismissed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Alfred W. Andrews, of New York City (Ainsworth, Carlisle, Sullivan & Archibald and John N. Carlisle, all of Albany, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. The employers maintain an apartment house five stories high. On each floor there are two apartments, each apartment consisting of five rooms; all the apartments being similar. In one of the apartments on the first floor the claimant resided with her family, consisting of herself and her husband and their two children. She was the janitress of the building. As compensation for her services she was given \$5 monthly, the free use of her apartment, and gas for the same. One morning while about to sit down at her kitchen table to eat breakfast, some plaster from the kitchen ceiling fell on the claimant, causing her some injuries, for which the award herein has been made, on the theory that the accident arose out of and in the course of her employment as janitress.

She was not at the time doing any work for her employer. It has been held many times that, when an employer customarily permits his employés to eat their meals upon his premises, they are not thereby excluded from the protection of such a law as the Workmen's Compensation Law (Consol. Laws, c. 67). The cases to that effect are collated in Matter of Di Salvio v. Menihan Co., 225 N. Y. 123, 126, 121 N. E. 766, Matter of McInerney v. Buffalo & Susquehanna Railroad Corporation, 225 N. Y. 130, 133, 121 N. E. 806, and Matter of Moore v. Lehigh Valley Railroad Co., 169 App. Div. 177, 183, 154 N. Y. Supp. 620. The theory of those cases is that a temporary sus-

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pension of the work for the purpose of eating, without leaving the work to go to the domicile of the employé for that purpose, is incidental to the employment, and does not terminate or suspend for the time being the relation of master and servant.

The principle of those cases does not apply to such a situation as here exists. The case is no different than it would be if the claimant, although janitress of the building in question, had occupied an apartment in another building and the accident had there occurred. In no proper sense can it be said that she was janitress of her own apartment, merely because it happened to be a part of the building of which she was the janitress. In her own apartment she presided over her household affairs and was serving, not her employers, but herself and her family. If this award can be sustained, so also it should be sustained if the plaster had fallen on her at night while she was sleeping, or while doing any ordinary housework for the requirements or convenience of her family. At the time of the accident she was doing nothing for her employers, nor anything incidental thereto. Her duty to them did not require her presence in her apartment. What she was doing was personal to herself. It was entirely disassociated with the work of her employers.

In *Matter of Daly v. Bates & Roberts*, 224 N. Y. 126, 120 N. E. 118, the claimant was a laundress in a hotel, and as part of her compensation received her board and lodging and the privilege of using the laundry plant of her employer to do her own laundry work. While thus engaged in working for herself, she was injured. It was held that she was not working for her employer, but for herself, and her claim for compensation was dismissed. In that case it is true the claimant had regular working hours, and the accident occurred after the time when her duties to her employer ceased. But that circumstance does not differentiate the case in principle from the present case. It does not appear in the instant case whether or not by the terms of employment of the claimant her duties were limited to specified portions of the day. I am assuming, however, that she was always on duty when the circumstances required her services. But with that assumption, the fact is that she was not doing anything for her employers at the time of the accident, but was serving exclusively her own purpose. What she was doing did not promote the interests of her employers, nor was it in any proper sense incidental thereto. She was in the building in a dual capacity. Her family was domiciled in one of the apartments. Her personal relations to her family were distinct and separate from her relations to her employers as janitress of the building. She was acting solely for herself as a member of her family at the time of the accident.

In *Matter of Di Salvio v. Menihan Co.*, 225 N. Y. 123, 121 N. E. 766, the claimant had merely crossed the room to say farewell to another employé who had been drafted, and while talking to him was injured, and it was held that he was serving his own purposes, and that the accident did not arise out of and in the course of his employment. In the opinion cases are cited from other jurisdictions sustaining the decision.

In *Matter of Urban v. Topping Brothers*, 184 App. Div. 633, 172 N. Y. Supp. 432, it was so held, also, in a case where an employé on quitting work for the day, but before leaving the premises, returned for some companions, who usually accompanied him home, and was killed.

The rule has been enunciated and reiterated that the injury, to be within the protection of the statute, must be received "while the workman is doing the duty he is employed to perform," and that it must be "one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work." *Matter of Heitz v. Ruppert*, 218 N. Y. 148, 151, 112 N. E. 750, 751 (L. R. A. 1917A, 344); *Matter of Di Salvio v. Menihan Co.*, supra; *Matter of Daly v. Bates & Roberts*, supra.

Both on principle and authority, therefore, I think this claim cannot be sustained.

The award should be reversed, and the claim dismissed. All concur, except JOHN M. KELLOGG, P. J., who dissents.

PFEIFFER v. MANSBACH.

(Supreme Court, Appellate Term, First Department. November 6, 1919.)

CORPORATIONS §120—AGREEMENT TO REPURCHASE ON SALE OF STOCK VALID.

Where defendant, who was vice president and general manager of a corporation, solicited plaintiff to purchase shares of stock, and told her that, if she would buy the stock, he would give her the money back at any time she wanted it, and on the faith of such promise plaintiff paid for and received an "interim certificate" calling for the stock, she was entitled, on offering to return the certificate, to the return of her money; the promise of defendant being a personal one founded upon a good and sufficient consideration.

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Ida Pfeiffer against Max A. Mansbach. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

George Hiram Mann, of New York City (George Cohen, of New York City, of counsel), for appellant.

Harry Rubin, of New York City (Charles S. Rosenthal, of New York City, of counsel), for respondent.

DELEHANTY, J. The complaint as set forth in the plaintiff's bill of particulars claimed for fraud and deceit in the sale of some stock to the plaintiff, but upon the trial was changed to an action on contract.

The material facts are not disputed. In March, 1918, the defendant, who was the vice president and general manager of a concern known as the International Sulphur Corporation, solicited the plaintiff

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to purchase some of the shares of the stock, of the par value of \$10 per share. The plaintiff testified that the defendant told her that if she would buy the stock he would give her the money back at any time she wanted. Upon the faith of this promise she paid him \$100 and received an "interim certificate" calling for 20 shares of stock.

In this statement defendant's counsel conceded that plaintiff would be corroborated by a Mrs. Fiola, who heard the conversation between the parties, and who was present in court, but not called by reason of such concession, and who was apparently a disinterested witness. The stock at the time of the sale was not yet on the market, and on May 8, 1919, a certificate of the registered stock was mailed to the plaintiff by the corporation. Prior to this, and in November, 1918, the plaintiff asked defendant for the return of her money, which was refused. The defendant went upon the stand, but was not asked any question by his attorney as to these statements, and the testimony of the plaintiff and her witness was uncontradicted. The court below gave judgment in favor of the defendant, dismissing the complaint upon the merits. This was error. The promise of the defendant was a personal one, and was founded upon a good and sufficient consideration.

The promise to repay the money was one of the inducing causes of the purchase, and as the case stood when submitted to the court judgment should have been given for the plaintiff.

Judgment reversed, and new trial ordered, with \$30 costs to appellant to abide event. All concur.

(189 App. Div. 569)

BURNS MFG. CO. V. CLINCHFIELD PRODUCTS CORPORATION.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. SALES ☞35(1)—ABSOLUTE CONTRACT TO DELIVER.

Contract whereby defendant agreed to manufacture and sell to plaintiff 1,000 barrels of a new product used in coloring material and make shipments in approximately equal monthly quantities over the year, the first shipment to be made on completion and operation of the plant, was an absolute contract to deliver the 1,000 barrels within the year, and defendant was liable for failure to do so, regardless of whether due diligence had been exercised in completing the plant.

2. EVIDENCE ☞323(4)—MARKET QUOTATIONS SHOWING VALUE OF PRODUCE.

Where article in question was not generally upon the market, and it was therefore practically impossible to prove its market value, there was no error in admitting in evidence a publication purporting to give the sales and quotations each day; there being proof on both sides as to reliability of publication.

Appeal from Special Term, New York County.

Action by the Burns' Manufacturing Company against the Clinchfield Products Corporation. From an order setting aside judgment for plaintiff, and granting a new trial, plaintiff appeals. Order reversed, verdict reinstated, and judgment ordered to be entered thereon.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

C. Parker Lattin, of New York City (Charles H. Young and Albert Ritchie, both of New York City, on the brief), for appellant.

Dawes, Abbott & Chester, of New York City (Herman Aaron, of New York City, of counsel, Hamilton M. Dawes and Charles Adkins Baker, both of New York City, on the brief), for respondent.

SMITH, J. This case was brought by plaintiff, a purchaser, against defendant, a seller, to recover damages for a breach of a contract of sale. The contract was, in fact, a contract to manufacture and sell to the plaintiff precipitated dry-powdered blanc fixe, 1,000 barrels. It provides shipments to be made in approximate equal monthly quantities over the year. The first shipment to be made on completion and operation of the plant, "which we expect to be in February, 1916." The price is given at 3 cents per pound f. o. b. cars, Johnson City, Tenn. The conditions stated are: Fires, strikes, accidents, or other contingencies beyond the control of either party. These, it was provided, were to absolve either party from obligation under the contract.

[1] The first question arises upon the construction of the contract. The trial judge has construed the contract to mean that there should be no delivery required whatever under the contract until the mill should be completed and in operation, and if the mill should not be completed and in operation, with the exercise of reasonable diligence, within the year, then the obligations of the contract were canceled. Plaintiff's claim, on the other hand, is that there is an absolute contract to deliver the 1,000 barrels within the year, and inasmuch as the delivery was to be in equal monthly installments, that the provision for the first shipment to be made upon completion and operation of the plant, "which we expect will be in February, 1916," is simply a provision as to the time within the year when the monthly shipments shall be begun. This contract was made in December, 1915, and the year would not expire until December, 1916. During the year the defendant delivered only a small part of the "blanc fixe," and this action is brought to recover damages for failing to deliver the balance as provided in the contract.

We agree with the plaintiff in its contention that the contract imported an obligation to deliver the 1,000 barrels within the year, and, for failure to do so, whether or not due diligence had been exercised in the completion of the mill, the defendant is liable. We are of opinion, as claimed by the plaintiff, that the provision that the monthly payments should begin only upon the completion of the mill did not, in any way, affect the absolute obligation to deliver the full amount within the year.

[2] The defendant seeks to sustain this order, however, also upon another ground, and that is that the plaintiff's damages were not properly proven. This article which was to be manufactured is a new product used in coloring material, in paint and in films to a certain extent. It was not generally upon the market. It was practically impossible to prove what its market value was, because for part of the time none of it could be purchased. There was, however, the Oil

Paint and Drug Reporter, which was a publication published in the city of New York, which purported to give the sales and quotations each day. Objection was made to the introduction of that paper, on the ground that it was not shown that the reports were generally accurate. Proof was thereupon given upon both sides as to the reliability of this paper, and there was sufficient proof, I think, to authorize its receipt in evidence.

It follows that the order must be reversed, with costs, and the verdict reinstated. Order filed. All concur.

GROSVENOR v. BUDDLE et al.

(Supreme Court, Special Term, Schenectady County. November 15, 1919.)

MORTGAGES $\Leftrightarrow$ 568—SURPLUS MONEY ON FORECLOSURE; ENFORCEMENT OF MECHANIC'S LIEN.

A mechanic's lien against mortgaged property sold on foreclosure, not established by action as required by Lien Law, § 41, relative to enforcement of mechanics' liens, cannot be enforced by the lienor in a surplus money proceeding, a special proceeding, against surplus money arising out of the foreclosure sale and in the hands of the county treasurer, except that, where an adversary judgment creditor of the mortgagor waived notice of and consented to all necessary proceedings for drawing and paying the money to the lienor, and permitted him to prove his claim as an uncontested claim, he has admitted the claim, and waived the objection that it has not been established.

Action to foreclose mortgage by Sidney Grosvenor against John A. Buddle and others, wherein Edward Dussault instituted a surplus money proceeding to enforce a mechanic's lien against the surplus money arising out of the foreclosure sale. Order directed in accordance with the opinion.

H. C. Glen, of Schenectady, for petitioner.

N. B. Spalding, of Schenectady, for Ransom Tallmadge.

WHITMYER, J. This is a surplus money proceeding, instituted by Edward Dussault to enforce a mechanic's lien for the sum of \$100.-77 against the surplus money arising out of the sale in foreclosure of the premises described in the mortgage foreclosed in the above-entitled action. The surplus amounts to the sum of \$61.48 and is in the hands of the county treasurer. The premises belonged to the defendants John A. Buddle and Kathryn Buddle, as tenants by the entirety. Defendants Peckham, Wolfe & Co., Ransom Tallmadge, and Clark Witbeck Company are judgment creditors, and their judgments were docketed after Dussault's lien was filed. The owner of the property and the defendants, who appeared in the action, including Tallmadge, waived notice of motion for the appointment of a referee, and of all other notices in the matter, and consented that all necessary proceedings to draw the money out of court might be had without notice to them. The referee was appointed without objection, and it was referred to him to ascertain and report the amount of Dussault's or of any other person's lien upon said surplus, and to ascertain the priorities of the several liens thereon, and to report.

On the hearing, Dussoult appeared in person and by attorney, and Tallmadge, the judgment creditor, appeared in person. Dussoult proved the facts in connection with and the amount due on his lien, without objection, and Tallmadge proved his judgment. Thereupon the referee made a report, in which he found that the amount due on Dussoult's lien was the sum of \$100.77, with interest from November 15, 1918, and that it was the first lien upon said surplus. Dussoult moved to confirm, and Tallmadge then for the first time objected, claiming that the lien may not be enforced in this procedure. Lien Law (Consol. Laws, c. 33) art. 3, § 41, provides as follows:

"A mechanic's lien on real property may be enforced against such property, and against a person liable for the debt upon which the lien is founded, by an action, by the lienor, his assignee or legal representative, in a court which has jurisdiction in an action founded on a contract for a sum of money equivalent to the amount of such debt."

Enforcement involves establishing the debt which is the basis of the lien and requires an action. Lien Law, § 41, *supra*; Snyder (6th Ed.) p. 30. A surplus proceeding is not an action, but is a special proceeding, in which a lien, not established, may not be enforced. In this case, the property has been sold, but that does not change the situation. The money has taken the place of the property and action is necessary to establish and to enforce the lien in the same way as if the property had not been sold. *Philbrick & Brother v. Florio Co-op. Ass'n*, 137 App. Div. 613, 614, 122 N. Y. Supp. 341; *Nutt v. Cuming*, 155 N. Y. 309, 49 N. E. 880. The lien might have been established in the action to foreclose, but that was not done. However, Tallmadge waived notice of and consented to all necessary proceedings for drawing and for paying the moneys to Dussoult, and permitted him to prove his claim as an uncontested claim (*Union Dime Savings Institution v. Osley*, 4 Hun, 657), without objection. He has admitted the claim and waived the objection.

Order accordingly.

(189 App. Div. 347)

PEOPLE ex rel. KALBACH v. STATE TAX COMMISSION.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

TAXATION $\text{C}\text{--}124\frac{1}{2}$ —**FRANCHISE TAX; OPERATION OF LEASED RAILROAD BY OWNER.**

Where railroad was being operated by receiver of owner, instead of receiver of lessee, receiver of owner, even prior to enactment of Laws 1917, c. 710, was required to pay as part of franchise tax under Tax Law, § 185, 1 per cent. on gross earnings reported under section 192, notwithstanding lease, since operation of railroad by such receiver was by virtue of franchise conferred upon owner by state.

Certiorari by the People of the State of New York, on the relation of Andrew E. Kalbach, as receiver of the property of the Second Avenue Railroad Company in the City of New York, against the State Tax Commission of the State of New York, to review determination of State Tax Commission upon application of relator for the revision

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and readjustment of the tax assessed under Tax Law, § 185, subd. 1. Determination confirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE and HENRY T. KELLOGG, JJ.

Davies, Auerbach & Cornell, of New York City (Brainard Tolles, of New York City, of counsel), for relator.

Charles D. Newton, Atty. Gen. (C. T. Dawes, Deputy Atty. Gen., of counsel), for respondent.

LYON, J. The question presented by this appeal is whether the franchise assessment of the Second Avenue Railroad Company was properly made under the first sentence of section 185 of the Tax Law (Consol. Laws, c. 60), or whether the same should have been made under the second sentence of that section. The Second Avenue Railroad Company is the owner of certain street railroads and of certain franchises for the operation thereof. On the 28th day of January, 1898, a lease of said railroads, excepting its franchise as a corporation, its shares of capital stock, and its rights reserved under that agreement, was made to the Metropolitan Street Railway Company, which took possession of and operated the same until there was transferred to the Interurban Street Railway Company, afterwards known as the New York City Railways Company, all the street railroads in New York City, including its leasehold interest in the railroad of the Second Avenue Railroad Company. In September, 1907, the New York City Railways Company being insolvent, receivers of its property were appointed by the United States court. The Metropolitan Street Railway Company, finding its affairs closely involved with those of the New York City Railways Company, obtained an order extending the receivership to cover its property. Both corporations were afterwards adjudged to be insolvent, and their receiverships were made permanent. The receivers so appointed took possession of the railroads of the Second Avenue Railroad Company and expended large sums in the improvement of the property. The receivers, after negotiating with the Second Avenue Railroad Company and being unable to agree upon a modified compensation, with the approval of the court decided not to adopt the lease.

The property of the Second Avenue Railroad Company, when leased, was subject to a mortgage to the Guaranty Trust Company, given to secure the payment of bonds. In an action for the foreclosure of the mortgage, an order was obtained from the New York Supreme Court appointing a receiver pendente lite, who was authorized to operate the railroads. In October, 1908, this receiver applied to the Circuit Court of the United States for possession of the leased railroads "without impairment of any right of action of the Second Avenue Railroad Company or of your petitioner against the Metropolitan Company on account of its obligations accrued or to accrue under the covenants of said lease." The petition was granted, and the court directed the receivers of the Metropolitan Railway Company to cease operating the railroad lines, and to give possession, except of certain ducts, and on November 13, 1908, the possession of said railroads and

properties of the Second Avenue Railroad Company passed to the receiver appointed by the Supreme Court of New York. Lynch, the first appointed receiver having died, one Beaver was appointed receiver. He filed reports covering the period from November 13, 1908, to June 30, 1916, in accordance with section 192 of the Tax Law, showing the gross earnings derived from all sources received by the receivers, and stating his belief that, under section 185 of the Tax Law, he was not liable to pay any tax upon gross earnings, and desired to relieve himself from any personal liability. Beaver having died, the present receiver was duly appointed. The state tax department having assessed a tax against the receiver of \$70,044.53, being 1 per centum of the gross earnings of said receiver from all sources from November 13, 1908, to June 30, 1916, and having granted a rehearing and affirmed the determination, the receiver has brought this proceeding for the purpose of reviewing such final determination.

Section 185 of the state Tax Law as it existed prior to June 1, 1917, was as follows:

"Every corporation, joint stock company or association owning or operating any elevated railroad or surface railroad not operated by steam, shall pay to the state for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state, an annual tax which shall be one per centum upon its gross earnings from all sources within this state, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up capital employed by said corporation, joint-stock company or association. Any such railroad corporation whose property is leased to another railroad corporation shall only be required under this section to pay a tax of three per centum upon the dividends declared and paid in excess of four per centum upon the amount of its capital stock."

It seems to have been the legislative intent, for the purpose of imposing a franchise tax upon such corporations, to divide them into two classes: First, those engaged in the actual operation of such railroads; and, second, those not engaged in the actual operation, but whose property is operated by another railroad corporation under a lease. It is true the property of the Second Avenue Railroad Company was leased to the Metropolitan Street Railway Company, but the property was not operated by the receiver of the lessee, but by the receiver of the lessor, who received the gross earnings.

By chapter 710 of the Laws of 1917, which became a law June 1st of that year, there was added to the end of section 185 the following words:

"Except that where the property leased is operated by a receiver and the gross earnings are not included with the gross earnings of the lessee for the purposes of taxation under this section, then said receiver shall be required to pay the tax upon the gross earnings as hereinbefore provided."

I think the purpose of this amendment was to make clear the intent of the act, which was that the tax upon gross earnings was to be paid to the state by the corporation or its representative engaged in the actual operation of the railroad. The controlling fact is that under the order of the court the receiver of the Second Avenue Railroad Company took possession of the property of the corporation and operated the railroad and received the earnings thereof. "But we are of the

opinion that the railroad, when in the receiver's hands and operated by him, is operated under and by virtue of the franchise which has been conferred upon the corporation by the state, and that when he receives the gross earnings arising from its operation, and has in his hands money enough to pay these taxes, the state has a paramount right to collect them before the moneys applicable to such payment shall be paid away by the receiver." *Central Trust Co. v. New York City & Northern R. R. Co.*, 110 N. Y. 250, 257, 18 N. E. 92, 95, 1 L. R. A. 260; *People ex rel. Joline et al. v. Williams*, 200 N. Y. 528, 94 N. E. 1097.

As between the state and the relator, the lease by the Second Avenue Railroad Company to the Metropolitan Street Railway Company is ineffectual to relieve the relator from the payment of the tax. During the period in question the Metropolitan Railway Company did not exercise the corporate franchise or operate the Second Avenue Railroad Company, but the relator's predecessors did, and it was their duty to pay the tax imposed for that privilege.

The determination should be confirmed, with fifty dollars costs and disbursements. All concur.

(189 App. Div. 412)

CAVALIER v. CHEVROLET MOTOR CO. OF NEW YORK, Inc., et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

1. EVIDENCE ⇨14—JUDICIAL NOTICE; HERNIA CAUSED BY NATURAL CAUSES.

Court will take judicial notice that hernia is a disease arising out of natural causes, as well as from accident.

2. MASTER AND SERVANT ⇨405(4)—WORKMAN'S DISEASE NOT CAUSED BY ACCIDENT.

Evidence that a workman, while doing his ordinary work, felt a severe pain in his right side, and that next day a physician found a "right inguinal hernia (traumatic)," is insufficient to show that he was accidentally injured in the course of his employment, since "inguinal" refers to groin, not side, and "traumatic" contemplates some wounding of the body.

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceedings under the Workmen's Compensation Law for compensation for the injury of James (or Vincenzo) Cavalier, opposed by the Chevrolet Motor Company of New York, Incorporated, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurance carrier. From an award of the Industrial Commission, allowing compensation, the employer and insurance carrier appeal. Reversed, and matter remitted to Commission.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Alfred W. Andrews, of New York City, and Ainsworth, Carlisle & Sullivan, of Albany (John N. Carlisle, of Albany, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

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WOODWARD, J. The State Industrial Commission has found as conclusions of fact that one James Cavalier received his injuries while employed as a laborer by the Chevrolet Motor Company, at Tarrytown, N. Y.; that "while engaged in his regular course of employment, at about 4:30 p. m. of March 11, 1919, James (or Vincenzo) Cavalier, while pushing a pipe about 14 feet long, felt a severe pain in the right side, which caused him to stop work for a short time. On March 12, 1919, he returned to the plant of his employer, and, after having informed his employer that he had been injured on March 11, 1919, he was assigned by his employer to light work, which was altogether different from his ordinary line of duty. On the evening of March 12, 1919, he consulted a physician, who informed him that his condition was such that he could not work, and that an operation was necessary. The said physician diagnosed his injury as a "right inguinal hernia (traumatic)," and that "the injuries sustained by James (or Vincenzo) Cavalier were accidental injuries, and arose out of and in the course of his employment."

[1, 2] If this case can be distinguished from that of *Matter of Alpert v. Powers*, 223 N. Y. 97, 119 N. E. 229, upon the authority of which one of the state industrial commissioners dissented from the award, the point of digression does not occur to us. There is no finding, as there is no evidence, of anything in the nature of an accident—merely that "while engaged in the regular course of his employment" and "while pushing a pipe about 14 feet long" the claimant "felt a severe pain in the right side," and that on the following day a physician "diagnosed his injury as a right inguinal hernia." There is no attempt to establish that the claimant did not have a hernia prior to the day on which he is alleged to have "felt a severe pain in the right side." What part of the right side is not disclosed; it may have been in the lung or in the pleura, or in any of the muscles of the right side; while an "inguinal hernia" is, as its name clearly discloses, confined to the groin. One would hardly describe the groin as the "right side" of a man, and yet, because a physician discovered "a right inguinal hernia" on the day following "a severe pain in the right side," the State Industrial Commission reaches the conclusion that the claimant suffered "accidental injuries" which "arose out of and in the course of his employment."

The claimant's own testimony is that at the time of the alleged injury he stopped work for about 10 minutes and then continued his employment up to 5 o'clock; that is, the alleged injury occurred at 4:30, and after an interval of 10 minutes he resumed work and stayed until 5 o'clock, a period of 20 minutes. No one pretends that there was any visible injury, that anything occurred outside of the ordinary routine of the day's work, and there is no testimony whatever tending to show that there was any connection between this "right inguinal hernia" and the "severe pain in the right side" of the claimant—no evidence that a hernia could be produced by anything which was shown to have occurred on the 11th day of March, 1919. We know judicially that hernia is a disease arising out of natural causes as well as from accident (*Matter of Alpert v. Powers*, 223 N. Y. 97, 101, 119 N. E. 229), and

the Workmen's Compensation Law (Consol. Laws, c. 67) does not insure against disease, except where the disease or infection "naturally and unavoidably" results from an injury (Richardson v. Greenberg, 188 App. Div. 248, 249, 176 N. Y. Supp. 651). It does not follow that, because a man has a pain in his side while doing his ordinary work, without slipping, falling, or other mishap, and a physician finds an inguinal hernia the next day, that the hernia resulted from accidental injuries, even though the physician adds to his declaration, in parenthesis, the word "traumatic." This word, however much abused in matters relating to insurance, contemplates some external violence, some wounding or bruising of the body, and no one pretends that anything of the kind occurred in this case. The claimant himself merely says that he was doing his usual work, making no suggestion of anything happening, except that he felt a "severe pain in the right side," such as all persons experience, no doubt, at some time in their lives, and the next day a "right inguinal hernia" is discovered, and this simple pain in the side is translated into an accident, within the meaning of a statute designed to protect against the extraordinary risks of certain designated employments. *Alpert v. Powers*, 181 App. Div. 902, 167 N. Y. Supp. 385. There is not even a suggestion that this hernia had not existed to the knowledge of the claimant prior to this alleged injury. It is not an uncommon thing for men with hernia to work at heavy labor and to suffer at times from exertion, and there is not a particle of testimony from which it may be legitimately inferred that this was not the case with the claimant. No connection whatever is shown between the performance of the labors of the claimant and the hernia for which this award has been made—no identity of time or of place, and nothing which brings the case within any of the provisions of the statute; and the capital of a legitimate business ought not to be taken to compensate for an alleged injury which is not shown to have been produced in connection with the services rendered by the claimant.

The award should be reversed, and the matter remitted to commission. All concur, except JOHN M. KELLOGG, P. J., who dissents.

WESTERN NEW YORK & P. TRACTION CO. v. ERIE R. CO.

(Supreme Court, Special Term, Erie County. February, 1906.)

1. RAILROADS §142—EVIDENCE SUFFICIENT TO SHOW ORGANIZATION AND CONSOLIDATION VALID.

In proceedings under Railroad Law 1890, § 12, now section 22 to determine the manner and point of proposed crossings of defendant's steam railroad by plaintiff's electric line, *held*, that plaintiff was a properly organized consolidated railroad corporation, with all the rights belonging to such a company, including that of crossing existing lines; the essential requirements of the laws of New York and Pennsylvania having been observed.

2. RAILROADS §52—WHAT CONSTITUTES "EXTENSION" OF ELECTRIC LINE.

A proposed extension of a railroad company's electric line for about 7 miles, the existing system forming a continuous line of about 76 miles,

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held an "extension," within the meaning of Railroad Law 1890, § 90, now section 170.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extension.]

3. RAILROADS ⚡52—CERTIFICATE OF PUBLIC SERVICE COMMISSION AUTHORIZING EXTENSION.

Where the Railroad Law regulating the construction of an extension of a railroad company's electric line was complied with prior to the passage of the Public Service Commissions Law, requiring a certificate of the Public Service Commission for an extension, the company had the right to construct the extension without the consent of the commission.

4. RAILROADS ⚡14—IN PROCEEDING FOR CROSSING DEFENDANT MAY QUESTION REGULARITY OF PLAINTIFF'S ORGANIZATION.

In proceedings against a railroad company, under Railroad Law 1890, § 12, now section 22, to determine the manner and point of proposed crossings of its line by another company's new line, defendant has the right to question the regularity of plaintiff's organization.

Proceeding by the Western New York & Pennsylvania Traction Company against the Erie Railroad Company. Judgment for plaintiff.

Simon Fleischmann, of Buffalo, and Joseph L. Page, of Olean, for plaintiff.

Fred A. Robbins, of Hornell, and Thomas H. Dowd, of Salamanca, for defendant.

MARCUS, J. The plaintiff, a railroad company, has instituted two proceedings against the defendant, another railroad company, for the appointment of commissioners, under section 12 of Railroad Law 1890, c. 565 (now Consol. Laws, c. 49, § 22), to determine the manner and point of two proposed crossings of the defendant's line by the plaintiff's line of Cattaraugus county. The defendant operates a steam railroad at the points of crossing, and the plaintiff an electric line.

The principal points urged by the defendant, in opposition to plaintiff's right to cross its lines, are that the plaintiff is not a properly organized consolidated railroad corporation, entitling it to maintain these proceedings, and that the portion of plaintiff's line which seeks to cross the defendant's line, and which is claimed by plaintiff to be an extension of its existing system, is of such length, relative to the remainder of its line, as not to be an extension within the meaning of section 90 of Railroad Law 1890, c. 565 (now Consol. Laws, c. 49, § 170), and that therefore the certificate of necessity of the Public Utilities Commission, which was not obtained, was necessary to authorize the construction of this new portion of the line. A considerable amount of oral and documentary evidence was taken before the court, which, together with the full and able briefs of the respective counsel, I have carefully considered.

It appears that the plaintiff, the Western New York & Pennsylvania Traction Company, is, in itself, the result of a consolidation of two railroads theretofore existing, one of which was, in itself, the result of a prior consolidation of earlier railroads, and the other component part of which was a reorganization of an older Pennsylvania railroad, and that the present combined system extends into both the states of

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New York and Pennsylvania, and now forms a continuous line and system of about 76 miles, exclusive of the proposed extension of about 7 miles.

The defendant claims that there are various defects in the organization of the constituent companies, or some of them, which I have examined, and which, it seems to me, are not substantial, but, at most, technical. On the other hand, it appears that the present plaintiff is the only railroad company now operating the entire system, and whose stock and bonds are in existence, and that it in all respects has completely absorbed and superseded all of the constituent railroads that have entered into its composition.

[1] I am satisfied, further, that all of the requirements of the laws of the state of Pennsylvania and of this state have been complied with in all essential respects, so as to make the present plaintiff a legally organized consolidated railroad corporation, with all the rights belonging to such a company, including that of crossing existing lines, under suitable compensation and restrictions, as provided by the Railroad Law.

[2] On the question as to whether the proposed extension is, in fact and in law, an extension within the meaning of the Railroad Law, I have had no hesitation in coming to the conclusion that it is such, under the decisions of the courts. *N. Y. C. & H. R. R. Co. v. Auburn Interurban Electric R. R. Co.*, 178 N. Y. 75, 70 N. E. 117.

[3] As the Railroad Law in regard to extensions of this kind was complied with prior to the passage of the Public Service Commissions Law (Consol. Laws, c. 48), under which the certificate of the Public Utilities Commission would now be required for such extension, the right of the plaintiff to construct the same became fixed and vested before the Utilities Law went into effect, and therefore the consent of the state commission was not, and is not, required to validate the same.

The other objections urged by the defendant to these crossings need not be specifically considered, as they do not appear to me to be serious.

[4] The defendant, of course, has the right to question the regularity of plaintiff's organization, and it is quite common for existing competing lines so to do, if for no other reason than to postpone the competition of the new railroad as long as possible, as a matter of business policy, and there may be cases where such opposition is found to be substantial, when subjected to judicial scrutiny; but in this case I have concluded that the plaintiff is entitled to the relief asked, and to the appointment of commissioners to determine the points and manner of the crossings which it seeks, and findings may be prepared accordingly, looking to a final order and judgment to that effect.

(189 App. Div. 410)

VALENTINE v. SHERWOOD METAL WORKING CO. et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

MASTER AND SERVANT §385(11½)—**WORKMEN'S COMPENSATION LAW**; "LOSS OF AN EYE."

Where injured eye, with the aid of a proper glass, is nearly normal for many purposes, there is no "loss of an eye," within the Workmen's Compensation Law.

Appeal from State Industrial Commission.

Proceeding for compensation under the Workmen's Compensation Law by Salonda Valentine, employé, opposed by the Sherwood Metal Working Company, employer, and the American Mutual Liability Insurance Company, insurance carrier. Award by the State Industrial Commission for claimant, and the employer and insurance carrier appeal. Reversed and remitted.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Jeremiah F. Connor, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

PER CURIAM. There is no dispute as to the facts in this case. The claimant was employed at Syracuse by the Sherwood Metal Working Company as a riveter upon shovels. A small portion of steel was picked up by the rapid hammer used and lodged in the back of the eye ball, defying all efforts at its removal. The State Industrial Commission has found that "this injury resulted in the loss of the left eye," but there is no evidence to support this finding, for the entire testimony is to the effect that the eye, with the aid of a proper glass, is nearly normal for many purposes. That there is an injury, and that it detracts from the value of the eye, there can be no doubt; but it is not the loss of an eye. The case is not distinguishable in principle from that of *Frings v. Pierce-Arrow Motor Car Co.*, 182 App. Div. 445, 169 N. Y. Supp. 309, and, if this court was right in that case, it follows that the award here under consideration must be reversed.

The award should be reversed, and the proceeding remitted to the State Industrial Commission.

(189 App. Div. 228)

SHALATA et al. v. RODGERS.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. MUNICIPAL CORPORATIONS §809(2)—**IMPROVEMENTS IN STREET**; NEGLIGENCE IN FAILURE TO GUARD.

Sewer contractors, who had erected concrete works and cofferdam along river at foot of a street, were not negligent in failing to erect a fence or guard across the street to prevent children going upon the concrete work.

2. TRIAL §337—**DISREGARD OF INSTRUCTIONS.**

In action against sewer contractor for death of boy, who fell off cofferdam, where court instructed jury that contractor was not liable if

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the boy had a right to be on cofferdam, since in such case contractor could not have kept him off, and further charged that contractor was not liable if boy had no right on cofferdam, since in such case he would have been a trespasser, verdict for plaintiffs was contrary to law of case as charged by court; such instructions being tantamount to direction to find for contractor.

Appeal from Trial Term, New York County.

Action by Nicholas Shalata and another, as administrators, etc., against John C. Rodgers, Jr. From judgment for plaintiffs entered upon a verdict, and from order denying motion for new trial, defendant appeals. Reversed, and complaint dismissed.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

Amos H. Stephens, of New York City (Clarence S. Zipp, of Hartford, Conn., of counsel), for appellant.

Bernard Bogart, of New York City (Thomas G. Price, of New York City, of counsel), for respondents.

MERRELL, J. Plaintiffs herein have recovered judgment against the defendant in the sum of \$2,337.53, based upon the verdict of a jury in plaintiffs' favor and against the defendant in an action brought to recover damages for the death of plaintiffs' intestate, which it is alleged occurred by reason of the negligence of the defendant. The complaint was framed so as to enable the plaintiffs to prosecute their action both upon the theory of a nuisance created by the defendant and also upon the theory that the death of plaintiffs' intestate was caused by the defendant's negligence. At the close of the evidence counsel for the plaintiffs elected to go to the jury on the question of negligence only.

On the afternoon of May 15, 1917, plaintiffs' intestate, a boy of six years of age, was drowned at the foot of East 114th street, in the borough of Manhattan. Until shortly before the drowning of plaintiffs' intestate, East 114th street east of Pleasant avenue was unimproved, and was unused as a public thoroughfare. Not long prior to the accident to plaintiffs' intestate a contract was let by the city of New York to the defendant to extend the sewer on East 114th street easterly from Pleasant avenue to the water front and emptying into the East River. Immediately south of East 114th street along the course of said sewer is situated the Thomas Jefferson Park; said park being laid out in lawns and paths, and devoted to the use of the public for recreation purposes. On its north side, along East 114th street to the river, this park was guarded by a 7-foot iron fence and from said iron fence easterly from high-water mark to low-water mark on the East River, and thence southerly along the East River was constructed a cement coping surmounted by a fence built of iron piping with a metallic network. This last-mentioned coping and iron fence surmounted the so-called bulkhead or seawall extending southerly from East 114th street along the waterfront to East 111th street.

The evidence shows that, in constructing the sewer for which defendant had the contract, work was commenced at about low-water mark and in nearly the middle of East 114th street, and said sewer was

built from thence along the middle of said street in a westerly direction to Pleasant avenue, and from there extending westerly to First avenue, where it connected with the other sewers of the city. The newly constructed sewer was of reinforced concrete. In the construction of the sewer considerable dirt was excavated, which was carted down East 114th street and dumped upon the slope and into the river, thus to some extent filling up the river at that point and extending the street. At the westerly end of the fence of iron piping extending from the bulkhead on East River and for a distance of 45 feet upon the southerly side of East 114th street, and at the point where the higher iron fence bounding the park on the north commenced, an opening had at some time been made by some one.

The evidence does not disclose who made this opening, nor is defendant connected in any way therewith, except that a witness for plaintiffs, a boy 14 years of age, testified that the defendant's employés used said opening to some extent in carrying on the work of constructing the sewer. Defendant, his superintendent of construction, and employés engaged upon the work deny such use. The evidence fails to show when or by whom said opening was made. The evidence is that the plaintiffs' intestate wandered from the park, through this opening in the fence, and upon the fill that had been made by defendant, and proceeded thence out upon the concrete sewer, and to a cofferdam which the defendant had erected in the course of his work, fell therefrom into the river, and was drowned. This sewer, except for a distance of from 20 to 40 feet from its end, was covered, but for said distance the top of the sewer and, for a few feet, its sides, until hidden by the slope of the bank, were exposed. The exposed portion of the sewer, rectangular in shape and level on top, was about 10 feet wide and 8 feet in depth. At high tide the water rose to within about a foot of the top. Outside of the sewer the defendant had erected the cofferdam from which the deceased fell into the river. At the time of the accident the work on the sewer, from its mouth westerly, had been completed, except that the cofferdam had not been removed.

In their complaint plaintiffs allege that the boy came to his death as the result of negligence on defendant's part in failing to construct and maintain a safe structure, in failing to guard the cement work with appliances and safeguards, and allowing the gateway through the fence from the park to remain open, unprotected, and unguarded. The plaintiffs respondents now seek to sustain their recovery upon the theory that the defendant was negligent in failing properly to guard the foot of East 114th street by a proper fence or guard to prevent the intestate walking or falling off the construction work and into the river.

Upon the proofs adduced upon the trial, I think the plaintiffs failed to establish any negligence on defendant's part. Plaintiffs' intestate wandered through the opening in the fence to and upon the street, and walked thence easterly a distance of 20 feet or more to the uncovered portion of the concrete sewer, which had been constructed by defendant under his contract with the city. The boy then walked out upon

the concrete work, and from thence upon the cofferdam, fell off, and was drowned. No evidence was given upon the trial from which the jury could have found the defendant in any manner responsible for the opening in the park fence through which it is claimed plaintiffs' intestate passed to reach the concrete sewer, nor did it appear that defendant was in duty bound to close such opening. Indeed, the whole street, from Pleasant avenue easterly, was open, and there was nothing to prevent children going down the street and walking out upon the sewer construction work, as did the plaintiffs' intestate.

[1] The respondents further claim that the defendant was negligent in failing to erect some fence or guard across the street to prevent children going upon the concrete work which he had erected. As well might one who was employed to construct a wharf or dock at the foot of any street of the city be called upon to fence off the dock after his work was completed. No possible duty rested upon the defendant thus to guard against children or pedestrians or vehicles coming down the street and going into the river. So far as the evidence shows, East 114th street, at the point in question, was, at the time, open for the use of the public in reaching the East River as much as any other thoroughfare of the city, and merely because the defendant, in constructing the sewer, built a structure some 8 feet above the water at low-water mark, does not render him liable for accidents befalling children or others who might walk out upon the sewer and fall therefrom. No duty rested upon him to guard against such accident by the erection of fences, barriers, or otherwise.

The appellant also assigns reversible error to the failure of the jury to heed the court's instructions as to the law applicable to the case. At the close of the court's main charge to the jury, counsel for the defendant requested the court to charge the jury in the following language:

"I ask your honor to charge the jury that, if the plaintiff had a right to be on the sewer, then the defendant is not liable, because he didn't put him off it, or keep him off it."

To such request the court complied. Defendant's counsel further asked the court as follows:

"I ask your honor to charge that if the plaintiff had no right to be on the sewer at all, he was a trespasser, and he cannot recover."

The court likewise acceded to this request of defendant's counsel.

Under the first of said requests the court, in effect, charged the jury that, if the plaintiff was rightfully on the sewer, the defendant would not be liable for failure either to put him off it or keep him off it, which, in effect, was tantamount to instructing the jury that there could be no recovery by reason of defendant's failure to keep plaintiffs' intestate from going into the place of danger, and of itself would seem to absolve defendant from any duty to guard. By the second charge above mentioned the court charged the jury that there could be no recovery if plaintiffs' intestate had no right to go upon the sewer.

[2] Thus, under the charge of the court, in either event, whether the plaintiffs' intestate was rightfully or wrongfully upon the sewer, there could be no recovery. Such instruction by the court was tanta-

mount to a direction that the jury find for the defendant. By their verdict the jury evidently disregarded such instructions, and, even though the evidence had been sufficient to establish defendant's negligence, the verdict of the jury would be set aside as contrary to the law of the case as charged by the court. But, for the reasons before stated, I do not think the plaintiffs established, by their evidence, any negligence on the part of the defendant.

The judgment and order appealed from should be reversed, and the complaint dismissed, with costs. Order filed.

CLARKE, P. J., and LAUGHLIN and DOWLING, JJ., concur.
SMITH, J., concurs in result.

(109 Misc. Rep. 247)

In re BJUNE.

(Supreme Court, Special Term, Kings County. November 8, 1918.)

MARRIAGE §32—CORRECTION OF RECORD BY COURT.

Supreme Court has no power to require city clerk of city of New York to amend a marriage license and record thereof in his office, so as to correctly state name of applicant, where mistake was that of applicant in not giving true name; the court, in absence of statutory authority, having no power, on a motion, to direct the correction of records in the office of the city clerk.

In the matter of the application of Anders Anderson Bjune to amend a public record. Motion denied.

Edgar T. Beamish, of Brooklyn, for the motion.

BENEDICT, J. This application is to require the city clerk of the city of New York to amend a marriage license and the record thereof in his office, so as correctly to state the name of the applicant. The applicant alleges that his true name is Anders Anderson Bjune, but that at one time, for convenience, he was customarily known as Anders Anderson, and that his marriage license was obtained under that name. It would appear from the moving affidavit that in applying for the license he gave his name as Anders Anderson, and not as Anders Anderson Bjune. If so, there was, of course, no mistake made in issuing and recording the license in the city clerk's office. It was the applicant's mistake in not giving his true name.

The application was not opposed, but I am constrained to deny it, because I think this court, in the absence of statutory authority, has no power on a motion to direct the correction of records in the office of the city clerk. See *Matter of Conrad*, 155 App. Div. 590, 140 N. Y. Supp. 630; *In re Bloom* (Sup.) 142 N. Y. Supp. 447; *Matter of Ruderman*, 179 N. Y. Supp. 452; *Matter of Goodman*, 178 N. Y. Supp. 499; *Ellis v. Caplan*, 178 N. Y. Supp. 503. In *People ex rel. Baker v. Department of Health*, 131 App. Div. 693, 116 N. Y. Supp. 66, a different situation was presented, for there the health commis-

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sioner had power by statute to correct his records, and a mistake had been made by the attending physician in giving the name of a child in a birth registration without the consent of both parents. There it was held that there was a remedy by mandamus.

I have not been referred to any statute, nor have I been able to find any, giving this court authority to make the order applied for.

Motion denied.

In re GOODMAN.

(Supreme Court, Special Term, Kings County. July 23, 1918.)

1. ALIENS §68—MOTION PAPERS; NATURALIZATION PROCEEDING.

Motion papers in a naturalization proceeding are defective, when an affidavit is not legally authenticated.

2. COURTS §116(1)—RECORDS; SUPREME COURT HAS NO CONTROL OVER RECORDS OF COUNTY COURT.

The Supreme Court has no control over the records of County Court of Kings County, and cannot correct errors in such records, assuming them to exist.

3. ALIENS §67—NATURALIZATION PROCEEDINGS; JURISDICTION OF STATE COURT.

The act of Congress, conferring exclusive jurisdiction on the Supreme Court in the naturalization of aliens applying to a state court, is not retrospective in its operation, nor does it confer authority over the records of other courts, as a County Court, which previously possessed power to naturalize aliens.

In the matter of one Goodman's motion for naturalization. Motion denied.

Zalkin & Cohen, of New York City, for petitioner.

BENEDICT, J. [1-3] The motion papers are defective, in that the affidavit of Joseph Bier is not legally authenticated. The Supreme Court has no control over the records of the County Court of Kings County, and therefore cannot correct errors in those records, assuming such errors exist. The act of Congress (Act June 29, 1906, c. 3592, § 3, 34 Stat. 596 [U. S. Comp. St. § 4351]), conferring exclusive jurisdiction upon the Supreme Court in naturalization of aliens applying to a state court, is not retrospective in its operation, nor does it confer authority over the records of other courts theretofore possessing the power to naturalize aliens.

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(189 App. Div. 335)

PEOPLE ex rel. LEWIS v. FOWLER, Surrogate.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. MANDAMUS ~~§~~42—To SURROGATE; ISSUANCE OF ORDER FOR EXAMINATION OF WITNESSES.

Mandamus will not lie to compel a surrogate to grant an application for the examination of a witness in a probate proceeding before trial.

2. DISCOVERY ~~§~~30—EXAMINATION BEFORE TRIAL; NOT APPLICABLE TO SURROGATE.

Provisions for examination of parties before trial, as provided by Code Civ. Proc. § 870 et seq., do not apply to, and have not been extended by section 2770, or other statutes, to proceedings in the Surrogate's Court. Philbin, J., dissenting in part.

Appeal from Special Term, New York County.

Proceeding by the People, on the relation of Herbert D. Lewis, to compel Hon. Robert Ludlow Fowler, a Surrogate of the County of New York, to order the examination before trial, of John A. Lewis in probate proceedings pending in the Surrogate's Court in such county. From an order (107 Misc. Rep. 253, 176 N. Y. Supp. 806) granting relator's motion for a peremptory writ of mandamus, the Surrogate appeals. Order reversed, and motion for writ of mandamus denied. See, also, 107 Misc. Rep. 70, 175 N. Y. Supp. 608.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

Anthony J. Barrett, of New York City (George L. Ingraham, of New York City, of counsel), for appellant.

Horwitz & Rosston, of New York City (Otto Horwitz, of New York City, of counsel), for respondent.

PHILBIN, J. This is an appeal from an order of the Special Term granting a mandamus directed to Hon. Robert Ludlow Fowler, a surrogate of the county of New York, directing him to grant—

"the application referred to in said affidavit of Herbert D. Lewis, duly verified the 24th day of April, 1919, and issue an order accordingly for the examination of said John A. Lewis in the probate proceedings now pending in the Surrogate's Court of the county of New York, entitled 'In the Matter of Proving the Last Will and Testament of Rosetta L. Hodgman, Deceased.'" 107 Misc. Rep. 70, 175 N. Y. Supp. 608.

The relator presented to the Special Term an affidavit, from which it appeared that on the 20th day of February, 1919, one John A. Lewis filed a petition in the Surrogate's Court of the county of New York, praying for the probate of a certain paper as the last will and testament of Rosetta L. Hodgman, deceased; that thereupon a citation was issued by the surrogate directing certain persons to show cause why the alleged instrument should not be admitted to probate as a will of real and personal property. Subsequently affiant filed objections to the probate of such paper as the last will and testament of the said decedent, and demanded a jury trial, and an order was made directing that there be had before a surrogate and jury a trial of the issues of fact raised by the objections.

On the 7th day of April, 1919, an application was made on behalf of the affiant to the surrogate for an order directing the said Lewis,

the proponent, to appear for examination before trial pursuant to section 872 of the Code of Civil Procedure. The proposed order, as submitted to the surrogate, required that the deposition of the proponent be taken pursuant to section 872 of the Code of Civil Procedure, and that he submit to examination upon eight specified subjects. The learned surrogate denied the application, stating that he was not satisfied that there existed such right to examine proponent before trial; that the proceeding for probate was one in rem, and was a special proceeding, and not an action at law.

I think the surrogate has the power to act under section 872 of the Code of Civil Procedure, and that in a proper case he must make an order for examination before trial pursuant to section 873. *Matter of Plumb*, 64 Hun, 317, 19 N. Y. Supp. 79, approved 135 N. Y., 661, 32 N. E. 22. In that case the application was for the issuing of a commission to take testimony under section 888, and it was claimed that the surrogate had no power. The section at that time (1892) did not provide for a commission in a special proceeding; the amendment including the latter being enacted in 1894. Laws 1894, c. 308. Therefore the same situation was presented as to the provisions of the Code as now exists. The present section 2770, which makes all sections of the Code apply to Surrogate's Courts, was taken from former section 2538, in effect when the *Plumb* Case was decided. There is some difference in the wording of the two sections. The earlier one specifically referred to certain chapters, titles, and articles of the Code. Section 2770 is much broader. It reads:

"Except where a contrary intent is expressed in, or plainly implied from the context of, a provision of this chapter, all other portions of this act, and the general rules of practice apply to Surrogate's Courts and to the proceedings therein, so far as they can be applied to the substance and subject-matter of a proceeding without regard to its form."

Former section 2538 did not refer to the general rules of practice. The insertion of such reference in section 2770 may fairly be regarded as an intention on the part of the Legislature to make the section broader in its scope. The court in the *Plumb* Case very forcibly said that to regard the sections authorizing the issuing of commissions as applicable only to actions in Surrogate's Courts would be meaningless, as there are only special proceedings therein; also that—

"The Legislature, in enacting section 2538, had undoubtedly in view the difference that exists between courts wherein actions may be brought and the Surrogate's Court, which deals solely with special proceedings; and hence, in making applicable the other provisions of the Code to the Surrogate's Court, we find that in reference thereto the language used is that such provisions are made applicable to the proceedings therein so far as they can be applied to the substance and subject-matter of a proceeding without regard to its form."

Although it thus appears that the learned surrogate erred in doubting his power to issue an order for examination, I think the order granting the mandamus was improper. The effect of the action of the Special Term was to substitute its discretion for that of the surrogate in determining that the order for examination should be made as required by section 873 of the Code. This the Special Term had no power to

do. It is for the judge, to whom the application is made, to determine whether the facts submitted entitle the applicant to an order. Where the person to be examined is a party to an action (in this case a special proceeding), the judge may, in the exercise of a sound discretion, designate and limit the particular matters as to which examination shall be had.

Another reason for reversal is that in any event the scope of the proposed order for examination is too broad and in other respects improper.

The order appealed from should be reversed, with \$10 costs and disbursements, and the motion for a writ of mandamus denied, with \$50 costs. Order filed.

CLARKE, P. J. [1, 2] I concur in the result. I am of the opinion that mandamus will not lie, and that the order for examination was properly denied by the learned surrogate. I am further of the opinion that the provisions for examination of parties before trial, as provided for in section 870 et seq. of the Code of Civil Procedure, do not apply to and have not been extended to proceedings in the Surrogate's Court.

DOWLING, PAGE, and MERRELL, JJ., concur with CLARKE, P. J.

(189 App. Div. 339)

MAIER v. MAZE REALTY CO.

Petition of WILSON.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. ATTORNEY AND CLIENT § 192(1)—ATTORNEY'S LIEN; SUMMARY PROCEEDINGS AGAINST THIRD PARTIES.

Summary proceeding to determine amount of attorney's lien, under Judiciary Law, § 475, cannot be maintained against a party other than client, except when amount due is beyond dispute; such statute being applicable only to disputes between attorney and client.

2. ATTORNEY AND CLIENT § 192(1)—ATTORNEY'S LIEN; ENFORCEMENT AGAINST THIRD PARTY IN EQUITY.

Where attorney's lien is sought to be enforced against party other than client, and amount due is in dispute, proper remedy is action in equity.

Appeal from Special Term, New York County.

Action by Ella Maier against the Maze Realty Company. From an order, on the petition of Edward H. Wilson, appointing a referee to determine the reasonable value of service rendered to plaintiff by Edward H. Wilson, defendant appeals. Reversed, and petition dismissed.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

James J. Mahoney, of New York City, for appellant.

Edward H. Wilson, of New York City, for respondent.

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PHILBIN, J. [1] In the Matter of Salant, 158 App. Div. 697, 143 N. Y. Supp. 870, affirmed 210 N. Y. 622, 104 N. E. 1140, it was held that the summary proceeding authorized by section 475 of the Judiciary Law (Consol. Laws, c. 30) is applicable only to disputes between attorney and client, and that if the attorney seeks to enforce his lien against a third party, except when the amount due is beyond dispute, he must proceed to foreclose his lien otherwise. It follows, therefore, that the present summary proceeding by petition under section 475 against the defendant—a third party—cannot be maintained.

[2] The proper form of remedy in such circumstances would seem to be an action in equity. That was the method followed in the case of Fischer-Hansen v. Brooklyn Heights Rd. Co., 173 N. Y. 492, 66 N. E. 395. In Matter of Reisfeld, 187 App. Div. 223, 175 N. Y. Supp. 365, modified and affirmed by the Court of Appeals (October 14, 1919) 124 N. E. 725, the point now under consideration was not presented to the court. The serious question there passed upon was whether the attorneys had or had not been discharged by their client. It also appears in the present proceeding that the client was not given notice of the application.

The order should therefore be reversed, with \$10 costs and disbursements, and the petition dismissed, with \$10 costs. Orders filed. All concur.

(189 App. Div. 340)

MAIER v. MAZE REALTY CO.

Petition of WILSON.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

Appeal from Special Term, New York County.

Action by Louis W. Maier against the Maze Realty Company. From an order, on the petition of Edward H. Wilson, appointing a referee to determine the reasonable value of services rendered to plaintiff by Edward H. Wilson, defendant appeals. Order reversed, and petition dismissed.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

J. J. Mahoney, of New York City, for appellant.

E. H. Wilson, of New York City, for respondent.

PHILBIN, J. For the reasons stated in opinion No. 4158, *Ella Maier v. Maze Realty Co.*, 178 N. Y. Supp. 502, 189 App. Div. 339, decided herewith, the order should be reversed, with \$10 costs and disbursements, and the petition dismissed, with \$10 costs. Order filed. All concur.

ELLIS v. CAPLAN.

(Supreme Court, Special Term, Kings County. May 12, 1919.)

1. LIS PENDENS ~~§~~20—RECORDS; JURISDICTION OF OTHER COURT TO CANCEL.

If notice of pendency was filed in the clerk's office, to show that the action in the Municipal Court had been begun, the Supreme Court has no jurisdiction to order it canceled of record; it not appearing from the papers that Supreme Court has acquired jurisdiction over the parties.

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2. RECORDS §11—CANCELLATION; JURISDICTION OF COURT.

The Supreme Court has no general jurisdiction over the records in the county clerk's office, and cannot give directions concerning them, except in connection with actions or special proceedings between parties over whom it has acquired jurisdiction.

Action by one Ellis against one Caplan. On application to order notice of pendency canceled of record. Denied.

J. Balthasar Caruso, of New York City, for defendants.

BENEDICT, J. [1, 2] If the notice of pendency referred to in the within papers was filed in the clerk's office to show that the action in the Municipal Court had been begun, this court has no jurisdiction to order it canceled of record. The Supreme Court has no general jurisdiction over the records in the county clerk's office, and cannot give directions concerning them, except in connection with actions or special proceedings between parties over whom it has acquired jurisdiction. If such is the case here, the papers fail to indicate it.

Application denied, without prejudice to a renewal upon further proof.

(189 App. Div. 405)

BRADY v. HOLBROOK, CABOT & ROLLINS CORPORATION.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

MASTER AND SERVANT §374—WORKMEN'S COMPENSATION; AMPUTATION OF LEG NOT DUE TO ACCIDENTAL INJURY.

An award for the loss of claimant's leg is not justified when all the evidence shows that amputation of the leg, which was fractured by a fall, was made necessary, not by the accident, but because of cancer of the bone.

Lyon, J., dissenting.

Appeal from the State Industrial Commission.

Proceeding for compensation under the Workmen's Compensation Law by Joseph F. Brady, opposed by the Holbrook, Cabot & Rollins Corporation, employer and self-insurer. Award in favor of claimant, and the employer appeals. Award reversed, and proceeding remitted to the Industrial Commission.

Argued before **JOHN M. KELLOGG, P. J.**, and **LYON, WOODWARD, COCHRANE**, and **HENRY T. KELLOGG, JJ.**

Adolph Hansen, of New York City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The State Industrial Commission has found as facts that on the 28th of January, 1919, the claimant was employed by the defendant company in the construction of a subway in New York City, and that while walking along a track outside of the subway, where he had a right to be in the course of his employment, the

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passageway was "suddenly plunged into darkness," and as the claimant was feeling his way he stumbled and fell down to the bottom of a concrete floor decline, "and that as a result of said accident the claimant sustained a fracture of the right femur, which necessitated the amputation of his right leg at about the middle of the thigh." There is no evidence in the record of this passageway having been previously lighted and "suddenly plunged into darkness," nor that the claimant "stumbled and fell down to the bottom of a concrete floor decline," nor yet that the "fracture of the right femur" was such as to "necessitate the amputation of his right leg." Aside from this, the finding seems to be sustained by some evidence.

The claimant testified:

"I was walking along in perfect darkness where it had been light a short time before, and when I came to this incline I stepped into space and fell down the incline."

This incline was shown to be at an angle of about 30 degrees and to be about 9 or 10 feet in length. What occurred was that the claimant, walking along this dark passageway, miscalculated his distance, stepped forward and upon the upper end of the incline, and fell forward, because of the comparatively abrupt decline. But, whatever may have been the details of the fall, there is no question that the claimant fell, and there is no doubt that the right femur was broken at the extreme lower end; but the conclusion that this comparatively simple fracture "necessitated the amputation of his right leg at about the middle of the thigh," some inches above the fracture, is not sustained by the evidence, and this is the material question in the case.

The evidence is wholly undisputed that the claimant had a "pathological fracture." This is his own admission. Upon his being taken to the Roosevelt Hospital it was found that he had an osteosarcoma, popularly known as cancer of the bone, at the point of the fracture, and there is no dispute in the evidence that the amputation was made, not because of the fracture, but because of the disease. Dr. Gillespie testified, and there was no contradiction, that there was no visible injury to the outside of the leg that he could find, and that "the leg was amputated because the growth was malignant"; that if the accident had occurred, as described, and there had been no sarcoma at that point, no amputation would have been necessary. The diagnosis was made immediately after the accident, and the operation took place within eight days of the diagnosis, and the undisputed evidence is to the effect that the operation was for the purpose of curing the diseased condition of the leg, not because of the fracture. Indeed, the fair inference from the evidence is that the fracture was the result of the disease rather than of the accident, though it was inferentially admitted that the false step hastened the break. But the loss of the leg was clearly due to the diseased condition; that disease was the only justification for the amputation, and the disease concededly existed before the accident, and was, doubtless, the underlying cause of the fracture, for it is hardly conceivable that such a fall as the claimant describes could have resulted in a breaking of a thigh bone at its lower extremity. It is not shown that the claimant was bruised in any way;

he apparently fell forward down an incline of about 30 degrees and rolled to the bottom, with no other injury than the breaking of the diseased bone, and to charge this disease to the industry, simply because it became manifest by reason of this inconsequential fall, is an abuse of the purpose of the Workmen's Compensation Law, which sought to insure against the inherent risks of certain classes of industry.

The very recent discussion in *Richardson v. Greenberg*, 188 App. Div. 248, 176 N. Y. Supp. 651, makes it unnecessary to go into the question of the distinction between an accident and disease, and it seems to us that, while the commission might have made an award for the accident, it was not justified in going to the extent of charging the employer with the loss of a leg, when all of the evidence shows that the amputation was made necessary, not by the accident, but by the disease, without which the accident, in all probability, would have resulted in nothing more serious than a wrenching of the body.

The award should be reversed, and proceedings remitted to the Industrial Commission for disposition in accordance with this opinion. All concur, except LYON, J., who dissents. -

(189 App. Div. 221)

O'NEILL v. EWERT.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. MUNICIPAL CORPORATIONS §=706(5)—NEGLIGENCE OF TRUCK DRIVER; SUFFICIENCY OF EVIDENCE.

In action for injuries to pedestrian, struck by automobile truck while crossing street, involving question of truck driver's negligence in failing to give warning on approach and in driving on wrong side of street, verdict for defendant *held* clearly against weight of evidence.

2. MUNICIPAL CORPORATIONS §=706(7)—CONTRIBUTORY NEGLIGENCE IN AUTOMOBILE ACCIDENT JURY QUESTION.

Pedestrian, who continued to cross street at street intersection, after having noticed automobile truck approaching at distance of 60 feet, and who was struck by truck after it had changed its course, was not negligent as a matter of law, in failing to look a second time or accelerating speed, where, if truck had continued on its course, he would have been beyond danger after proceeding only 5 or 6 feet.

Appeal from Trial Term, New York County.

Action by William O'Neill against Frederick Ewert. From a judgment for defendant upon a verdict, and from an order denying motion for new trial, plaintiff appeals. Reversed, and new trial granted.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

Alfred L. Marilley, of New York City, for appellant.

William Dike Reed, of New York City (William B. Shelton, of New York City, on the brief), for respondent.

MERRELL, J. This is an appeal from a judgment entered in favor of the defendant and against the plaintiff in an action brought to re-

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cover for personal injuries. The plaintiff, a man of the age of 50 years, and by trade a mason, was injured in the late afternoon of November 15, 1916, by being run down by an automobile owned and driven by the defendant near the corner of Fifty-Second street and Second Avenue in the city of New York.

The plaintiff testifies that about 5 o'clock on the afternoon of the accident he left his work on Fifty-Ninth street and proceeded toward his home, which is situated on First avenue, between Fifty-First and Fifty-Second streets; that in thus proceeding he came down Third avenue to the southerly side of Fifty-Second street, and walked thence easterly on the southerly side of Fifty-Second street until he reached Second avenue, when he left the curb and proceeded to cross Second avenue on the line of the southerly sidewalk on said street. Plaintiff testifies that before leaving the curb he glanced to the north and to the south and could see no approaching vehicle from either direction; that as he reached the westerly rail of the south-bound track, and when, being beneath the elevated railway structure on said avenue, he obtained a clear view to the north and south, he again looked in both directions, and saw approaching, a short distance northerly from the north crosswalk, the automobile van driven by the defendant. At that time, he testifies that the van was about 60 feet away and coming directly toward him on the westerly or south-bound surface car track. Plaintiff testifies that, without again looking, he proceeded to cross the south-bound track, and had just reached the westerly rail of the north-bound track, a distance of substantially 10 feet from the place where he had last looked, when he heard an outcry, and glancing to the left saw the defendant's automobile truck just about to strike him; that before he could escape he was struck; that when he regained consciousness he had been carried a distance of $21\frac{1}{2}$ feet along the north-bound track in a southerly direction, and that at that time the automobile truck was upon him, the front axletree resting upon his body.

Plaintiff is corroborated by an eyewitness, one James O'Mara, who was a merchant engaged in the retail grocery business, with a store upon First avenue, not far distant from the place of the accident. O'Mara testifies that at the time of the accident he was standing on the southwest corner of Fifty-Second street and Second avenue, where he had a plain view of the plaintiff and the approaching automobile van driven by the defendant, and saw the accident. O'Mara testified that he saw plaintiff walk across the westerly roadway on Second avenue to the west rail of the south-bound track, and that plaintiff then looked up; that when plaintiff was on the westerly rail of the south-bound track defendant's motor truck was about the crossing at Fifty-Second street, and was coming south on the south-bound car track at the rate of 15 miles an hour; that when the motor truck was midway between the north and the south crosswalks at said point, where Fifty-Second street crosses Second avenue, O'Mara saw it swing onto the east or north-bound track at the same rate of speed it had been driving, and, without warning, strike the plaintiff as he was on the westerly rail of the north-bound or easterly car track; that the truck came to a stop about 25 feet southerly from the point where it struck plaintiff;

that plaintiff was then beneath the front axle; and that he (O'Mara) helped pull plaintiff from beneath the car.

Two other witnesses were sworn in behalf of the plaintiff; one being Samuel Miller, a furniture dealer with a store on Second avenue, on the southeast corner of Fifty-Second street, nearly opposite the spot where the defendant's truck came to a stop after hitting plaintiff. He testified that he was in his store at the time of the accident, when he heard a woman cry out that a man had been hit by an automobile; that, accompanied by a helper, one Alenik, Miller ran out and saw the defendant's motor truck at a standstill, with its front wheels a little east of the north-bound or easterly track, and near the elevated pillar, which was over 20 feet south of the southerly crosswalk.

Alenik, who was a driver for Miller and his helper, testified that he ran out of Miller's store and saw defendant's van across the surface car tracks in substantially the same position as stated by the plaintiff and by the witnesses O'Mara and Miller; that at that time plaintiff was lying on the uptown track under the front axle of the van; that he helped pull plaintiff from under the van and carry him into a nearby drug store.

The plaintiff received very serious injuries, and was at once carried on a stretcher and by ambulance to the City Hospital, where he remained for a week, suffering intense pain. Thereafter he was upon crutches for four months, and for over eight months was under the care of a physician.

Plaintiff and his witnesses apparently made out a clear case of negligence on the part of the defendant in driving his automobile at the time of the accident. O'Mara and plaintiff both gave testimony tending to show that no warning was given of the approach of the car, and their evidence, as well as that of Miller and Alenik, would seem to indicate that at the time plaintiff was struck the defendant was driving his car in a southerly direction on the wrong side of the street.

Defendant, to meet plaintiff's testimony, offered himself as a witness, and testified that he was the owner of the automobile which he was driving, and which was an Alco truck or van of 36 horse power, weighing 7,800 pounds; that as he approached Fifty-Second street he was proceeding upon and along the downtown or westerly car tracks at a speed of 6 miles an hour; that as he approached Fifty-Second street he noticed a man going along; that when he was 2 feet away from the man he first blew his horn, and when he got a little nearer he put on brakes and hollered at the man, but that the man kept right on. Later on in his testimony defendant claimed that he was about 5 feet or 6 feet away, and still later that he was about 10 feet away, from plaintiff when he sounded his horn. Defendant's testimony was to the effect that plaintiff stepped upon the westerly rail of the south-bound car tracks when defendant's automobile was almost upon him, and that he (defendant) then turned to the left in an effort to avoid him, but that plaintiff kept on walking, when, as defendant expressed it, he "bunked into him"; that plaintiff fell down in front of the automobile, which came to a standstill with the left front wheel on the uptown track and "the right wheel on the outside west-bound track"; and that both

of the front wheels of his automobile truck were "right on the crosswalk." Defendant further swore that O'Neill dropped where he was hit, and the van went about 2 feet further, but did not run onto plaintiff at all.

It will thus be seen that there was a great discrepancy between this testimony of the defendant, in which he is uncorroborated, and that given by the plaintiff, O'Mara, Miller, and Alinek, all of whom agree that when the truck came to a stop it was 20 feet or more south of the south crosswalk, and that plaintiff was lying beneath the car. At the close of the evidence the case was submitted to the jury, and the jury returned a verdict in favor of the defendant.

[1] Plaintiff contends that such verdict was clearly against the weight of the evidence, and that the same should, for that reason, be set aside and a new trial granted. From a careful examination of the evidence I think the verdict of the jury was clearly against the weight of the evidence. As against the testimony of the defendant, who was an interested witness, we have the testimony of a bystander, a merchant and apparently an entirely disinterested witness, who saw the accident, and who supports the plaintiff in his version thereof. We have also the testimony of the merchant, Miller, and his helper, Alinek, both of whom were disinterested, and who support plaintiff's version of the accident, and in their testimony radically differ with that of the defendant. Upon the ground that the verdict is against the weight of the evidence I think the plaintiff is entitled to a reversal, and that a new trial should be granted.

But, aside from the consideration of the weight of evidence, I think reversible error was committed by the learned trial court in submitting the case to the jury, which calls for reversal of the judgment entered in defendant's favor. After the close of the court's main charge, counsel for the defendant submitted several requests to charge. Among others, by his fourth request, counsel for the defendant asked the court to charge the jury that:

"If the jury find from the evidence that the plaintiff saw the automobile approaching about 60 feet away, just as he was about to cross the south-bound car track leisurely, and never looked towards the automobile again to see how the automobile was approaching, although there was nothing to obstruct his view, and the next thing he knew he was hit with the automobile, then the plaintiff was guilty of contributory negligence and cannot recover."

[2] The court granted such request, and the jury was so instructed. I do not think such charge was proper under the circumstances. Even had the plaintiff been struck upon the south-bound or westerly surface car track in the course of the automobile as he saw defendant approaching about 60 feet away, I do not think his failure to look a second time to ascertain the position of the approaching automobile could be said to be negligence on his part, as matter of law. As the plaintiff approached and had reached the westerly rail of the south-bound track, his testimony is that he looked northerly and saw the automobile approaching on the westerly or south-bound car track 60 feet away. If the automobile had continued on its course, plaintiff would have had to proceed but 5 or 6 feet to be beyond danger of being struck. I do not think it can be said that his failure to look a second time under such

circumstances was contributory negligence as matter of law. At most, it would be for the jury to say, under all the circumstances, considering the distance that the car was away when the plaintiff saw it and the distance which he had to walk in order to pass beyond its course, whether or not, in failing to look again at the approaching car and to accelerate his speed, that he failed to exercise that care and prudence which, under the circumstances, he was called upon to observe.

But, under the plaintiff's testimony here and that of his witnesses, he was not struck in the course of the approaching automobile as he saw it 60 feet away as he was stepping upon the south-bound track; but he had proceeded a distance of at least 10 feet easterly, and had reached the north-bound track, when the automobile, having swerved out of its course, bore down upon him and struck him. He certainly was not called upon to anticipate the automobile would change its course, and he could not be said, as matter of law, to have been guilty of contributory negligence, under the circumstances, because he looked but the once in attempting to cross in front of the approaching car. Moreover, the law does not put upon a pedestrian the burden of looking any particular number of times, nor does it say when he must look. He is not bound, as matter of law, to look at a particular time, and, as matter of law, he is not called upon to stop to allow the passing of an approaching vehicle. Unless the vehicle is close upon him, he may proceed upon his way, and whether or not, in proceeding, he is observing that degree of care which a reasonably careful and prudent man should observe for his protection, was a question of fact for the determination of the jury. It was for the jury to say whether, under all the circumstances, the plaintiff here was guilty of such carelessness as contributed to the accident which befell him. *Knapp v. Barrett*, 216 N. Y. 226, 110 N. E. 428; *Lentsch v. International Railway Co.*, 172 App. Div. 775, 160 N. Y. Supp. 6.

I think the jury may well have found the plaintiff entirely justified in proceeding to cross the south-bound surface car track upon which the defendant's automobile was approaching when he saw it 60 feet away. Surely he cannot be held to have been guilty of contributory negligence as matter of law, preventing any recovery for his injuries, because he did proceed and was struck on the easterly or north-bound track upon which defendant, leaving the course that he was pursuing when plaintiff saw him, had turned his car. This erroneous instruction to the jury may well have been instrumental in causing them to render the verdict which they did so clearly contrary to the weight of the evidence.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to appellant to abide event. Order filed. All concur.

(189 App. Div. 242)

AMERICAN FIDELITY CO. v. LEAHY.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. INSURANCE ¶16—"DOING BUSINESS"; FOREIGN INSURANCE CORPORATIONS.

Foreign insurance corporation, having certificate entitling it to do business in state and to guarantee performance of contracts other than insurance contracts, under Insurance Law, § 9, and section 70, subd. 4, was not required to limit its contract of guaranty to period during which it was authorized, at time of execution of contract, to transact business, under section 32, and was not precluded from making premium payable in installments due after expiration of such period; the continuance of company's liability after expiration of period not constituting "doing business" in state, within section 9.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

2. INSURANCE ¶362—ESTOPPEL TO ASSERT LACK OF AUTHORITY TO DO BUSINESS IN STATE.

Where owner did not question contractor's bond, or require contractor to furnish new bond upon expiration of period for which surety company was authorized to do business in the state, contractor, having enjoyed benefit of bond, could not refuse to pay premium upon ground that surety had no right to do business in the state.

3. CORPORATIONS ¶662—FOREIGN CORPORATION; LIABILITY INCURRED WHILE AUTHORIZED TO DO BUSINESS.

While authority of foreign corporations to do business in states other than that in which they are incorporated may be revoked or terminated, the liability incurred while authorized to do business in the foreign state is not limited to period during which such authority continues.

Appeal from Appellate Term, New York County.

Action by the American Fidelity Company against Michael J. Leahy. Judgment of Municipal Court for plaintiff modified, and affirmed, as modified, by Appellate Term, and defendant by leave appeals. Affirmed.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Kellogg & Rose, of New York City (William K. Hartpence, of New York City, of counsel), for appellant.

Harriman & Blake, of New York City (Herbert McKennis, of New York City, of counsel), for respondent.

LAUGHLIN, J. On the 24th day of January, 1916, defendant, as principal, and the plaintiff and two other insurance companies, as sureties, executed a bond in writing to the Interborough Rapid Transit Company in the sum of \$100,000 for the performance of a contract made by defendant for the construction of the Webster Avenue line, section No. 9-B, of the subway, and it was provided therein that the plaintiff should be bound only to the extent of \$25,000. Defendant agreed in writing with the plaintiff, among other things, that in consideration therefor he would pay the plaintiff annual premiums at the rate of \$4 per thousand of the total amount of the contract covered by the bond, until defendant delivered to it, at its home office, competent written evidence of its discharge from liability. Defendant paid

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the annual premium for the first year, and this action was brought for the annual premium for the second year, ending January 24, 1918. The action was commenced on the 25th of February, 1918. It was stipulated that the work under the contract was not completed and was still in progress at the time of the trial.

[1] The only ground of defense to the action is that the plaintiff was a foreign corporation organized under the laws of Vermont, and that while it was authorized by certificate of the superintendent of insurance to do business here when the bond was executed, its authority existing at that time terminated on April 30, 1916, and was only extended until October 23, 1916, after which date it was not authorized to do business in this state. The claim is that the contract should have been limited to liability accruing before the expiration of its authority to transact business here, and that the continuance of its liability bond after October 23, 1916, constituted doing business here, and that such business, having been done without authority of the superintendent of insurance, was in violation of section 9 of the Insurance Law (Consol. Laws, c. 28), which forbids the transaction of business with respect to insurance without a certificate of the superintendent of insurance to the effect that the corporation or person so transacting business has complied with all of the requirements of law and is authorized to transact the business of insurance specified in the certificate. The certificate which the plaintiff held from the superintendent of insurance authorized it, among other things, to guarantee performance of contracts other than insurance contracts (subdivision 4, section 70, Insurance Law). Section 32 of the Insurance Law provides, among other things, that such a certificate issued to a foreign corporation shall not remain in force for longer than one year, and shall expire on the 30th of April of the year following the date of issue, and provides that the superintendent, if satisfied that the capital, security, and investments required to be filed with him remain secure, and that the company may be safely intrusted with the continuance of its authority to do business, may grant a renewal of the certificate.

It is claimed in behalf of the defendant that no recovery may be had in such a case unless the plaintiff alleges and proves, not only that it held such a certificate when the contract was made, but that it continued to be authorized to do business here throughout the period for which it seeks to recover premiums. I am unable to agree with that contention. The true construction of the statutory provision in question is, I think, that the insurance company could not enter into a contract guaranteeing the performance of a contract, unless it was then authorized by a certificate of the superintendent of insurance to do business in this state, but that it was not necessary to limit the contract of guaranty to the period during which the company was then authorized to transact business here, and that the contract of guaranty may cover the performance in the ordinary course of business of any contract, even though the work be not required to be performed within the period for which the company was then authorized to do business here, and that the continuance of its liability under such a contract,

after the expiration of the period during which it was so authorized to do business, does not constitute doing business within the fair intent and meaning of the statute, and that therefore it was authorized either to exact a gross premium to cover its entire liability in advance, or, as here, to require that it should be paid from time to time in installments. See *Provident Savings Association v. Kentucky*, 239 U. S. 103, 36 Sup. Ct. 34, 60 L. Ed. 167, L. R. A. 1916C, 572.

[2] There is no claim or evidence that the Interborough Rapid Transit Company questioned the validity of the bond or called upon the defendant to furnish another when the plaintiff's authority to do business here terminated, and consequently plaintiff's liability continued, and defendant has had the benefit thereof, and therefore he cannot refuse to pay the premium. *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 106; *National Surety Co. v. Winston*, 161 App. Div. 594, 146 N. Y. Supp. 825. See, also, *City of New York v. Illinois Surety Co.*, 180 App. Div. 513, 167 N. Y. Supp. 752; *Hunter v. Mutual Res. Life Ins. Co.*, 184 N. Y. 136, 76 N. E. 1072, 30 L. R. A. (N. S.) 677, 6 Ann. Cas. 291; and *Birch v. Mutual Res. Life Ins. Co.*, 91 App. Div. 384, 86 N. Y. Supp. 872, affirmed 181 N. Y. 583, 74 N. E. 1115.

[3] It is universally recognized that, while authority of foreign corporations to do business in states other than that in which they are incorporated may be revoked or terminated, the liability incurred while authorized to do business in the foreign state is not limited to the period during which such authority continues, and this is shown by decisions sustaining service within the foreign state as prescribed when the authority to do business was conferred, although the liability did not accrue until after the authority was terminated. *Hunter v. Mutual Life Ins. Co.*, supra; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Mutual Res. Life Ins. Co. v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; *Birch v. Mutual Res. Life Ins. Co.*, supra; *Badger v. Helvetia Swiss Fire Insurance Co.*, 136 App. Div. 31, 120 N. Y. Supp. 161.

It follows that the determination of the Appellate Term was right, and should be affirmed, with costs. Order filed. All concur.

(109 Misc. Rep. 255)

PEOPLE ex rel. McAVOY v. LEO et al., Board of Appeals of City of New York.

(Supreme Court, Special Term, Kings County. November 12, 1919.)

1. LIVERY STABLE AND GARAGE KEEPERS $\Leftrightarrow$ 4½ — GARAGE PERMIT; POWER OF BOARD OF APPEALS OF NEW YORK.

Under Greater New York Charter, as amended by Laws 1916, c. 503, and other amendatory acts, and Building Zone Resolution of Board of Estimate and Apportionment of City of New York, § 20, the board of appeals of the city had power to grant permit to erect and maintain a garage in the borough of Brooklyn, even though there was a technical violation in the manner in which the consents of property owners were executed, in that they were not duly acknowledged as required by Zoning Resolution, § 7, subd. 9, but were merely in the form of an affidavit sworn to before a notary.

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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2. LIVERY STABLE AND GARAGE KEEPERS ~~§ 41~~—GARAGE PERMIT; POWER OF BOARD OF APPEALS OF NEW YORK.

Under Building Zone Resolution of Board of Estimate and Apportionment of City of New York, § 20, board of appeals of the city *held* vested with power to grant permit for a garage in a specific exceptional case, even though there had been no consents of property owners procured and filed at all, being empowered to vary any provision of the resolution in harmony with its general purpose and intent that the public health, safety, and general welfare be secured, and substantial justice done.

Certiorari by the People of the State of New York on the relation of Elsie Hanneman McAvoy, against John P. Leo and others, composing the Board of Appeals of the City of New York. Writ dismissed, and determination of the Board of Appeals affirmed.

Jacob Brenner, of Brooklyn, for relator.

William P. Burr, Corp. Counsel, of New York City (Joseph I. Berry and F. E. V. Dunn, both of New York City, of counsel), for Board of Appeals.

Antonio Madeo, of Brooklyn, for intervenor.

MANNING, J. [1, 2] The question submitted on this motion concerns the validity of a permit to erect and maintain a garage upon the premises known as Nos. 8716 and 8718 Sixteenth avenue, in the borough of Brooklyn. The superintendent of buildings had refused to issue a permit, and, upon an appeal being taken by the property owner pursuant to law, the board of appeals having jurisdiction thereof pursuant to the powers conferred upon such board by chapter 503 of the Laws of 1916, and the acts amendatory thereof, and also by virtue of section 20 of the Building Zone Resolution of the Board of Estimate and Apportionment, reversed the decision of the superintendent of buildings and granted the permit in question. The relator in this proceeding asserts that the action of the board of appeals is illegal, and such illegality is claimed to exist mainly for the reason that certain consents of surrounding property owners, claimed by the relator to be a condition precedent to the granting of the permit, were not "duly acknowledged" as required by section 7, subdivision 9, of the Zoning Resolution. The section invoked calls for the consent of 80 per cent. of the property owners of the frontage deemed by the board to be affected by the proposed garage. It appears, as a matter of fact, that 81 per cent. of such consents were procured and filed with the board, though it is conceded that, instead of being "duly acknowledged," the consents are in each instance in the form of an affidavit and sworn to before a notary.

The power of the board of appeals, in my opinion, was full enough to grant the permit applied for, even though there was a technical variation in the manner in which the consents were executed. In fact, I am convinced that the board had power to grant the relief asked for, even though there had been no consents at all. The return to the writ made by the board sets forth the reasons why the application was granted in the following language:

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"The board was of the opinion that because of the existing use of the said premises numbered 8716 and 8718 Sixteenth avenue, borough of Brooklyn, prior to the adoption of the Building Zone Resolution, supplemented by the consents of 80 per cent. of the frontage deemed by the board to be immediately affected by the proposed new building, and that the fire hazard would be lessened by the substitution of a brick building in place of the existing frame structure, that the public health, safety, and general welfare would be secured and substantial justice done by the granting of the application permitting the erection of a new building in place of the old one, to be used as a garage for more than five motor vehicles, subject to conditions which by their terms gave the fullest protection to adjoining owners and the public interests."

The board further imposed a condition that the outer walls of said garage be unpierced throughout their entire length and height, and that any skylights in the roof of the building should not be within 10 feet of the exterior walls of the structure, and it further imposed the condition that any permits necessary for the prosecution of the work should be obtained within 9 months of the date of the board's action, and that the work should be completed within 18 months from said date.

Section 20 of the Building Zone Resolution adopted by the board of estimate and apportionment reads:

"Sec. 20. *Rules and Regulations—Modification of Provisions.*—The board of standards and appeals created by chapter 503 of the Laws of 1916 shall adopt from time to time such rules and regulations as they may deem necessary to carry into effect the provisions of this resolution. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the board of appeals shall have the power in a specific case to vary any such provision in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and substantial justice done. * * *"

By this section, I think, it will clearly appear that the board of appeals possessed the discretionary power to deal with specific exceptional cases, and to vary any provision of the resolution in harmony with its general purpose and intent, so that the public health, safety, and general welfare may be secured and substantial justice done, and evidently it considered this to be one of the cases in which the discretionary power possessed by it should be exercised, and having so determined, and acted within its jurisdiction, its determination, in my opinion, cannot be considered as an illegal official act. See *People ex rel. Beinert v. Miller*, 188 App. Div. 113, 176 N. Y. Supp. 398.

The writ is therefore dismissed, and the determination of the board of appeals affirmed, with costs.

PEOPLE ex rel. LEMPP v. BOARD OF ELECTIONS.

(Supreme Court, Special Term, Queens County. September 30, 1918.)

1. SHERIFFS AND CONSTABLES §5—SHERIFF CHOSEN AT SPECIAL ELECTION; TERM OF OFFICE.

Under Const. art. 10, § 1, providing for election of sheriffs every three years, a sheriff elected at a special election to fill a vacancy holds for the term of three years.

2. MANDAMUS §74(3)—WRIT ISSUES TO COMPEL PRINTING OF BALLOTS WITHOUT NAMES OF CANDIDATES FOR OFFICE ALREADY FILLED.

Mandamus is a proper remedy to compel the printing of official ballots without the names of candidates for an office in which there is no vacancy to be filled at that election.

Action for mandamus by the People, on the relation of one Lempp, against the Board of Elections. Writ issued.

Order affirmed 185 App. Div. 939, 172 N. Y. Supp. 913, affirmed 224 N. Y. 633, 121 N. E. 884.

Herman Lempp, for John B. Merrill.

Merton E. Lewis, Atty. Gen., for Secretary of State.

William P. Burr, Corp. Counsel, of New York City, for Board of Elections.

Phillip Frank, of Long Island City, for Mitchell and others.

Edgar F. Hazleton, of Jamaica, for Campbell.

CROUSEY, J. A mandamus is sought to compel the board of elections to print the ballots for the coming election so that they will not contain the names of any candidates for the office of sheriff in Queens county. The contention is that there is no vacancy in that office to be filled at the coming election. The facts involved have been before the courts in different phases several times, but this question has never been directly decided.

The sheriff of Queens county died on October 23, 1916. This was too late to elect a successor at the general election in that year. Matter of Mitchell v. Boyle, 219 N. Y. 242, 114 N. E. 382. Thereafter the Governor directed the holding of a special election and the sheriff now in office was elected on January 23, 1917. His term began on the day of his election. Matter of Mitchell v. Prendergast, 178 App. Div. 690, 165 N. Y. Supp. 972. The question here involved is: What is the extent of his term; that is, when does it end? The present sheriff agrees with the contention of the relator that his term does not expire at the end of this year, but holds that the remedy sought in this proceeding is not the proper one. The Republican candidate for sheriff in the coming election agrees entirely with the contention of the relator. The corporation counsel and the Attorney General both appeared, but did not express any conviction as to the question involved. The Democratic candidate for sheriff contended that there would be a vacancy in that office at the end of this year, but neither in the remarks of his counsel on the argument nor in the memorandum submitted has he set forth any reasons for this conclusion. Every one concerned is anxious for a prompt decision, as an appeal will be taken in any event. So no attempt will be made to discuss this question at any length.

[1, 2] The constitution (article 10, § 1) provides that sheriffs "shall

be chosen by the electors of the respective counties, once in every three years," and shall "be ineligible for the next term after the termination of their offices." It has been directly held that the term of a "sheriff" elected at a special election is three years. *People ex rel. Gallup v. Green*, 2 Wend. 266; *Coutant v. People*, 11 Wend. 511; *People ex rel. Weller v. Townsend*, 102 N. Y. 430, 7 N. E. 360. No authorities holding to the contrary have been brought to the court's attention, and the reasoning in the authorities cited seems to be sound. If so, it follows that there is no vacancy in the office of the sheriff to be filled at the coming election. And if there is no vacancy the ballots should not contain the names of any candidate for that office. To permit it to be otherwise would produce confusion, as well as incur needless expense. This form of proceeding is the proper one in which to raise the question. It was the form followed and approved in *Matter of Sherrill v. O'Brien*, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841, and *Matter of Reynolds*, 202 N. Y. 430, 442, 96 N. E. 87, 416. As supporting this contention, see, also, *People ex rel. Conklin v. Boyle*, 98 Misc. Rep. 364, 163 N. Y. Supp. 72, and cases cited therein. It is desirable that this question should be decided on the merits now. When the successor to the present sheriff is to be elected is not involved and has not been considered.

Motion granted. Writ to issue. No costs.

(189 App. Div. 328)

GLOVER V. HOLBROOK, CABOT & ROLLINS CORPORATION.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

PLEADING ~~§~~52(1)—**SEPARATE STATEMENT OF CAUSES OF ACTION.**

Where the complaint would warrant a recovery for nuisance or negligence there are two causes of action, which, under Code Civ. Proc. § 481, subd. 2, and section 483, must be separately stated and numbered, unless allegations pertinent to one only are eliminated.

Appeal from Special Term, New York County.

Action by Millie Glover against the Holbrook, Cabot & Rollins Corporation. From an order denying defendant's motion to compel plaintiff to separately state and number her causes of action, or in the alternative to strike out certain allegations of the complaint, defendant appeals. Reversed, and motion granted.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Thomas F. Conway, of New York City (Tobias E. Purcell, of Corning, of counsel, and Thomas E. O'Brien, of New York City, on the brief), for appellant.

Benjamin R. Buffett, of New York City, for respondent.

PAGE, J. It is conceded by the plaintiff's counsel, and was stated by the learned justice at Special Term, that each of the causes of action alleged in the complaint would warrant a recovery for unlawfully and wrongfully maintaining a nuisance or for negligence. It is contended that a party cannot be compelled to state the theory on

which he will ask a recovery until he has produced his proof. As an authority for this proposition the court cites *Schoenfeld v. Mott Avenue Realty Co.*, 168 App. Div. 91, 153 N. Y. Supp. 745. In that case, however, the complaint alleged two distinct causes of action, one for a nuisance and the other for negligence, which were separately stated and numbered, and the court held that, these causes of action not being inconsistent, the plaintiff could not be required to make an election between them until he had produced his proof. That case did not in any way involve the rule of pleading that the complaint must contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition, and if it sets forth two or more causes of action they must be separately stated and numbered. Code Civ. Proc. § 481, subd. 2, and section 483; *Stabilimento Metallurgico Ligure v. Joseph*, 189 App. Div. 173, 178 N. Y. Supp. 241.

✓ While substantially the same facts may in some instances support a recovery of damages sustained either for the maintenance of a nuisance or for a negligent act, the two causes of action are distinct in their elements and are subject to different defences. Nuisance consists in the wrongful maintenance of the thing itself, while negligence usually consists in the manner of doing the thing. In nuisance it is the wrongful or unlawful maintenance of the thing resulting in damage to others that gives the right of action, irrespective of whether its operation was careful or careless; while in negligence it is the careless operation of the thing whereby others are damaged, irrespective of whether it is lawful or unlawful. Therefore that the defendant exercised due care in maintaining the nuisance would be no defence, while that it was lawfully maintained would be. That the defendant observed due care would be a defence in an action predicated upon negligence, but that he was lawfully authorized to operate the thing would be no defence. Furthermore, different limitations are provided upon the right to bring the action. An action to recover damages for the maintenance of a nuisance may be brought within six years from the time when the cause of action accrues (Code Civ. Proc. § 382, subd. 3), while an action for a personal injury resulting from negligence must be commenced within three years (Id. § 383, subd. 5). In order that the defendant may be enabled intelligently to plead to the complaint, it is necessary that the plaintiff be required to frame his complaint in compliance with the few simple rules of pleading prescribed by the Code. If he desires to state alternative theories of liability, either for nuisance or negligence, then he should appropriately allege the facts constituting each cause of action separately and number them. If he desires to state either one alone, then all allegations not pertinent to that cause of action should be eliminated. ✕

The order is reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs, with leave to the plaintiff to serve an amended complaint within 10 days from service of a copy of the order to be entered herein with notice of the entry thereof, upon payment of such costs. Order filed. All concur.

(189 App. Div. 408)

In re BALAIS.

STATE INDUSTRIAL COMMISSION v. BRADY & GIOE et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

MASTER AND SERVANT — 351 — WORKMEN'S COMPENSATION LAW; ACTION BY ADMINISTRATRIX FOR HUSBAND'S DEATH NOT ELECTION.

Where an administratrix of her deceased husband brought an action to recover damages provided for by Code Civ. Proc. §§ 1903, 1904, for his negligent death, in which action she was defeated on the merits, she did not thereby make an election barring her claim under the Workmen's Compensation Law for the benefits thereby given to the widow and minor dependents; the parties and the subject-matter involved being different.

Appeal from State Industrial Commission.

Proceeding by Clementina Balais and minor dependents under the Workmen's Compensation Act to obtain compensation for the death of Giacomo Balais, opposed by Brady & Gioe, the employers, and the Travelers' Insurance Company, insurance carrier. There was an award of compensation by the State Industrial Commission, and the employers and insurance carrier appeal. Award affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Amos H. Stephens, of New York City (E. C. Sherwood, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

WOODWARD, J. There does not appear to be any serious question that the claimant would be entitled to the award which has been made in this case, except for the fact that the present claimant, as administratrix of the estate of her decedent, brought an action in the Supreme Court to recover for the death of the intestate, in which action she was defeated upon the merits, and it is now urged that, having elected to sue, the claimant has made an election which operates as a bar to this proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67).

The complete answer to this contention, it seems to us, is the fact that "Clementina Balais, as administratrix of the goods, chattels, and credits of Giacomo Balais, deceased," is, in law, an entirely different person from "Clementina Balais and minor dependents," making a claim for compensation under the Workmen's Compensation Law. "It has been repeatedly held," say the court in *Leonard v. Pierce*, 182 N. Y. 432, 75 N. E. 313, 1 L. R. A. (N. S.) 161, "that persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons, and strangers to any right or liability as an individual, and consequently a former judgment concludes a party only in the character in which he was sued. If the judgment was for or against an executor, administrator, assignee, or trustee, it would not preclude him, in an action affecting him personally, from disputing the findings or judgment, although the same questions are involved."

Not only are the parties different, but the subject-matter involved is different. In the one case the statute provides a definite sum to each dependent, based upon the actual or constructive earning power of the decedent at the time of the accident, without reference to negligence, while in the other the jury are permitted only to give "a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons for whose benefit the action is brought" (Code of Civil Procedure, § 1904), and the amount is to be distributed as though it constituted a part of an unbequeathed estate (Code of Civil Procedure, § 1903).

We are of the opinion that the election of an administratrix cannot be a bar to a claim on behalf of the individuals who are given definite rights under the statute, and that the award should not be disturbed.

The award should be affirmed. All concur.

(189 App. Div. 216)

SILVERMAN v. WARE et al.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. DISCOVERY §55—EXAMINATION OF PARTIES BEFORE TRIAL; SUFFICIENCY OF AFFIDAVIT.

An affidavit for an order for examination of defendants before trial should, in accordance with the proper practice, meet the requirements of the Code, and not depend on the affidavit on which a former order was granted to supply its insufficiencies.

2. DISCOVERY §55—EXAMINATION OF DEFENDANTS BEFORE TRIAL; AFFIDAVIT BY ATTORNEY'S CLERK.

An affidavit for an order to examine defendants as witnesses before trial should be made by plaintiff or his attorney, and not by the attorney's managing clerk, who cannot supply evidence that deponent expects to use the deposition upon the trial of the action, and that the testimony is material and necessary.

Appeal from Special Term, New York County.

Action by Robert M. Silverman against J. Herbert Ware and another, impleaded, etc. From an order denying the motion to vacate an order for the examination before trial of certain of the defendants, the defendants appeal. Order reversed, and motion to vacate granted.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Henry C. Quinby, of New York City (Leverett J. Luce, of New York City, of counsel), for appellants.

Samuel I. Ferguson, of New York City, for respondent.

PAGE, J. The plaintiff had obtained an order for the examination of these defendants before trial, in which the subject of this examination was not covered.

[1, 2] The affidavit recites the granting of the prior order and says that a copy of the said order is annexed. The affidavit upon which the former order was granted is printed in this record. These papers are not, however, recited in the order for the examination. There are

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many insufficiencies in the affidavit upon which this order was granted, which the respondent claims are supplied by the affidavit on which the former order was granted. The proper practice is that the affidavit upon which the order was granted should meet the requirements of the Code. Another and more serious difficulty is that the affidavit upon which the order was granted in this case was made, not by the party or his attorney, but by the managing clerk of the attorney. It has been frequently held that the attorney may make the affidavit where the facts are within his knowledge, or where the party cannot make the affidavit and the attorney discloses the basis of his information and belief.

There are certain things required in the affidavit, as, for instance, that the deponent expects to use the deposition upon the trial of the action, and that the testimony is material and necessary, which cannot be supplied by a managing clerk.

The order should be reversed, with \$10 costs and disbursements, and the motion to vacate granted, with \$10 costs. Order filed. All concur.

(189 App. Div. 714)

TRANTER v. TRANTER.

(Supreme Court, Appellate Division, Second Department. November 14, 1919.)

DIVORCE — 222 — COUNSEL FEE.

Generally, the basis of a counsel fee in an action for divorce is necessity prospective at the time of the application, and such fees will not be awarded to discharge past obligations, unless necessary in order to carry on the action.

Appeal from Special Term, Kings County.

Action for divorce by Beatrice Tranter against Sefton Tranter. From an interlocutory judgment in favor of plaintiff, defendant appeals. Modified and affirmed.

Argued before JENKS, P. J., and RICH, PUTNAM, BLACKMAR, and JAYCOX, JJ.

Louis T. Noonan, of New York City, for appellant.

Effingham L. Holywell, of Brooklyn, for respondent.

JENKS, P. J. The defendant appeals from the part of the interlocutory judgment for absolute divorce against him that orders him to pay \$150 "as and for an extra allowance of costs and counsel fees herein." When plaintiff moved for confirmation of the referee's report, she also moved for an extra allowance of counsel fee and costs.

The general rule is that the basis of a counsel fee is necessity prospective at the time of the application. The courts have awarded such fees to discharge past obligations when it has seemed necessary to carry on the action. *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. 735; *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 550. It is not asserted that there was any necessity at the time of the application, such as is contemplated by the rules. It is stated that, if the applica-

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tion for confirmation of the referee's report is successful, the attorney for the plaintiff will be required to prepare the interlocutory and the final decree, but nothing more.

We think that the judgment, in so far as appealed from, must be modified, by striking therefrom the provision for \$150 as an extra allowance and for counsel fee, and, as so modified, affirmed, without costs. All concur.

(189 App. Div. 489)

GOLDENBERG v. CUTLER et al.

(Supreme Court, Appellate Division, Second Department. November 21, 1919.)

1. SALES ⇨177—WARRANTIES; TIME AND PLACE OF "SHIPMENT."

The time and place of shipment of goods are regarded as a warranty—that is, a condition precedent—upon the failure or nonperformance of which the other party may repudiate the whole contract; "shipment" meaning delivery of goods to carrier and his bill of lading therefor issued.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Shipment.]

2. SALES ⇨177—WARRANTIES; PREMATURE SHIPMENT.

Where contract specifies a November shipment, the buyer need not accept one made in October.

Mills, J., dissenting.

Appeal from Trial Term, Kings County.

Action by Mollie Goldenberg against Paul Cutler and others, co-partners, etc. From a judgment upon a verdict in favor of defendants, and from an order denying plaintiff's motion for a new trial, plaintiff appeals. Judgment and order reversed, and new trial granted.

Argued before JENKS, P. J., and MILLS, RICH, PUTNAM, and BLACKMAR, JJ.

Samuel Widder, of Brooklyn, for appellant.

A. S. Cutler, of New York City, for respondents.

PUTNAM, J. Plaintiff sued on April 19, 1917, for breach of a written contract made October 30, 1916, with Morris Goldenberg, her assignor, for sale to plaintiff of five tons of Chinese or Japanese antimony, November shipment from China or Japan, at 13½ cents per pound, duty paid, f. o. b. New York, subject to British government regulations. The complaint alleged that defendants had refused and neglected to give the name of the steamer on which the antimony was to have been shipped, but averred on information and belief that such November shipment from China and Japan had reached ports in the state of New York. It also alleged tenders of the agreed price to defendant on March 23 and April 18, 1917, which tenders had been refused.

The answer, admitting the sale contract, alleged a tender by defendants of the material mentioned in the complaint, which the plaintiff's assignor had refused to accept. Defendants sought to show that such an offer of antimony had been made on January 5 or 6, 1917. This, however, was denied by plaintiff's assignor, who testified that defend-

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ants had been putting him off by saying that the antimony had not arrived. Defendants put in evidence copy of a letter to plaintiff's assignor, dated December 15, 1916, referring to the contract, and stating that "we expect to deliver same from the steamship 'Tsuyima Maru,' " and requesting him to furnish them with consumer's guaranties, according to the British government regulations.

Plaintiff, in rebuttal, introduced three bills of lading by the Japanese steamer Tsuyima Maru from Shanghai, all dated October 28, 1916, for large quantities of antimony shipped and transported via the Panama Canal to New York, to be deliverable to the order of the British consul, or his assigns. These bills of lading, being dated October 28, 1916, standing without contradiction or explanation, taken with defendant's letter naming that steamer, indicated that the antimony in defendant's possession in January was from these shipments of October 28th.

There was a further issue as to plaintiff's compliance with the British government regulations during the war period, which were intended to secure a guaranty satisfactory to the British consul that the consumer would not export the antimony otherwise than to the United Kingdom or to a British possession. A guaranty to this effect by the Berger Metal Manufacturing Company was produced March 23, 1917, as part of the plaintiff's tender at that time.

[1, 2] These merchants had specified a "November shipment." "Shipment" means that the goods have been delivered to the carrier and his bill of lading therefor issued. The time and place of such shipment are regarded as a warranty; that is, a condition precedent, upon the failure or nonperformance of which the other party may repudiate the whole contract. *Norrington v. Wright*, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366; *Mora y Ledon v. Havemeyer*, 121 N. Y. 179, 24 N. E. 297, 8 L. R. A. 245. Where the contract specifies a November shipment, the buyer is not held to accept one on any date in October. *Bowes v. Shand*, L. R. 2 App. Cas. 455; 35 Cyc. 178.

Appellant, therefore, was entitled to a ruling, substantially as requested, that, if the antimony tendered to plaintiff's assignor was not from a November shipment, defendants had not made a tender under their contract. Hence there should be a new trial, with costs to the appellant to abide the event.

JENKS, P. J., and RICH and BLACKMAR, JJ., concur.

MILLS, J. (dissenting). The sole question presented by this appeal is this: Did the learned trial justice err to the substantial prejudice of the appellant, the plaintiff, by holding, as he did in various ways, that the fact that the bills of lading in evidence were dated October 28, 1916, instead of some day in the following November, for instance, even on November 1st, was immaterial?

The justice submitted the case to the jury upon the narrow issue whether or not the defendants did offer the antimony to the plaintiff's assignor in January, 1916, and he instructed them that, if they found such tender established, they should render a verdict for the defendant, but otherwise one for the plaintiff.

I conclude that in so holding the justice committed no such error, and I have reached that conclusion upon the following grounds, namely:

(a) There was no direct evidence that the company from which defendants obtained their antimony, and which was the consignee in said bills, did not have other shipments than those represented by those bills, and therefore no such evidence that the antimony tendered by defendants in January was of that October shipment.

(b) A shipment just prior to November, to wit, on October 28th, would satisfy the contract requirement for a November shipment. The distinction between that date and the date of November 1st, only three days later, is trivial upon its face, especially as there was no evidence of any facts—such as change of price or customary grading by months—making the three days earlier date of shipment of any material consequence.

(c) According to defendants' version, which the jury must have accepted as true in order, under the charge, to find a verdict for defendants, the plaintiff's assignor refused to accept the January tender upon the sole ground that he was unable to procure the consent of the British consul required by the "British government regulations" specified in the contract. It is manifest that, if the said assignor had then taken the objection that it did not appear that the goods were of a November shipment, the defendants might, for aught this record discloses, have readily obviated that objection by producing due proof that the goods were of such a shipment, or, even if they were not, by tendering other goods which were. It is elementary that under such circumstances the taking of an entirely different objection was a waiver of all others, or at least of any other which, if then taken, might have been obviated.

Moreover, there is no merit in plaintiff's claim, if in fact such tender was really made in January. Then the market price had advanced only 1 cent a pound over the contract price, which was 13 $\frac{1}{8}$ cents per pound. Plaintiff's assignor waited over two months, and then on March 23d, when the market price had reached 34 cents a pound, an advance of 159 per cent., made his demand upon which this action is based.

Therefore I dissent, and vote to affirm the judgment and order appealed from, with costs.

(189 App. Div. 246)

FAIRMOUNT FILM CORPORATION v. NEW AMSTERDAM CASUALTY CO.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. CORPORATIONS $\Leftrightarrow$ 672(7)—ACTION BY FOREIGN CORPORATION; ANSWER ALLEGING NONCOMPLIANCE WITH TAX LAW.

In an action by a foreign corporation on an undertaking on attachment executed by defendant in an action brought by a third person against the corporation, the answer, which alleged that the corporation was conducting business in the state without having complied with the provisions of Tax Law, § 181, but which alleged no facts, *held* insufficient to show such a noncompliance with the Tax Law relating to payment of license fees by foreign corporations as to prevent the corporation from maintaining an action on the undertaking.

2. CORPORATIONS $\Leftrightarrow$ 657(1)—FOREIGN CORPORATIONS; CONTRACTS WITHOUT COMPLYING WITH LAW.

Where defendant executed an undertaking on attachment in an action brought by a third person against plaintiff, a foreign corporation, *held*, that recovery on the undertaking cannot be defeated on the ground that plaintiff was doing business in the state of New York without having complied with General Corporation Law, §§ 15, 16, declaring that no corporation shall maintain an action in the state upon any contract made by it in the state, unless it shall have procured a certificate, etc., for the Legislature could only have intended to bar actions on contracts made by a foreign corporation within the state, and the undertaking, though contractual in its nature, cannot be considered an ordinary contract made by a foreign corporation in the state.

Appeal from Special Term, New York County.

Action by the Fairmount Film Corporation against the New Amsterdam Casualty Company. From an order overruling its demurrer to the first separate defense interposed, plaintiff appeals. Order reversed.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

Everett, Clarke & Benedict, of New York City (Herman S. Hertwig, of New York City, of counsel), for appellant.

Hector M. Hitchings, of New York City (J. Elmer Melick, of New York City, on the brief), for respondent.

LAUGHLIN, J. Plaintiff is a foreign corporation, and brings this action against the defendant, a domestic corporation, on an undertaking on attachment given by defendant in an action brought here by one Burdick against the plaintiff, whereby defendant undertook that if the warrant of attachment should be vacated or if the defendant in the action, the plaintiff in this action, should recover judgment therein, said Burdick would pay all the costs that might be awarded to this plaintiff and all of the damages which it might sustain by reason of the attachment, not exceeding \$250, which amount was increased to \$2,750 by subsequent undertaking given by the defendant. Plaintiff, although a foreign corporation, was solely by reason of the attachment compelled to appear in the action. The complaint in the at-

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tachment action was dismissed on the merits, with costs, and the judgment was affirmed by this court. 184 App. Div. 895, 170 N. Y. Supp. 1170. The action is brought to recover \$3,000, the damages alleged to have been sustained by the plaintiff by reason of the attachment.

[1] The defense to which a demurrer for insufficiency was interposed is that at the time the warrant of attachment was granted and the defendant executed the undertaking, and at all times thereafter until the commencement of this action, the plaintiff was engaged in and was conducting business within this state without having complied with the provisions of sections 15 and 16 of the General Corporation Law (chapter 23 of the Consolidated Laws), or with the provisions of section 181 of the Tax Law (chapter 60 of the Consolidated Laws), and that the contract upon which the action is brought was made between the plaintiff and the defendant within this state at a time when the plaintiff had not complied with said laws.

The real point presented for decision is whether the undertaking executed in the attachment action by the defendant herein for the benefit of the defendant in the attachment action, being the plaintiff herein, constituted a contract made by the plaintiff within this state, upon which it is precluded by section 15 of the General Corporation Law from maintaining an action in the courts of this state on account of its having failed to obtain a certificate from the secretary of state pursuant to the provisions of said section. The defense attempted to be predicated on section 181 of the Tax Law is without merit, and is not well pleaded in any event. It merely charges in general terms that the plaintiff failed to comply with the provisions of that section, but alleges no facts. It will be observed on examining said section 181 that it requires a foreign corporation, doing business here, to pay a license fee for the privilege of exercising its corporate franchises or carrying on its business here, the amount of which license fee is determinable by the amount of the corporate stock employed by the company in the state during the first year it carries on business here. The amount of capital upon which the license fee is required to be paid must be fixed by the state tax commission as prescribed in said section. It is manifest, therefore, that the license fee is not payable until the amount thereof has been fixed by the state tax commission. It is neither alleged that the state tax commission fixed the license fee nor that the plaintiff failed to pay it; and a mere general pleading of failure to comply with the provisions of such a statute is but a conclusion of law, and not a statement of facts. See *Seibert v. Dunn*, 70 Misc. Rep. 422, 126 N. Y. Supp. 974; *Burrowes v. Rapid Safety Filter Co.*, 49 Misc. Rep. 539, 97 N. Y. Supp. 1048; *Vonnoh v. 67th Street Atelier Bldg.*, 55 Misc. Rep. 222, 105 N. Y. Supp. 155; *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855; *Ellis v. Keeler*, 126 App. Div. 343, 110 N. Y. Supp. 542. It is evident that the provisions of said section 181 relate to foreign corporations which have obtained the requisite certificate specified in section 15 of the General Corporation Law to do business here, and it has been so held in effect. *Hoewel Sand Blast Machine Co. v. Hoevel*, 167 App. Div. 548, 153 N. Y. Supp. 35.

[2] We come now to the real point in the case, which is whether the undertaking on attachment so executed by the defendant for the benefit of the defendant in the attachment action was a contract made in this state by the defendant in the attachment action, within the purview of the provisions of section 15 of the General Corporation Law, which are as follows:

"No foreign stock corporation doing business in this state shall maintain an action in this state upon any contract made by it in this state, unless prior to making such a contract it shall have procured"

—the certificate from the secretary of state as therein provided. Whenever the question has arisen in any of the courts of this state, so far as our attention has been drawn, or we have found, it has been uniformly held that bonds or statutory undertakings given in legal proceedings or actions are not contracts or agreements within the provisions of statutory law relating to the requirements essential to the validity or enforceability of contracts or agreements. *Thompson v. Blanchard*, 3 N. Y. 335; *Doolittle v. Dininny*, 31 N. Y. 350; *Smith v. Brown*, 28 Miss. 810; *Sterling Mfg. Co. v. National Surety Co.*, 94 Misc. Rep. 604, 159 N. Y. Supp. 979.

The Legislature, I think, only intended to bar the doors of our courts to foreign corporations with respect to business which they were forbidden to transact here without obtaining a certificate from the secretary of state, and that is fairly to be inferred from the phraseology limiting the prohibition to actions upon contracts made by foreign corporations in this state. It is evident that it relates to negotiated contracts which become binding by the consent or voluntary action of the foreign corporation, and not to contracts inuring to its benefit by implication of law, such as the undertaking on attachment with respect to which it had no volition. The undertaking, it is true, inured to its benefit as a contract, but it neither negotiated it, nor signed nor assented to it, and was powerless to reject it. Our courts are open to foreign corporations doing business here in violation of said statutes for the maintenance of actions arising outside the state, and the statute does not preclude the maintenance in our courts by a foreign corporation of any action where the cause of action arises here other than those on contracts made by it within this state. *Bremer v. Ring*, 146 App. Div. 724, 131 N. Y. Supp. 487; *Great Northern Molding Co. v. Bonewur*, 128 App. Div. 831, 113 N. Y. Supp. 60; *Eclipse Silk Mfg. Co. v. Hiller*, 145 App. Div. 568, 129 N. Y. Supp. 879; *American Typefounders' Co. v. Conner*, 6 Misc. Rep. 391, 26 N. Y. Supp. 742.

The learned counsel for the appellant gives an apt illustration of what might happen if it should be held that such an undertaking constitutes a contract made by a foreign corporation here. He assumes a case where a foreign corporation, although doing business here without obtaining a certificate, brings an action and recovers a judgment on a cause of action not within the prohibition of the statute, and that an undertaking on appeal is given which the plaintiff is powerless to reject, and he well states that, if the contention made by the defendant here be sound, it would necessarily be held that such undertaking

was a contract made by the plaintiff here, where it was doing business without authority, and that it could not recover thereon.

It follows that the order should be reversed, with \$10 costs and disbursements, and the demurrer sustained, with \$10 costs. Order filed.

All concur.

(189 App. Div. 209)

COHEN v. A. GOODMAN & SONS, Inc.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. MUNICIPAL CORPORATIONS $\Leftrightarrow$ 706(6)—AUTOMOBILE ACCIDENT; RELEVANCY OF SPEED ORDINANCE.

In action for death of pedestrian, struck at street crossing by automobile truck claimed to have been driven at excessive rate of speed, it was proper for jury to consider ordinance regulating speed of vehicles upon question of truck driver's negligence.

2. EVIDENCE $\Leftrightarrow$ 82—JUDICIAL NOTICE OF ORDINANCES.

Under Greater New York Charter, § 1556, as amended by Laws 1917, c. 382, courts may now take judicial notice of ordinances.

3. MUNICIPAL CORPORATIONS $\Leftrightarrow$ 706(8)—AUTOMOBILE ACCIDENT; NOT CAUSED BY DISREGARD OF ORDINANCE ON LAW OF THE ROAD.

In action for death of pedestrian, struck by automobile while crossing street, where circumstances were such that pedestrian must have noticed portion of street in which automobile was traveling, it was error to permit jury to predicate negligence on violation of ordinance requiring automobiles to keep to the right and as near curb as practicable, since violation of such ordinance could have had no direct connection with the accident.

Appeal from Trial Term, New York County.

Action by Frieda Cohen, as administratrix, etc., against A. Goodman & Sons, Incorporated. From a judgment for plaintiff, entered upon a verdict, and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial granted.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

Frederick Mellor, of New York City, for appellant.

M. N. Schleider, of New York City (Moses Feltenstein, of New York City, of counsel), for respondent.

LAUGHLIN, J. On the 3d day of September, 1918, the plaintiff's intestate, while crossing the carriageway of Convent avenue, from west to east, at or near the southerly crosswalk of West 133d street, was struck, knocked down, and injured by a motor truck owned by the defendant and engaged in its business, which was going southerly on Convent avenue. He died shortly thereafter from the injuries thus sustained, and this is a statutory action to recover for his death, which it is alleged was caused by the negligence of the defendant's chauffeur in operating the truck. The negligence charged is the failure to keep the truck under reasonable and proper control, failure to check its speed, failure to give the decedent reasonable opportunity to avoid it and to cross the street in safety, failure to comply with the ordinances of the city of New York regulating vehicular traffic upon the public

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streets, and generally failure to exercise reasonable care, diligence, and prudence in the premises.

The uncontroverted evidence shows that the carriageway was 39 feet in width and was paved; that there was no other vehicle or any obstruction on the avenue; that it was a bright, dry day; that the accident occurred between 4 and 5 o'clock in the afternoon; that the truck was traveling in the middle of the pavement until after it came opposite an electric light pole, which was located at the westerly curb about midway between the northerly line and the northerly curb line of West 133d street; that the decedent had wheeled a baby carriage containing his infant child about eight months of age across the avenue from the easterly side and left it on the sidewalk at the south-westerly corner of the avenue and 133d street and was attempting to cross back to the easterly sidewalk where he had left his little boy about three years of age. The evidence is also in substantial accord to the effect that the decedent was within about 4 or 5 feet of the easterly curb of the avenue when he was run over by the truck, and that after it struck him it continued on over the curb, onto the sidewalk, and against a stone wall at the easterly side of the avenue, striking the wall with great force.

On the part of the plaintiff evidence was given tending to show that the truck was approaching at a very rapid rate, namely, from 20 to 30 miles per hour, and that after the decedent had passed the middle of the carriageway and the lines within which the truck was traveling the course of the truck was changed, without any signal or warning, so that it followed and ran him down as stated. On the part of the defendant evidence was given tending to show that the course of the truck was changed by the chauffeur in order to avoid injuring the decedent, who, when the truck was opposite said electric light pole, started on a run to cross the avenue from west to east, attempting to pass in front of the truck. Thus the evidence presented questions of fact with respect to the chauffeur's negligence and the contributory negligence of the decedent, on which the jury were warranted in predicating liability, and if these issues had been submitted to the jury without error we would not feel justified in disturbing the verdict. But we are of opinion that the learned trial justice erred in permitting the jury to predicate negligence on the part of the defendant, not only on the speed of the truck and the manner in which it was operated by the defendant's chauffeur, but upon the violation of an ordinance which provides that vehicles shall keep to the right-hand side of the road and as near to the curb as practicable.

[1] The ordinance regulating the speed of vehicles, and providing that speed in excess of that prescribed shall constitute a violation thereof, was properly referred to, commented upon, and left for the consideration of the jury as bearing on the question of the defendant's negligence. The court then drew their attention to the other ordinance requiring vehicles to keep to the right-hand side of the road and as near to the curb as practicable, and charged that a violation thereof was not negligence as a matter of law, but that it was some evidence of negligence to be considered by the jury, and then instructed the jury

that the evidence showed that the truck was on the wrong side of the road at the time the accident happened, and that the only reason assigned therefor was the chauffeur's testimony to the effect that he turned to the left to avoid hitting the decedent, and further charged that if the chauffeur's testimony in that regard was true he could not be charged with negligence for being on the wrong side of the road. It will be observed that the instruction to the jury with regard to the chauffeur being on the wrong side of the road related, not to his traveling along the middle of the road before the accident, but to the time of the impact with the decedent.

[2] At the close of the charge in chief the attorney for the defendant excepted to the court's charge referring to and reading from the ordinances with respect to speed of vehicles and to the keeping to the right and stated that they were not in evidence. Whereupon the court correctly announced that the courts now may take judicial notice of the ordinances. The attorney for the defendant thereupon excepted particularly to the ordinance requiring vehicles to keep to the right of the road and near the curb, on the ground that it was not material to the issues in the case, and did not concern the jury, and requested the court to charge that the fact that the truck was driving a little to the right of the center of the street, and not up against the curb, was immaterial to the issues of the case. The court declined so to charge, and said:

"I leave it to the jury as to whether the chauffeur was proceeding in a careful, prudent manner."

The attorney for the defendant duly excepted. The court then stated that the jury had already been instructed that the violation of the ordinance was not of itself negligence, but was to be taken into consideration with all the other facts of the case. The attorney for the defendant then stated that his point was that the jury should not be permitted to take into consideration the fact that the chauffeur was driving a little to the right of the center of the street, and not up against the right-hand curb, "as any evidence of negligence at all under the issues in this case." The court gave no further instructions to the jury on that point.

[3] Counsel for the respondent contended on the appeal, and doubtless it was so argued to the jury, that if the chauffeur had complied with the ordinance, and the truck had been traveling along the right-hand side of the carriageway near the curb, the accident would not have happened, for in that event the decedent, without doubt, would have cleared its path before it came sufficiently near to endanger his safety, or to cause the chauffeur to lose control of the truck, as it was claimed he did, and overtake him. For aught that appears the verdict on the issue with respect to the defendant's negligence may have been rendered on that theory. We are of opinion that the court erred in so submitting the cause to the jury that they were permitted to predicate negligence on the part of the defendant on that theory and that the instructions requested by the attorney for the defendant, eliminating from the consideration of the jury the ordinance requiring vehicles to keep to the right and as near to the curb as practicable, should have been given.

There may, of course, be circumstances in which a pedestrian might be prejudiced by a failure of a vehicle to observe this traffic ordinance, but they are not presented by this case. If, in the circumstances disclosed by the record in this case, the chauffeur was operating the truck at a proper rate of speed, and continued to operate it with due care down the middle of the avenue, the decedent had no greater right to attempt to pass it in the middle of the avenue, when it was too close for safety, than he would have had, had it been traveling along the curb, and the liability of the defendant for the conduct of the chauffeur was no greater than if the truck had been traveling close to the curb. If every violation of such an ordinance is to be left to the jury, then the negligence of the defendant may always be predicated on that alone, where a pedestrian steps in front of a vehicle not traveling in that portion of the street in which it is required to be by the ordinance.

We are of opinion, therefore, that such ordinances should not be left to the consideration of a jury, unless it can be seen that a violation thereof may have had some direct connection with the accident, as, for instance, where the person injured or killed had a right to expect compliance with the ordinance and did not discover that the vehicle was where it should not have been in time to avoid injury. In such case it might be said that he was prejudiced by the violation; but such is not the case at bar, for here the decedent must have seen where the truck was.

It follows that the judgment and the order appealed from should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

(109 Misc. Rep. 228)

STREET v. POST et al.

(Supreme Court, Special Term, New York County. October 8, 1919.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⇐197—TERMINATION OF RIGHTS OF ASSIGNEE BY LAPSE OF TIME.

Where trust deed provided for termination of trust on death of beneficiary and payment of residuary interest in trust fund to grantor or his estate, grantor's assignee for benefit of creditors was not entitled to residuary interest upon beneficiary's death under assignment made more than 35 years prior thereto; assignee's claim having expired by operation of law under statute providing that trusts shall be deemed discharged at end of 25 years from creation.

2. TRUSTS ⇐112—CONSTRUCTION OF DEED.

Trust deed will be construed according to intention of donor.

3. TRUSTS ⇐140(1)—CONSTRUCTION; DISPOSITION ON BENEFICIARY'S DEATH.

Where trust deed for benefit of wife, provided for termination of trust and delivery of capital of trust fund to husband, or, if deceased, to his personal representative or person entitled thereto under will, the trust funds, on wife's death, after husband had died intestate, reverted to husband's estate.

Action by William A. Street, as surviving trustee under a certain deed of trust made and executed by Henry Morgan on December 30, 1880, against Alice Lee Post and others. Decree ordered.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Weekes Brothers, of New York City, for plaintiff.

Lee McCanliss, of New York City, for defendant Adela O. Girdner, and others as executrices, etc.

Cadwalader, Wickersham & Taft, of New York City (Thomas B. Gilchrist, of New York City, of counsel), for defendant Le Roy.

Henry C. Beadleston, of New York City, for defendants Post and Morgan.

Henry A. Forster, of New York City, for defendants Street and Eustis.

Jabish Holmes, of New York City, for defendant Dixon.

NEWBURGER, J. Plaintiff asks for a judicial settlement of his account and a construction of a trust deed. In December, 1880, one Henry Morgan executed a trust deed creating an antenuptial agreement for the benefit of his future wife, then Penelope Overton White. At the time the settlor was a banker of prominence and considerable wealth, with four adult children by his deceased first wife, all of whom, or their next of kin, are defendants herein. The deed transferred to the plaintiff and one Edward Morgan, now deceased, \$100,000 in cash upon the following trusts:

"To invest and from time to time during the continuance of the trust to reinvest the same and keep the same invested as hereinafter provided, and until the said intended marriage shall be solemnized to have and to hold the same and the income thereof for the use and benefit of the said Henry Morgan, and upon the further trust, from and after the solemnization of the said intended marriage and during the natural life of the said Penelope Overton White, the said intended wife, to pay over the whole net income from time to time arising from the said trust fund and coming to the hands of the said trustees or trustee, after deducting all proper expenses and charges, including taxes, if any such shall be lawfully imposed, to the said Penelope Overton White, the said intended wife, for her sole and separate use and benefit, and upon the death of the said Penelope Overton White, the said intended wife, upon which event it is hereby declared the said trust shall terminate, to transfer and deliver over the capital of the said trust fund to the said Henry Morgan, if he be then living, and if the said Henry Morgan be then dead, then to his personal representatives or to whomsoever may be entitled under his last will and testament to receive the same as part of his estate, it being hereby expressly declared and agreed that the whole residuary interest in said trust fund after satisfying the purposes of the said trust by payment over of the net income to the said Penelope Overton White during her life as aforesaid, is reserved to and shall belong to the said Henry Morgan as his property."

On June 24, 1884, the settlor failed, and made an assignment to William P. Dixon for the benefit of his creditors. The settlor died intestate on March 13, 1891. Penelope Overton Morgan, his second wife and the beneficiary under the trust, died on August 3, 1918. The children and grandchildren of the settlor constituting the only next of kin and heirs at law, now claim the trust fund. The defendant William P. Dixon, assignee for the benefit of the settlor's creditors, claims the fund by virtue of the assignment to him in 1884. The defendant executrices of the last will and testament of Penelope Overton Morgan claim that upon her death the remainder vested absolutely in the settlor, and therefore the widow is entitled to one-third of the estate.

[1] As to the claim of the assignee for the benefit of creditors, it appears that more than 25 years have elapsed since such assignment

was made, and it has been held that the operation of the statute was to discharge all property, both real and personal, from the effect of an assignment for the benefit of creditors at the end of 25 years from the date of the assignment. As was said by Mr. Justice O'Brien in *Mills v. Husson*, 140 N. Y. at pages 103, 104, 35 N. E. at page 424:

"In this case, however, the trust was clearly discharged by force of the statute at the end of 25 years, and the property reverted to the assignor, and through him to the plaintiff, under the transfer, unless, as the learned counsel for the defendant claims, the statute relates solely to real estate. A construction of the statute which discharges the trust at the end of 25 years as to real estate, but preserves it indefinitely as to personalty, must rest upon the language alone, as no support for that view can be found in considerations based upon reason or justice. The language is that 'such trust shall be deemed discharged at the end of 25 years from the creation of the same.' This means the whole trust, and not a part of it. It refers to all the property embraced in the trust, and not to a part of it only. It refers to a case where all the assigned property was personalty, as well as to the case of an assignment where the property is all or in part realty. It is true that the words used are all apt to describe real estate, but they are comprehensive enough to include personalty also, and there is no reason to suppose that all the property of every kind was not within the purpose of the act or the legislative intent. It applies when an estate has been conveyed to trustees for the benefit of creditors, and that word in the law governing such assignments is used to describe the assigned property without regard to its character."

The assignment in this case was executed in 1884, more than 35 years ago; therefore any claim by the assignee expired by operation of law.

[2, 3] As to the other claims it is well settled that the intention of the donor must be ascertained. A reading of the whole trust deed clearly shows that the settlor intended that the entire income should be paid over to his intended wife, and upon her death should revert to his estate. It is unnecessary to cite authorities for this finding. The language is plain. I therefore direct that the plaintiff pay out of the trust funds in his possession one-third of the principal undisposed of to the executrices of Penelope Overton Morgan and the balance to the children and grandchildren of Henry Morgan.

Findings passed upon. Settle decree.

(189 App. Div. 359)

In re LEWIS, Atty. Gen.

In re HARLEM DENTAL CO.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

1. CORPORATIONS ~~590~~—DISSOLUTION; FAILURE TO FILE CERTIFICATE AS TO PAYMENT OF CAPITAL STOCK.

Though Business Corporations Law, § 5, requires one-half of the capital stock of corporations to be paid within one year of incorporation and a certificate of that fact to be filed, and Stock Corporation Law, § 34, requires a corporation to make and annually file in the office of the secretary of state a report, the failure of a corporation to file the certificate is no ground for annulling its charter when the annual report has been filed and the taxes paid on the stock.

2. CORPORATIONS ~~14(2)~~—PURPOSE; PRACTICE OF DENTISTRY.

A corporation cannot be lawfully authorized to practice dentistry.

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. CORPORATIONS ¶14(2)—AUTHORITY TO PRACTICE DENTISTRY; "LEGAL"; "LAWFUL."

Under Public Health Law, § 203, subd. 4, prohibiting a person from practicing dentistry under a corporate, parlor, or trade name, provided that legally incorporated dental corporations, existing prior to 1916, may continue operating while conforming to the provisions of the act, a corporation practicing dentistry which was incorporated prior to 1916 in accordance with the forms of law, is entitled to continue the practice of dentistry, though a corporation cannot be lawfully authorized to practice dentistry; the word "legal" referring to matters of form, while "lawful" refers to matters of substance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lawful; Legal.]

Appeal from Special Term, Albany County.

In the matter of the application of Merton S. Lewis, as Attorney General of the State of New York, for leave to commence an action against the Harlem Dental Company, a business corporation, vacating its charter and annulling its corporate existence. From an order denying the application, petitioner appeals. Affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Charles D. Newton, Atty. Gen. (Glenn A. Frank, Deputy Atty. Gen., of counsel), for appellant.

De La Mare & Morrison, of New York City (A. B. Morrison, of New York City, of counsel), for respondent.

LYON, J. This is an appeal from an order denying as matter of law an application for leave to commence an action, pursuant to section 131 of the General Corporation Law (Consol. Laws, c. 23). The action is to annul the existence of the corporation based upon three grounds: First, that the corporation had for years failed to file a certificate of payment of one-half of its capital stock; second, that it had failed annually during the month of January to file annual reports; and, third, that it has practiced and is practicing dentistry in violation of the Public Health Law (Consol. Laws, c. 45).

[1] Section 5 of the Business Corporations Law (Consol. Laws, c. 4) requires that one-half of the capital stock of the corporation shall be paid in within one year of its incorporation, and that a certificate of that fact shall be filed, or the corporation shall be dissolved. The certificate of incorporation was filed October 22, 1902. The certificate of payment of capital stock was not filed until the 28th day of October, 1918, when a certificate showing that the entire capital stock was paid in at the time of the incorporation of the company on the 3d day of November, 1902, was filed in the office of the clerk of the county of New York. On the 30th day of October, 1918, a duplicate thereof was filed in the office of the secretary of state. This was prior to the verification of the petition herein.

By section 34 of the Stock Corporation Law (Consol. Laws, c. 59), a corporation shall annually during the month of January make and file in the office of the secretary of state an annual report. In case of the failure to make and file such report within 10 days after written re-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

quest so to do, the corporation shall forfeit to the people the sum of \$50 for every day it shall so neglect or refuse. In *People v. Buffalo Stone & Cement Co.*, 131 N. Y. 140, 29 N. E. 947, 15 L. R. A. 240, Judge Earl writing the opinion, held that the failure of the corporation to make and file the certificate, and to pay in one-half of the capital stock as required, was cause for annulling the charter of the corporation. The four judges who sat with Judge Earl did not, however, concur in this branch of the opinion.

The affidavit of the treasurer, used in opposition to this application, states that all the original certificates of stock have been surrendered and new certificates issued; that for many years past, and as the affiant believes since the incorporation of the company, annual capital stock reports have been filed in the office of the comptroller of the state, until in recent years in the office of the state tax department, showing that the entire authorized capital stock has been issued, and all taxes imposed by the state on the same have been paid. The affidavit also states that the affiant knows of no request for the filing of an annual report ever having been made, and that the corporation has no creditors other than those whose accounts are settled monthly, and that an annual report as of the 1st day of January, 1918, was filed in the office of the secretary of state on the 30th day of October, 1918, before the verification of the petition herein. The failure to file the certificate, which in the brief of the respondent is stated to exist in 80 per cent. of the incorporations, would hardly be accepted by the courts as a sufficient ground for annulling the existence of a corporation, when it is shown that the annual report has been filed and the taxes paid on the stock.

[2, 3] As to the third ground, that the company has and is practicing dentistry, it appears from this affidavit that said corporation has in all respects conformed to the provisions of the Public Health Law, that its advertising has been subject to the rules of the regents, and that its employes who practice dentistry are duly licensed and registered dentists.

The stockholders having duly obtained the incorporation of the respondent corporation, and engaged in legally conducting the same, the question arises whether the court can declare the same void notwithstanding the rule of law. That a company could not be lawfully authorized to practice dentistry must be conceded. *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429; *People v. Dermatological Institute*, 192 N. Y. 454, 85 N. E. 697; *Matter of Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

Section 203, subd. 4, of the Public Health Law, prohibits a person from practicing dentistry under a corporation, parlor or trade name. "Provided that legally incorporated dental corporations existing and in operation prior to January 1, 1916, may continue so operating while conforming to the provisions of this act. Their advertising subject to the rule of the regents, and employes of said corporations shall be licensed and registered dentists, and corporations that cease to exist or operate for any reason whatsoever shall not be permitted to resume operation."

This corporation although unlawful, was legally created as the term is used in section 203. Legally incorporated means that the incorporation was proper as to matter of form. The word "legal" is to be distinguished from "lawful." "Legal" refers to matters of form; "lawful" refers to matter of substance. Black's Law Dictionary.

"Lawful means conformable to the principle, spirit, or essence of the law, and is applicable to moral as well as juridical law." Legal means conformable to the letter or rules of the law as it is administered in the courts; conformable to juridical law." Webster's International Dictionary.

It seems that, where the state seeks by action to destroy the life of a corporation, it must show some grave misconduct on the part of the latter, some sin against the law of its being, not merely formal or incidental or affecting only private interests but material and serious, and which has produced or tends to produce injury to the public. *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843. If the Legislature did not intend to legalize and exempt corporations formed as this one was it is difficult to understand what meaning was intended. The Legislature plainly intended to legalize such corporations as were in existence and in operation January 1, 1916. Otherwise, the language is without meaning. We must give effect to the plain wording of the statute. The judgment should be affirmed.

Order affirmed, with \$10 costs and disbursements. All concur.

(106 Misc. Rep. 510)

MARKS v. UNITED STATES GRAND LODGE, ORDER OF BRITH ABRAHAM.

(Municipal Court of City of New York, Borough of Manhattan, Second District. August, 1919.)

1. INSURANCE ~~697~~—STATUS OF SUBORDINATE OR SUPERIOR LODGES OF BENEFIT ASSOCIATION.

The various lodges of a fraternal benefit association, whether subordinate or superior, form one organization, although individual lodges may have distinctive rights and liabilities.

2. INSURANCE ~~697~~—LOSS OF MEMBERSHIP BY DISSOLUTION OF SUBORDINATE LODGE.

Where the charter of a subordinate lodge of a fraternal benefit society provided that the lodge could not be dissolved voluntarily so long as 10 of its members in good standing objected thereto, a member who had seceded from the order, together with the majority of the members of a subordinate lodge, could not avail himself of such provision and claim that no dissolution had taken place, although a dissenting member might have done so.

3. INSURANCE ~~747~~—LOSS OF MEMBERSHIP BY SECESSION FROM ORDER.

A member of a subordinate lodge of a fraternal insurance society, who with other members seceded from the order and established a rival lodge, thereby forfeited his membership, and his widow could not thereafter claim benefits under the insurance contract.

4. INSURANCE ~~754~~—TENDER NECESSARY OF AMOUNT OF ASSESSMENT DUE GRAND LODGE.

That the grand lodge of a fraternal benefit association calls upon a subordinate lodge for assessment in a larger amount than is actually

~~697~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

due does not excuse a member of the subordinate lodge from paying or tendering the amount legally due.

Action by Bertha Marks against the United States Grand Lodge, Order of Brith Abraham, to recover a death benefit. Complaint dismissed.

Charles Liebbling, of New York City, for plaintiff.
Goldfogle & Dorf, of New York City, for defendant.

SPIEGELBERG, J. The plaintiff seeks to recover an endowment of \$500 upon the death of her husband, Berel Marks. Berel Marks was a member of State of New York Lodge No. 205, one of the subordinate lodges of the defendant. Some time in June, 1917, a meeting was called of Lodge 205 to determine upon the withdrawal from the defendant. Berel Marks had notice of the meeting and was present thereat. At the meeting a resolution was adopted to withdraw from the defendant organization. The subordinate lodge failed to make payment of assessments due to the defendant for July, 1917. In August, 1917, the grand master of the defendant sent notices to the members of the subordinate lodge, including Berel Marks, to the effect that their membership in the defendant had been terminated and requesting the members of the lodge to rejoin the defendant. An addressed postal card was inclosed in the communication upon which the loyal members were to signify their intention of rejoining the defendant. Berel Marks did not avail himself of the invitation. On October 3, 1917, Lodge No. 205 was suspended. The faction adhering to the defendant formed a new lodge, known as No. 607, and were reinstated in the defendant organization, while the seceding members organized a membership corporation known as B'hai Israel Sick & Benevolent Society, Incorporated, and severed all affiliation with the defendant organization. Berel Marks became a member of the latter corporation. He died November 7, 1917.

[1] On November 6, 1917, his son approached the secretary of Lodge No. 607, requesting the reinstatement of his father, and tendered the overdue payments. It is not necessary to discuss that phase of this case any further than to state that I held upon the trial that a palpable fraud was attempted upon the defendant by seeking the reinstatement while Berel Marks was in the hospital suffering from a fatal disease. The question to be determined in this case is whether the secession of Lodge No. 205 and its suspension by the defendant forfeited the plaintiff's right to an endowment upon the death of her husband. It is a general rule that the various lodges, whether subordinate or superior, form one organization, although individual lodges may have distinctive rights and liabilities. 1 Bacon, Life & A. Ins. (4th Ed.) § 95. Accordingly, if there was a secession of Lodge No. 205 from the defendant the members of the lodge forfeited all their rights in the parent organization. Grand Lodge Knights of Pythias v. Germania Lodge, 56 N. J. Eq. 63, 38 Atl. 341.

[2] It is quite true, as claimed by the plaintiff, that the property rights of members, upon the withdrawal of a subordinate lodge, depend upon the charter and constitution of the parent organization and of

the subordinate lodge. 7 C. J. 1114. I am of the opinion that the provisions of the constitution of the defendant were scrupulously followed in dealing with the subordinate lodge and the members thereof. The inhibition in the defendant's charter that no lodge can be dissolved voluntarily so long as 10 of its members in good standing object thereto does not avail the plaintiff. Assuming that 10 members objected to the resolution of dissolution, this provision was broken, not by the defendant, but by the seceding lodge. Members who took part in the secession cannot take advantage of this provision. Not they, but the loyal dissenting members, could have claimed to be considered as still constituting the subordinate lodge and objected to the voluntary dissolution. *Sabourin v. Lippe*, 195 Mass. 470, 81 N. E. 282. Moreover, it was incumbent upon the plaintiff to show that there were 10 dissenting members in favor of the continuance of the lodge. *Koerner Lodge v. Grand Lodge Knights of Pythias*, 146 Ind. 639, 45 N. E. 1103. The provision in question was made for the benefit of loyal members to prevent a dissolution if they so chose, but cannot be construed as giving those who took part in the violation of this provision the right to claim a disaffirmance of their act whenever it might suit them. Berel Marks had ample opportunity to re-join the defendant. Instead, he joined a hostile organization. The plaintiff will not now be heard to say that a voluntary dissolution of Lodge No. 205 has not taken place.

[3] The fatal objection to plaintiff's recovery is that the deceased, her husband, was at the time of his death not a member in good standing. The abortive attempt of his son to gain reinstatement is conclusive proof that he was fully aware of the fact that his membership in the defendant had ceased.

[4] The plaintiff also objects that the call of the defendant upon Lodge No. 205 for assessments required a larger amount than actually due. Assuming this to be so, the decedent could not refuse to pay the entire amount, and should have tendered such as he was legally obliged to do. *Goldberger v. United States Grand Lodge*, 77 Misc. Rep. 136, 136 N. Y. Supp. 13.

I have carefully examined the facts with a view of determining whether there was any illegal infringement upon the plaintiff's rights, and have determined that the defendant has acted within the letter and the spirit of its constitution. This is not a case where the plaintiff has been deprived of her rights by a literal enforcement of the provisions of the defendant's charter. Her husband deliberately forfeited his membership. The plaintiff has no cause for complaint. Both the law and the equities of the case are with the defendant. The complaint is dismissed on the merits.

Judgment accordingly.

(108 Misc. Rep. 500)

FRANKLIN FIRE INS. CO. OF PHILADELPHIA v. WEINBERG et al.
(Municipal Court of City of New York, Borough of Manhattan, First District,
August, 1919.)

INSURANCE §=808—EFFECT OF RELEASE BY INSURED ON INSURER'S RIGHT TO SUBROGATION.

A general release by a tenant to his landlord for damages sustained by the tenant because of a sprinkler leakage covered by insurance held to bar the insurer's claim of subrogation under its policy, and to constitute a violation thereof by the insured tenant.

Action by the Franklin Fire Insurance Company of Philadelphia against Emanuel Weinberg and another to recover payments made by it to defendants under a policy of insurance. Judgment for plaintiff.

Goldstein & Goldstein, of New York City (David Goldstein and Alex Davis, both of New York City, of counsel), for plaintiff.

Joseph J. Jacobs, of New York City, for defendants.

LYNN, J. This action, submitted on an agreed statement of facts, is brought by the plaintiff insurance company to recover from the defendants \$236.01 paid by it to the defendants under a policy of insurance issued by the plaintiff to the defendants, indemnifying them for damages sustained by reason of a sprinkler leakage loss to their property at premises Nos. 43-47 West Twenty-Fourth street, Manhattan. While the policy was in full force the defendants made claim against the plaintiff for damages in the sum of \$236.01 by reason of a sprinkler loss which occurred on January 3, 1918, and filed with the plaintiff proofs of loss under the terms of the policy.

The policy provides, and the defendants concede, that the plaintiff was subrogated to the extent of such payment to the defendants' right of recovery against any person for the loss resulting from such sprinkler leakage. Upon the payment of the sum of \$236.01 the defendants assigned and transferred in writing to the plaintiff—

"all their and each of their claims and demands against any person, persons, or property arising from or connected with said sprinkler loss or damage to the extent of said sum."

On February 21, 1918, the defendants wrote to the Metropolitan Life Insurance Company, the landlord of the said premises, claiming damages, including loss due to sprinkler bursting caused by the landlord's failure to supply heat, which it was obligated to do under its lease with the defendants.

In the month of September, 1918, the landlord paid to the defendants the sum of \$394.90 and received in exchange an instrument in writing containing a general release, absolute in terms. Attached to the release was a copy of the defendants' letter of February 21st, in which the defendants wrote as follows:

"Another loss, for example, due to the cold temperature in our place, was caused by the sprinkler pipe bursting in our dress stock room and flooding the entire floor and part of the sixth floor, and damaging over \$500 worth of our dresses."

§=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The defendants concede that their acts in releasing and discharging the landlord were made without the knowledge or consent of the plaintiff.

The action is brought by the plaintiff to recover the sum of \$236.01, claiming that the delivery of the general release by the defendants to the landlord destroyed the plaintiff's right of subrogation, both under the policy and the written assignment signed by the defendants. The defendants, on the other hand, while conceding plaintiff's right to subrogation, contend that the plaintiff must prove both the negligence and legal responsibility of the landlord, and also hold that the general release does not destroy plaintiff's right of subrogation as against the landlord.

The defendants in their letter to the landlord, which is incorporated in the general release, complained that they were suffering on account of heatless days, having previously requested heat from the landlord, and in the same letter they claim that the sprinkler pipe burst, due to the cold temperature, causing great damage to their dresses. The defendants themselves, having claimed that the landlord was responsible for the sprinkler leakage due to the lack of heat, cannot at this time be heard to dispute the landlord's negligence and legal responsibility. After making such complaint to the landlord, the defendants delivered to it a general release discharging the landlord from all claims whatsoever, without reservation of the claim which the defendants had previously assigned to the plaintiff.

The delivery of this general release by the defendants to the landlord barred plaintiff's claim and destroyed its right of subrogation. *Dilling v. Draemel* (Com. Pl.) 9 N. Y. Supp. 497; *Bloomingtondale v. Columbia Ins. Co.* (Sup.) 84 N. Y. Supp. 572; *Thomas v. Montauk Fire Ins. Co.*, 43 Hun, 218; *Insurance Co. v. Storrow*, 5 Paige, 285; *Carstairs v. Mechanics' & Traders' Ins. Co.* (C. C.) 18 Fed. 473. These cases clearly hold that the delivery of a general release without reservation to the party responsible for the damages is a violation of the provision of the policy of the insurance company, relieving the company from payment.

In *Dilling v. Draemel* the assured's property was destroyed by collapse of a building due to an excavation by his landlord on an adjoining lot. After suit was brought by the assured against his landlord for the loss, amongst others, to his goods and merchandise, the action was settled, and the assured delivered a release to the landlord against all claims and demands whatsoever. Thereafter the assured sued the insurance company for the proportion of his loss above the sum received from the landlord, and the court held that the insurance company was released; the assured having defeated the insurance company's right of subrogation.

In the *Bloomingtondale* Case, *supra*, where a release had been delivered to a carrier, the wrongdoer, the Appellate Term of this department held that the assured could not excuse its act in delivering such release by the attempt to show that the fire in transit was of an incendiary origin, for which the carrier was not liable, even if not released, and further said:

"That the question of the carrier's liability was something which the defendant, when subrogated, was entitled to litigate with the carrier, and the question was concluded against the defendant by the release given in violation of the condition agreed to by the insured."

It seems that the case cited is clearly in point with the facts in the present case.

The defendants, having assigned their claim to the plaintiff insurance company, violated the policy in delivering to the landlord an absolute general release, after having claimed that the landlord's negligence in not supplying sufficient heat caused the sprinkler loss.

The authorities cited by the defendants in support of assured's contention that the general release does not destroy the plaintiff's right of subrogation as against the landlord seem to point out that the negligent parties in those cases had actual notice and knowledge of the insurance company's subrogation assignment, which distinguishes them from the case at bar.

The defendant's violation of the provision of the contract of insurance with respect to subrogation barred the plaintiff's claim against the landlord and destroyed plaintiff's subrogation rights. Judgment is accordingly rendered for the plaintiff against the defendant as demanded, \$236.01.

Judgment accordingly

(108 Misc. Rep. 506)

GOLDFARB v. CITY OF NEW YORK.

(Municipal Court of City of New York, Borough of the Bronx, Second District.
August, 1919.)

1. MUNICIPAL CORPORATIONS ⇨734—NO LIABILITY FOR NEGLIGENCE IN EXERCISING GOVERNMENTAL FUNCTIONS.

A municipality, controlling a building as a governmental function merely, and not through any choice on its part, incurs no liability for a personal injury sustained because of the exercise of such functions.

2. MUNICIPAL CORPORATIONS ⇨734—LIABILITY FOR NEGLIGENCE IN EXERCISING GOVERNMENTAL FUNCTIONS.

In an action for personal injuries sustained by plaintiff while standing on the sidewalk in front of a building occupied by the board of health of the city of New York, due to the fall of a pane of glass from one of the windows, striking plaintiff, there was no liability upon the part of the city, where the building was maintained for the health department under the mandatory provisions of Public Health Law, § 120, and under the supervision of the city in the exercise of its governmental functions.

Action by Tillie Goldfarb, an infant, by David Goldfarb, her guardian ad litem, against the City of New York, to recover for personal injuries. Judgment for defendant.

Kornbluh & Hutter, of New York City (Harry Stackell, of New York City, of counsel), for plaintiff.

William P. Burr, Corp. Counsel, of New York City (David C. Broderick, of New York City, of counsel), for defendant.

ROBITZEK, J. On May 1, 1918, the plaintiff, an infant, while standing on the sidewalk adjacent to the building commonly known as

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No. 3731 Third avenue, Bronx, which is under the control of the city of New York, was struck by a pane of glass which fell from one of the windows of the said building, causing the plaintiff to sustain serious, painful, and permanent injuries in and about her head and body. Thereafter this action was instituted to recover \$1,000 damages for such injuries.

Upon the trial the proof showed that at the time the injuries were sustained the building in question was occupied by the department of health of the city of New York. The plaintiff proved the happening of the accident and that the injuries were sustained. The defendant introduced a lease of the building in evidence, showing that the building had been occupied by the board of health since 1905 to the present day. The facts of the accident and the attending circumstances, without further proof of the cause, warrant the inference of negligence, and the plaintiff was justified in resting thereon, and this was sufficient to establish a prima facie case against the defendant. See *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678.

The department of health of the city of New York is organized under the Public Health Law of the state of New York. Laws 1909, c. 49 (Consol. Laws, c. 45). This law makes it mandatory upon the city to maintain a board of health, and under the Greater New York Charter (Laws 1901, c. 466, § 109):

"Said board shall consist of the commissioner of health, the police commissioner, and the health officer of the port."

The health officer of the port of New York is not appointed and is not under the jurisdiction of the city of New York, but under section 120 of the state Public Health Law is appointed by the Governor, by and with the advice and consent of the Senate, and he is also paid by the state. Thus the city of New York, in conducting the department of health, is not acting on its own initiative, but carrying on the mandates of the state law.

[1] The plaintiff contends that, although the building was occupied by the board of health, it was under the control of the city of New York; but the courts of this state have held that, while the city of New York might control a building, it controls it as a governmental function, and not through any choice on its part, and when its control is merely as a governmental function there is no liability.

In *Schlegel v. City of New York*, 90 Misc. Rep. 285, 152 N. Y. Supp. 975, the plaintiff sued for being injured in the Sixth District Municipal Court, Borough of Manhattan. He attempted to open a door which was in a defective condition, and which had been in a defective condition for some time before the accident, and the glass in the door fell out and cut him. The court said:

"On these facts judgment was rendered for the plaintiff. I think the complaint should have been dismissed. The cause of action was for negligence. In maintaining its Municipal Courts the city acts in its governmental capacity, and is not liable for negligence such as is alleged in this case."

Also in the case at bar both the Municipal Court buildings and the board of health buildings are under the supervision of the city of New York, but it is quite clear that the city, in supervising the building,

exercises a governmental function, for which the city cannot be held liable for negligence arising out of an accident which may happen in and about such buildings.

The superintendent of public buildings, an appointee of the borough president, has the obligation of keeping these buildings repaired and cleaned, while the employes of the department of health use and control the building for all other purposes, and inasmuch as the city of New York has no power in the selection or discharge of the health officer of the port, one of the members of the board of health, it is clear that it cannot be held liable for his acts. No proof has been presented to show that the negligence complained of was caused by the lack of care on the part of the appointees of the superintendent of public buildings, as distinguished from the employes of the board of health. Under these circumstances the courts have frequently held:

"That the officers who carry on a governmental function are not the agents of the municipality, but the agents of the public, and for this reason the municipality cannot be sued for their negligent acts."

The leading case on this point is *Maxmilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468. In that case the plaintiff's intestate was killed by being run over by an ambulance wagon. It was held that:

"This rule of respondeat superior, is based upon the right which the employer has to select his servants, to discharge them if not competent, or skillful, or well behaved, and to direct and control them while in his employ. * * * The rule has no application to a case in which this power does not exist."

Referring more particularly to the board of health, the court, in the case of *Bamber v. City of Rochester*, 26 Hun, 587 (unanimously affirmed without opinion 97 N. Y. 625), said, among other things:

"If the corporation appoints or elects them, and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers and for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of respondeat superior applies; but if, on the other hand, they are elected or appointed by the corporation in obedience to the statute to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the Legislature in the distribution of the powers by the government, if they are independent of the corporation as to the tenure of their office, and the manner of discharging their duties, they are to be regarded as the servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them, and the doctrine of respondeat superior is not applicable."

In the case of *Gregory v. City of New York*, 40 N. Y. 273, the court also held that the board of health was not the agent or servant of the city of New York, and that the city could not be held for its act. It has also been frequently held that the city is not liable for negligence in carrying on governmental functions along other lines, notably in the case of *Finkelstein v. City of New York*, 183 App. Div. 539, 169 N. Y. Supp. 718. In this case a brick from the wall of Ludlow street jail fell out and struck the plaintiff's intestate, from which injuries

he died. In that case the court said, referring to the liability of the city of New York:

"From the condition of the wall, as shown by the exhibits, it must have been in a condition for so long a time as to have given notice, upon proper inspection, that it was not a safe one to be allowed to remain. The city owns the fee of the property upon which this jail is situated, and the defendant Grifenhagen, who was the sheriff of the county, had charge of the civil prisoners who were confined within said jail. The plaintiff's contention is that the condition of this wall constituted a nuisance, for which the city, as the owner of the property, was liable, and for which also the defendant Grifenhagen, by reason of the custody which it is claimed that he possessed of this jail, was also liable. The complaint was properly dismissed as to the city of New York, under the authority of *Lefrois v. County of Monroe*, 162 N. Y. 503, 57 N. E. 185, 50 L. R. A. 206. In that case the county was held freed from liability, although by its acts it created a private nuisance, because those acts were in the performance of a governmental function."

[2] From all of these circumstances it seems clear that in conducting or maintaining the building for the board of health the city is acting in a governmental capacity, and I therefore render judgment for the defendant.

Judgment for defendant.

(108 Misc. Rep. 483)

MARGULIES v. SEIGEL et al.

(Kings County Court. August, 1919.)

1. MECHANICS' LIENS §260(2)—RIGHT TO FORECLOSE BEFORE CONTRACT PRICE IS DUE.

The right to foreclose a mechanic's lien is not lost because the lienor is obliged to commence his action before the whole amount of the contract price is due.

2. MECHANICS' LIENS §211(1), 213—NOTE OR MORTGAGE NOT BAR TO FILING OF LIEN.

A note is a mere unconditional promise to pay, and, although accepted for work done and materials furnished, is not a security, barring the filing of a lien at any time within four months after completion of the work, nor does a mortgage in lieu of payment give such right, unless legally delivered and actually accepted as payment.

3. MECHANICS' LIENS §291(1)—RECOVERY ON NOTES IN ACTION TO FORECLOSE LIEN.

A contractor, who files a notice of mechanic's lien within four months after the completion of the work and the furnishing of the material, and before maturity of the first of a series of notes given for contract price, may maintain an action to foreclose the lien and recover judgment for amount due on any such notes at the time of trial.

Action to foreclose a mechanic's lien by Mayer Margulies against Elizabeth Seigel and another. Judgment for plaintiff.

Isidore Solomon, of Brooklyn, for plaintiff.

Israel H. Perskin, of Brooklyn, for defendants.

MacMAHON, J. This is an action in rem, brought by plaintiff, who seeks to foreclose a mechanic's lien for the sum of \$400 for painting work performed and materials furnished on defendants' property described in the complaint.

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Plaintiff began the work under an agreement in writing with defendants dated September 3, 1918, and completed said work on September 21, 1918. By terms of said agreement plaintiff agreed to perform said work and furnish said materials to defendants for the sum of \$400, and to accept in payment defendants' four promissory notes for \$100 each, made and dated as follows: The first, dated the 23d day of October, 1918, and payable two months after date; the second, also dated October 23, 1918, and payable four months after date; the third, also dated the 23d day of October, 1918, payable six months after date; and the fourth, likewise dated the 23d day of October, 1918, and payable eight months after date. That said notes were made by Solomon Seigel and indorsed by Elizabeth Seigel, defendants. That on the 9th day of October, 1918, plaintiff filed his mechanic's lien in the office of the county clerk of Kings county, for the sum of \$400 against the property of defendants. That payment of the first note for \$100, which fell due on the 23d day of December, 1918, was demanded from defendants, who refused to pay the same, and that said note was protested on the day it fell due, to wit, the 23d day of December, 1918. That on or about the 31st day of December, 1918, plaintiff brought this action to foreclose the said mechanic's lien against the property of defendants.

[1] The court cannot agree with the learned counsel for the defendants that, because plaintiff chose to take advantage of his legal right and filed his mechanic's lien against defendants' property before the maturity of the first promissory note, for that reason plaintiff's lien is "void, invalid, and unenforceable." I think the law is well settled that the plaintiff's rights are not impaired by reason of his having filed his lien before a promissory note taken for part of his lien had matured. In *Landsberg & Co. v. Hein Constr. Co.*, 135 App. Div. 819, 120 N. Y. Supp. 190, it has been held that the right to acquire a mechanic's lien will not be waived by the extension of credit, through the acceptance of notes, unless the time of payment is extended beyond the time within which an action must be commenced to enforce the lien.

[2] A promissory note is a mere unconditional promise to pay, and although accepted by the plaintiff for work done and materials furnished, is not a security such as would bar plaintiff from filing his lien at any time within four months after the completion of the work. So vigilant is the justice of the law in the interest of labor honestly performed and materials furnished that, even if an agreement had been entered into between plaintiffs and defendants, whereby plaintiff had agreed to accept a mortgage in lieu of payment, it would not constitute a waiver of his right to file his mechanic's lien, unless such mortgage or other securities were legally delivered and actually accepted by the plaintiff. And our courts have held repeatedly that, where the defendant has failed to comply with his agreement, plaintiff may enforce his lien, although the notice of lien was filed before defendants failed to comply with their agreement.

[3] Therefore it is the judgment of the court that plaintiff, in filing his mechanic's lien on the 9th day of October, 1918, within four months after the completion of the work done and the furnishing of the mate-

rials, and before the maturity of the first note, was within his legal rights. The right to enforce a mechanic's lien is not lost nor waived by taking notes for the amount of the indebtedness, unless the time of payment is extended beyond the time within which an action must be commenced to enforce the lien. *Rukeyser v. Fountain & Choate, Inc.*, 185 App. Div. 263, 173 N. Y. Supp. 21; *Happy v. Mosher*, 48 N. Y. 313; *Mott v. Lansing*, 57 N. Y. 112; *Linneman v. Bieber*, 85 Hun, 477, 33 N. Y. Supp. 129; *Woolf v. Schaefer*, 103 App. Div. 567, 93 N. Y. Supp. 184.

It is the judgment of the court that the mechanic does not lose his right to foreclose his lien because he is obliged to commence his action before the whole amount of the contract has become due. In *Ringle v. Wallis Iron Works*, 85 Hun, 279, 32 N. Y. Supp. 1011, affirmed 155 N. Y. 675, 49 N. E. 1103, the learned court said:

"There was an evident intention in the statute to assimilate the practice in the foreclosure of mechanic's lien to that of a foreclosure of a mortgage. In was not in the contemplation of the Legislature that a mechanic should lose his lien because he was obliged to commence his action before the whole amount of the contract had become due. As in the case of a mortgage, he might commence his action and recover all that was due at the time of the decree."

Therefore it is the judgment of the court that the plaintiff did not waive his lien, but that said lien is good and valid, and that plaintiff is entitled to foreclose the same and to recover judgment, not only for the amount of the promissory note which matured before the commencement of this action, but for whatever amount was due him on any or all of the said promissory notes made by the defendants and dated the 23d day of October, 1918, and which were due at the time of the trial of this action, with interest and costs.

Judgment accordingly.

(108 Misc. Rep. 481)

PEOPLE v. THIRTY-ONE CASES OF LAGER BEER.

(Fulton County Court. August, 1919.)

1. INTOXICATING LIQUORS §250—BURDEN OF PROOF ON SEIZURE AND FORFEITURE.

In a proceeding to seize and forfeit intoxicating liquor under Liquor Tax Law, § 33, it must be proved by plaintiff that the liquors seized were kept stored or deposited for the purpose of unlawful sale or distribution and a single gift of liquor is not alone sufficient to prove unlawful purpose; intent to conceal an unlawful traffic not being shown.

2. INTOXICATING LIQUORS §250—SUFFICIENCY OF EVIDENCE ON SEIZURE AND FORFEITURE.

In a proceeding, under Liquor Tax Law, § 33, to seize and forfeit certain liquors, evidence, merely showing that the liquor seized was found at defendant's residence, *held* not sufficient to establish that it was kept, stored, or deposited for the purpose of unlawful sale or distribution.

Proceeding by the People, under Liquor Tax Law, § 33, to seize and forfeit 31 cases of lager beer. Complaint dismissed, with directions.

J. W. Titcomb, Dist. Atty., of Gloversville, for the People.

G. Park Young, of Gloversville, for Tony Cristiano.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

TALBOT, J. It is conceded that Tony Cristiano, a resident of the city of Gloversville, had on his premises 31 cases of lager beer. A part was in his cellar, and the residue was still upon a truck when the same was seized under the warrant heretofore issued herein. It is also conceded that the property where the beer was found was Cristiano's residence, and there is no suggestion that any part of the premises is or ever has been used for anything except residence purposes. There is no evidence that any of this beer, or any other beer or liquor, has ever been sold or given away from these premises or by Cristiano from any place. In short, the case stands upon the bare fact of the beer in question being found and seized upon Cristiano's premises in the city of Gloversville, which has concededly been legally "dry" since October 1, 1918.

By section 33 of the Liquor Tax Law (Consol. Laws, c. 34), under which this proceeding has been taken and which must govern the rights of the parties herein, the right to declare a forfeiture of the liquor seized depends upon proof that such liquors were "kept, stored or deposited for the purpose of unlawful sale or distribution within this state." Under subdivision 4 of that section certain presumptions of law are enumerated none of which are applicable to the facts here concerned. Whether the enumeration of these presumptions is restrictive upon the right to draw other presumptions, as might be claimed under a familiar rule of statutory construction, is perhaps not material to consider. Neither is it of consequence here that the possession was unlawful. Laws 1919, c. 469.

[1] It was held in *Farley v. Certain Liquors Seized*, 84 Misc. Rep. 104, 146 N. Y. Supp. 1003, that "the plaintiff to succeed [in a proceeding under this section] must establish that the liquors seized were kept, stored or deposited for the purpose of unlawful sale or distribution." It has also been held that "the statute is a drastic one and before one's property can be confiscated under it, clear and satisfactory proof of its violation must be presented." "The burden of proving that fact was upon the plaintiff." *Green v. Liquors Seized, etc.*, 173 App. Div. 686, 160 N. Y. Supp. 126.

"A single gift of liquors is not, in and of itself, sufficient to prove an unlawful purpose in keeping the liquors;" an intent to conceal an unlawful traffic not being shown. *Green v. Liquors Seized, etc.*, 173 App. Div. 686, 160 N. Y. Supp. 126.

[2] Under the foregoing rules it does not seem permissible to draw an inference that the liquors in question were kept, stored or deposited for the purpose of unlawful sale or distribution from the bare fact of their possession by Cristiano within dry territory.

It follows that judgment must be entered dismissing the complaint, and providing that such liquors and the vessels containing the same be returned to the place from which they were taken.

Judgment accordingly.

(109 Misc. Rep. 207)

In re HOLDEN.

In re PALMER'S ESTATE.

(Surrogate's Court, Westchester County. November 5, 1919.)

1. WILLS §565(4)—BEQUEST OF UNSOLD PUBLICATIONS AND COPYRIGHTS CONSTRUED.

A bequest of "the unsold publications and copyrights" of testatrix's deceased husband *held* not to include proceeds of sales made by testatrix under contracts providing for payment from time to time, but passing title at once.

2. WILLS §565(1)—BEQUEST OF "WEARING APPAREL" CONSTRUED.

Bequest of testatrix's "wearing apparel" *held* to include watch and chain, but not earrings, finger rings, breast pin, or bracelet.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Wearing Apparel.]

Judicial settlement of the account of Stephen Holden, executor of Lucia A. Palmer, deceased. Will construed.

Holden & Cavanaugh, of Mount Vernon, for executor.

Gabriel Reeves, of Yonkers, special guardian.

SLATER, S. [1] Upon this accounting, the executor and special guardian ask for the construction of the "twentieth" and "twenty-fifth" clauses of the will. The "twentieth" clause gives "the unsold publications and copyrights of my late husband." It appears that there are some unsold publications and copyrights. The estate is in receipt of payments of royalties for those that have been sold by the testatrix in her lifetime under contracts providing for payment from time to time. The title, however, passed at the time of the purchase, and the proceeds of these sales do not belong to the legatee mentioned in the "twentieth" clause, but fall under the residuary clause set forth in the "thirtieth" paragraph of the will.

[2] The "twenty-fifth" clause of the will gives to three relatives, to be equally divided between them, certain named personal property, including "my wearing apparel." The question submitted is: What is "wearing apparel?" Wearing apparel usually means clothing and garments protecting a person from exposure. The personal property in question consists of earrings, finger rings, bar breast pins, a watch and chain, and a bracelet, of considerable value.

The cases in the several states of the Union are not at all in accord upon what should be included as "wearing apparel" of a man or woman.

In *Gooch v. Gooch*, 33 Me. 535, it was held that a watch which testator had been in the habit of carrying did not pass by a bequest of his "wearing apparel."

McCormick v. Hudson River Railroad Co., 4 E. D. Smith (N. Y.) 181, held that "wearing apparel" includes a gold watch, when not carried about the person in a trunk while traveling as an article of baggage.

In *re Smith* (D. C.) 96 Fed. 832 (Texas case), held that "wearing apparel" in its popular sense includes all articles of dress generally

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worn by persons in the calling and condition of life and in the locality of the residence of the persons claiming the exemption.

In *Re Steele*, 22 Fed. Cas. 1202, the court said:

"It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the Bankruptcy Act, to include in it a gold watch of moderate value."

In *Towns v. Pratt*, 33 N. H. 349, 66 Am. Dec. 727, the Supreme Court of New Hampshire said:

"Articles of jewelry, designed to be worn upon the person as ornaments, are not 'wearing apparel' in the popular sense of the term."

And a breast pin was held not exempt. A diamond stud used for the purpose of fastening a shirt front was held to be "wearing apparel."

In *re Gemmell* (D. C.) 155 Fed. 551 (Pennsylvania case), held that a diamond ring worth several hundred dollars, worn by a bankrupt, is not exempt under the state statute as "wearing apparel."

Cases may be cited to justify holding the articles named to include "wearing apparel" in case claim had been made under exemption, tariff laws, or loss by common carrier. Even in such cases there is marked discord.

It has been held that "wearing apparel" includes jewelry in *Sawyer v. Sawyer*, 28 Vt. 249, and *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666, and does not include jewelry. In *re Kasson*, 14 Fed. Cas. 138, No. 7,616; *Fox's Appeal*, 99 Pa. 382.

Here we have a will. What was the intent of the testatrix, as gathered from the written document? She named many small things, in many clauses in her will, as gifts to many friends and relatives. Had she intended to give these jewels, all of some considerable value, she undoubtedly would have said so.

There is no case in our state courts to assist in solving the instant case. There is no reason why a special or technical meaning, rather than the ordinary meaning of "wearing apparel," should be given to the term as used in the will. Therefore I shall follow the ruling in *Dox's Estate*, 30 Pa. Super. Ct. 393, as being sound and reasonable.

In New York state the General Business Law,¹ relating to hotels and boarding houses and to the responsibility of innkeepers, names money, jewels, or ornaments, in section 200, as property that should be placed in the personal possession of the innkeeper of the inn, and, by section 201, limits the loss of clothing liability under the words "wearing apparel, goods or merchandise."

I shall hold that the watch and chain passed as "wearing apparel" under the "twenty-fifth" clause of the will, and that the other jewelry, earrings, finger rings, and breast pin do not fall within the definition of the words "wearing apparel," and pass under the "thirtieth" clause of the will, which is a gift of all the rest, residue, and remainder of the property of the decedent.

¹ Consol. Laws, c. 20.

(109 Misc. Rtp. 194)

In re DAVIS' ESTATE.

(Surrogate's Court, New York County. November 5, 1919.)

1. WILLS §=680—TRUST FUND; HOW PROVIDED.

Where a clause provided that it was testator's intention to provide for a trust fund in one of the two distinct ways set forth, but one way could be adopted, and resort in part could not be had to both ways.

2. WILLS §=439—INTENT OF TESTATOR.

In construing a will, intention of testator, as expressed in will, governs.

3. WILLS §=684(7)—TRUST PROVISION; ACCRUAL OF RIGHT TO INCOME.

Where will provided for trust fund, with directions to pay income to wife, with proviso that, if estate was not sufficient to pay all bequests, trustee should pay over income from certain portion of such fund to stepdaughter "during her life," and where estate was not sufficient for payment of all bequests, making inoperative provision for stepdaughter made conditional upon estate being sufficient, gift to stepdaughter was a present gift, taking effect upon testator's death, and not upon wife's death.

4. WILLS §=449—CONSTRUCTION AGAINST INTESTACY.

The court, in construing a will, will favor a construction that will avoid intestacy, but in so doing will not go to the extent of refusing to give effect to the testator's plain language, and of adding a substantial clause to the will.

5. WILLS §=441—UNAMBIGUOUS WORDS NOT CONTROLLED BY CIRCUMSTANCES.

The plain and unambiguous words of the will must prevail over a doubtful construction, based on the situation or circumstances of the testator or of the estate.

In the matter of the estate of John A. Davis. Proceeding to construe will and codicil of John A. Davis. Decree ordered.

Bigelow & Wise, of New York City (Henry A. Wise and Ernest A. Bigelow, both of New York City, of counsel), for executor.

Frueauff, Robinson & Sloan, of New York City (Charles A. Frueauff and Robert S. Sloan, both of New York City, of counsel), for widow and legatee and stepdaughter and legatee.

Alvin M. Higgins, of New York City (Louis S. Harris and Randolph N. Souffront, both of New York City, of counsel), for sister and legatee.

Edward J. Downing, of Mineola, for niece and legatee and nephew and legatee.

Hardin & Hess, of New York City (Harold B. Elgar, of New York City, and Clarence H. Knapp, of Saratoga Springs, of counsel), for half-brother of the decedent.

Charles M. Bleecker, of New York City, special guardian for infant children of deceased nephew.

COHALAN, S. This is a proceeding to construe the will and codicil of John A. Davis, who died December 28, 1918, leaving a widow, a stepdaughter, a sister, brothers, nieces, and nephews of the full blood, a brother of the half blood, and children of a deceased brother of the half blood.

§= For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The undisputed provisions of the will bequeath a total of \$102,000, including \$25,000 outright to the widow, \$25,000 to the sister of the full blood, \$25,000 in trust for the benefit of a brother of the full blood and two trust funds of \$12,500 each for two children of a deceased brother of the full blood.

The parts of the codicil in dispute contain further trust provisions aggregating \$300,000 for the benefit of the widow and stepdaughter. If the estate was sufficient to pay all bequests in full, the codicil provided a trust fund for the life benefit of the widow in the sum of \$200,000, with remainder to testator's sister, niece, and nephew, and after the death of the widow, an additional trust fund of \$100,000 for the stepdaughter. By the "third" paragraph of the codicil the widow is bequeathed the income for life from a trust fund of \$200,000, with remainder over, "excepting and providing, however," that if the estate was insufficient to pay all bequests in full, the stepdaughter is to receive the income of a trust fund of \$100,000 "of said \$200,000 during her life. * * *

There was no residuary clause, and there results a perplexing situation by reason of the fact that the estate is not sufficient to provide the specific trust funds of \$200,000 and \$100,000 for the widow and stepdaughter, respectively, which were expressly conditioned upon the estate being sufficient to pay all bequests, and yet the estate is about \$60,000 in excess of the express bequests which constituted the alternative provisions in the event that the estate was insufficient to set up the \$200,000 trust for the widow and the additional trust of \$100,000 for the stepdaughter, after the death of the widow. The estate left by the testator is about \$362,000. The sum required to pay all the bequests in the will is \$402,000.

The chief difficulty arises in connection with the provisions for Amo Pauline Sessions, the daughter of the widow and the testator's stepdaughter. The codicil provides:

"It is my intention to provide for said Amo Pauline Sessions hereinabove mentioned, one (1) sum only of one hundred thousand (\$100,000.00) dollars, in one of the two ways and manner above set forth."

[1] All parties are agreed, and of course there is no doubt, that, whatever the construction adopted, there must be provided a \$100,000 trust fund for the stepdaughter. It is very clear that the provision for her must be arrived at "in one of the two ways and manner above set forth."

These two distinct and separate "ways" are found in the "third" and "fifth" paragraphs of the codicil. There can be no doubt that one and only one of these two ways must be adopted. The directions are too precise to admit of providing the fund by resort in part to both ways specified. It is contrary to testator's express wishes to adopt one way and part of another way, and make provision for the stepdaughter by attempting to fit or piece together or harmonize the two absolute alternatives. In my opinion, such a procedure would not be warranted, even in an effort to avoid a finding of partial intestacy. That would be to add to the will a clause or clauses expressly contrary to the testator's precisely expressed intention to make the provision "in one of

the two ways and manner above set forth." Language so precise and definite must prevail over any general intention that rests upon presumption or conjecture. It is the intention as expressed in the will that governs.

[2] The manner provided in the "fifth" paragraph of the codicil is that by which a \$200,000 trust fund would be set up for the life benefit of the widow and after her death an additional sum of \$100,000 would be provided for the life benefit of the stepdaughter. But this scheme is to be operative "in the event that my estate shall be sufficient to pay all of the bequests in my said will provided in full." The bequests in the will and codicil aggregate \$402,000, and the estate at the testator's death amounted to about \$360,000. Argument is unnecessary therefore to demonstrate that the estate is not sufficient to pay all of the bequests in full and that this "fifth" paragraph is not to be considered as "one of the two ways" above mentioned.

[3] The only other way mentioned in the will is found in the "third" paragraph of the codicil. This is the only plan, therefore, that may be followed. The "third" paragraph is as follows:

"I give to my trustee, the Dollar Savings & Trust Company of Youngstown, Ohio, in trust, however, the sum of two hundred thousand (\$200,000.00) dollars, to invest and keep the same invested, and pay over the income or interest thereof to my wife, Frances R. Davis, during her life, and at her death I give and bequeath said two hundred thousand (\$200,000.00) dollars to my sister, Jane Davis Orth, and my niece, Helen J. Davis, and my nephew, Fred Davis, equally, share and share alike, excepting and providing, however, that if my said estate shall not be sufficient to carry out all of the bequests of my said will in full, then and in that case I direct that my trustee pay over to Amo Pauline Sessions, daughter of my wife, the interest and income of one hundred thousand (\$100,000.00) dollars of the said two hundred thousand (\$200,000.00) dollars during her life, and at her death I give and bequeath said one hundred thousand (\$100,000.00) dollars to her child or children, share and share alike. If, however, she shall die without issue, then and in that case I give and bequeath said one hundred thousand (\$100,000.00) dollars to my sister, Jane Davis Orth, and my nephew, Fred Davis, and my niece, Helen J. Davis, equally, share and share alike. I also give, devise and bequeath the balance of said sum of two hundred thousand (\$200,000.00) dollars, to wit, one hundred thousand (\$100,000.00) dollars, to my said sister, Jane Davis Orth, and my niece, Helen J. Davis, and my nephew, Fred Davis, equally, share and share alike, to be paid after the death of my wife."

The above is plain and explicit. A total sum of \$200,000 is to be provided in trust for both the widow and stepdaughter. The gift to the stepdaughter is as much a present gift as the gift to the widow, and there is no dispute as to when the gift for the widow takes effect. A construction that preserves the whole \$200,000 for the benefit of the widow during her life, with further provision for the stepdaughter after her mother's death, or which provides \$100,000 as a trust for the stepdaughter with more than \$100,000 for the benefit of the widow, adds to the said "sum of \$200,000 so expressly provided as the total trust provision for both mother and stepdaughter." This is repugnant to the plain language of the will, which limits the total provision for the life of the widow and the stepdaughter to \$200,000. A construction that postpones the erection of the trust for the stepdaughter until after the death of the wife does violence to the unambiguous language of the will, which plainly makes the bequest to the stepdaughter "dur-

ing her life." The only condition is that the estate be sufficient to pay all bequests in full. This event is determinable at the death of the testator and not at the death of the widow. The time when the trust for the stepdaughter takes effect is at the death of the testator. In the "fifth" paragraph it is made plain that the trust provided for the stepdaughter was not to take effect until after the death of the widow, and in the controlling third paragraph it is equally clear that the trust for the benefit of the stepdaughter is a present and is not a future gift.

In my opinion, therefore, the construction required by the language of the will is that, in addition to the \$25,000 bequest to her, the widow is the life beneficiary of a trust in the sum of \$100,000 effective at the death of the testator, with remainder to the sister, niece and nephew; and that the stepdaughter, Amo Pauline Sessions, is the life beneficiary of a trust for \$100,000 effective at the death of the testator with remainder as provided in said "third" paragraph of the codicil. This construction leaves the excess of the estate over \$302,000, unbequeathed, and as there is no residuary clause, it follows that a testator died intestate as to such excess.

[4] Although it is the duty of the court to favor a construction that will avoid intestacy, the effort in that direction should not go to the extent of refusing to give effect to the testator's plain language and of adding a substantial clause to the will.

[5] The testator may not have intended any part of his estate to go to his brother, who he stated was amply provided for, and he may not have intended any relative of the half blood to share in his estate, but his will must be construed in the light of its dispositive provisions rather than what is thought to have been in the mind of the testator. The plain and unambiguous words of the will must prevail over a doubtful construction based on the situation or circumstances of the testator or of the estate. Even if there were evidenced in this will a general intention to dispose of the entire estate, such general intention could not enlarge a particular provision beyond its ordinary or legitimate meaning.

It may be noted that, if the estate had exceeded \$402,000, there would be no doubt at all that there would have been intestacy as to the excess over \$402,000.

The construction found is not advocated by any of the parties in its entirety, and is more favorable to the stepdaughter than is argued for her by her attorneys. The attorneys for the stepdaughter are the attorneys for the widow, and under their theory of construction the widow is the life beneficiary in a trust of \$200,000; the daughter having a life interest in \$100,000, contingent upon her surviving her mother. There is considerable adversity of interest between the mother's and daughter's interests in the various theories of construction presented to the court, and ordinarily such adversity of interest would require the daughter and mother to be represented by separate attorneys. The fact that the stepdaughter through her mother's attorneys does not urge her claim to the full, while advocating the greatest possible advantage for her mother, does not affect the duty of the court to give effect to what it considers the true construction of the will and codicil.

Settle decree on notice.

(109 Misc. Rep. 267)

In re MILLER'S ESTATE.

(Surrogate's Court, New York County. November 18, 1919.)

1. TAXATION $\S$ 879(1)—TRANSFER TAX; TRUST DEEDS.

Where grantor in trust deed reserves right to revoke the deed and terminate the trust, the transfer is subject to the operation of the statute, which provides for taxation of transfers made in contemplation of death, or intended to take effect in possession or enjoyment at death.

2. TAXATION $\S$ 876(1)—TRANSFER TAX; TRANSFER TO CITY FOR HOSPITAL.

A transfer of property to a city for the establishment of a hospital was not exempted from taxation by Tax Law, $\S$ 221, relating to charities, etc.; exemption under such statute being determined by the identity of the beneficiary, and not by the purpose of the transfer.

3. TAXATION $\S$ 867(1)—TRANSFER TAX; PROPERTY OF NONRESIDENT.

A trust deed executed by a son of deceased was subject to a transfer tax, although son was a nonresident and was given possession of the securities prior to execution thereof, where deceased was to receive the income of the trust property for life, and had power of revocation; the son being only an intermediary.

In the matter of the estate of Andreas M. Miller, deceased. The United States Trust Company and others appeal from a report of the transfer tax appraiser and an order fixing the tax. Order fixing transfer tax reversed, and report remitted to appraiser, to have certain property included among the taxable assets of the estate of the decedent.

Stewart & Shearer, of New York City (McCready Sykes and George L. Shearer, both of New York City, of counsel), for executors and for city of Duluth, Minn.

Lafayette B. Gleason, of New York City (Schuyler C. Carlton, of New York City, of counsel), for state comptroller.

COHALAN, S. Appeals have been taken by the United States Trust Company, as executor of the last will and testament of the above-named decedent, by the city of Duluth, and by the state comptroller, respectively, from the report of the transfer tax appraiser and the order fixing the tax herein.

The decedent died a resident of this state on May 22, 1917. He left a net estate of \$77,963.45. There is included as taxable, in the report of the transfer tax appraiser, additional property of the value of over \$1,500,000 transferred by three deeds of trust made by decedent in his lifetime, and dated, respectively, December 26, 1914, January 5, 1917, and January 9, 1917. The executor appeals on the ground that these transfers were not taxable. The decedent also transferred by deed of trust property of the value of about half a million dollars, which is not included among the taxable assets of his estate, and as to which no appeal is taken by the state comptroller. A trust deed dated March 11, 1907, of property of the value of \$408,000 was executed by Athol M. Miller, son of decedent. The state comptroller appeals on the ground that the appraiser has not reported the transfer as taxable, claiming that the securities which formed the corpus of the trust were the property of decedent, and that the transfer was in legal effect

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the decedent's act. The city of Duluth appeals on the ground that the trust fund of \$595,250, in which it has the remainder interest under the trust deed of January 5, 1917, is exempt from taxation.

The value of the property included in all the trust deeds mentioned above is nearly \$2,500,000. The executor contends that the only taxable property of the decedent is the net estate of which he died possessed, \$77,963.45.

[1] The deeds, dated respectively December 26, 1914, and January 9, 1917, have the following provision, which is identical in the two instruments:

"The party of the first part reserves the right at any time during his lifetime, by an instrument in writing under his hand and seal, and duly acknowledged so as to authorize it to be recorded, to revoke this trust deed and to terminate the trust hereby created, and thereupon to receive from the party of the second part all the trust property, principal and income, then in its hands."

It is contended by the state comptroller that this reservation to the grantor in the two deeds of the power of revocation subjects the transfers to the operation of the statute which provides for their taxation when made in contemplation of death or intended to take effect in possession or enjoyment at death. The learned counsel for the executor relies on the decision of the Court of Appeals in *Matter of Masury*, 159 N. Y. 532, 53 N. E. 1127, affirming, without opinion, 28 App. Div. 580, 51 N. Y. Supp. 331, in support of the claim that the property transferred by the trust deed is not taxable.

The question of the liability to the transfer tax of property conveyed by deeds of trust was again presented for determination to the Court of Appeals very soon after its affirmance of the decision of the Appellate Division in the *Matter of Masury*, supra. In the case referred to (*Matter of Bostwick*, 160 N. Y. 489, 55 N. E. 208) the transfer was held taxable. In the *Masury* Case the power to revoke the trust was alone reserved. In the *Matter of Bostwick* the donor retained the right to alter or amend the provisions of the trust deed, to withdraw or exchange the securities which made up the fund and to control their disposition and sale. The decision of the court in the *Masury* Case is discussed at considerable length in the *Bostwick* Case, in which Judge Gray, writing the opinion of the court, says (160 N. Y. page 493, 55 N. E. 210):

"The affirmance of the decision in the *Masury* Case may seem to have committed this court to views which support the contention now made in behalf of these appellants; but if that be so, it is an erroneous inference from that decision. I think that we may have gone too far in generally affirming the *Masury* decision; certainly the limit was then reached, beyond which the courts could not go within emasculating the provisions of the statute. We thought there was some reason in the facts of the *Masury* Case for finding an intention in the donor to make an absolute transfer of property during his life, which the mere reservation of a power to revoke was, of itself, insufficient to negative."

There are no facts in the present proceeding, as there evidently were in the *Masury* Case, which would show that the donor intended to make an absolute transfer of his property, notwithstanding his reservation of the power of revocation. The gift could not be absolute and

revocable at the same time. The liability to the transfer tax of the property set over by the two instruments now under consideration is governed by the decision in *Matter of Bostwick*, supra. Neither in the present nor in the *Bostwick* Case was it provided by the trust deed that any part of the principal or income from the fund was to be paid to the donor in his lifetime, so that the only effect of his death, as far as the interests of the beneficiaries of the trusts were concerned, was to remove the possibility of interference by the donor and to make secure their enjoyment of his bounty. It was necessarily by reason of this termination by the death of the donor of the power to affect the enjoyment of the trust by the beneficiaries, and on this ground alone that the court held in the *Bostwick* Case that the donor intended that the transfer should take effect at his death. It cannot be asserted with reason that the reservation of the power to alter or amend retained by *Bostwick* is to be deemed an indication by him of an intention that the gift was to take effect at death, while the reservation by the donor of the power of revocation in the trust deeds now before us is not to be so considered. The execution of a simple instrument by Mr. Miller could deprive the beneficiaries of all interest in the fund, and it was not until he died that their possession was complete and secure. The trust deed was "just as capable of revocation as a will would have been." *Matter of Dana*, 215 N. Y. 461, 109 N. E. 557. I am of the opinion that the transfers by the trust deeds, dated respectively, December 26, 1914, and January 9, 1917, were made to take effect in possession and enjoyment at death of the decedent.

[2] By the deed, dated January 5, 1917, decedent transferred to the United States Trust Company, as trustee, securities of the value of somewhat less than \$600,000 in trust to pay the income to the decedent during his life and at his death "to transfer and pay over said securities and property to the city of Duluth, Minnesota, for the establishment of a free and public hospital and dispensary in a cheerful and convenient location within the city for secular use and benefit of worthy sick and helpless poor without distinction of sex, color, creed or nationality who are not afflicted with any loathsome or contagious disease."

The right to revoke the trust and to regain the ownership of the property was reserved by the decedent. For this reason, and also because of the life interest retained by the donor in the fund, the principal is taxable as a transfer to take effect at death (*Matter of Keeney*, 194 N. Y. 281, 87 N. E. 428), unless the city of Duluth comes under the classification of beneficiaries, transfers to which or to whom are specifically exempted from taxation by the statute.

Section 221 of the Tax Law (Consol. Laws, c. 60) provides:

"Any property devised or bequeathed * * * to any religious, educational, library, charitable, missionary, benevolent, hospital or infirmary corporation, wherever incorporated, * * * shall be exempted from and not subject to the provisions of this article."

Under this section the exemption is to be determined by the identity of the beneficiary and not by the purpose of the transfer. *Matter of Palmer*, 33 App. Div. 307, 53 N. Y. Supp. 847.

The city of Duluth is a municipal corporation, and not a hospital corporation, and does not come within the exemption provided for in section 221. The transfer to it by the deed of trust, dated January 5, 1917, is taxable.

[3] The deed of Athol M. Miller, the son of decedent to the United States Trust Company as trustee, gives the income from the trust fund of \$408,000 to the decedent for life and on his death to the grantor's mother for life and on her death to the grantor, if living, and if not living to the grantor's issue, and if no issue to designated charitable institutions. The son, who predeceased his father, was at the time of his death a nonresident of this state.

The facts bearing upon the execution of this deed were developed by the testimony of an officer of the Van Norden Trust Company, the trustee named in the trust deed, in an action brought in the Supreme Court involving the right to the accrued income under the deed of trust, in which the Equitable Trust Company was the plaintiff and Annie E. Miller, the widow of decedent, the defendant. The testimony, a transcript of which was introduced in evidence before the transfer tax appraiser by stipulation of the parties, is in part as follows:

"Q. Did Mr. Miller consult or confer with you about the creation of any trust in 1907? A. The father or son are you talking about?

"Q. Mr. Andreas M. Miller, the father. A. Yes.

"Q. Did he tell you what he desired to do, what he desired to accomplish? A. Yes.

"Q. What did he tell you? A. He said that he wished to arrange for a distribution of his property while he was alive so that there would be no lawsuits about it after he died.

"Q. And were trust agreements executed at that time by Mr. Miller? A. Yes, I think he executed one himself, if I remember it, and one through his son. It was executed by the son; I mean the son.

"Q. I show you plaintiff's Exhibit A of this date, and ask you if you have ever seen that document before? A. Yes.

"Q. Did Mr. Miller consult you or concur with you about the execution of that document? A. He did.

"Q. That document is executed by the son, is it not? A. Yes.

"Q. Were the securities mentioned in that deed of trust placed in your hands or in the hands of the trust company, to your knowledge? A. Yes.

"Q. By whom? A. By the son—when he executed that trust.

"Q. Did Mr. Miller or the son inform you whose securities they were that were being placed there? A. Yes; they were very positive about that.

"The Court: You may tell what they said. A. The father said that he had given to his son certain securities absolutely without any qualification or condition, that they were his absolutely. And he said that the son would be in the next day to turn over those securities annexed to the certificate of trust. And the son came in and delivered the securities to us, and we received them as the property of the son.

"Q. What had Mr. Andreas M. Miller previously said to you about the disposition of his property in this way in addition to what you have said? A. Well, he said that he wanted the income to go to him during his life because he thought that was safer: if he gave it to them and they supported him they might get tired of supporting him. He was a man of considerable humor. And he said I want to have the income while I am alive, but when I am through with it I want it to go to the people for whom it was intended.

"Q. Did he mention his wife and his desire to provide for her, anything in that connection? A. Yes, he said very specifically that he was providing for his wife, that he wanted us to get the—that this was a trust practically for

her, but he wanted the income reserved for himself while he lived, but that on his death he wanted everything to go to her that he personally did not get."

The testimony clearly reveals the fact that the son, whose possession of the securities was limited to the brief space of a day, was acting as the mere medium for the disposition of property belonging to his father. The transaction is accurately described by the witness above quoted in stating that the decedent executed the instrument "through his son." Even the right to revoke the trust is expressly given to the father, as well as reserved to the son, in the deed. The transfer of the securities was as much the act of decedent as if he had been named as the grantor and had signed the instrument.

In writing the opinion of the court in *Matter of Keeney*, supra, Chief Judge Cullen said (page 287 of 194 N. Y. [87 N. E. 429]):

"It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate."

An illustration of the operation of the "ingenious mind" is afforded by the present instance. If it were not for the disclosure of the facts in the record now before the court, the device might have been successfully applied.

The scheme by which this evasion of the Tax Law was attempted would, if countenanced, unquestionably be the one most frequently resorted to as affording the simplest method of avoiding the payment of the tax; the only requisite for its accomplishment being an absolute reliable intermediary who is a nonresident of this state. The transfer by the deed of trust dated March 11, 1907, was a disposition by the decedent of his own property. As the income from the fund was to be paid to the decedent during his life, the transfer is taxable. *Matter of Keeney*, supra.

The order fixing the transfer tax is reversed, and the report is remitted to the appraiser, for the purpose of including the property transferred by the deed of trust dated March 11, 1907, among the taxable assets of the estate of decedent.

Settle order on notice.

(108 Misc. Rep. 487)

In re GUITERAS' ESTATE.

(Surrogate's Court, New York County. August, 1919.)

TAXATION ¶895(7)—DEDUCTION FROM LEGACY OF TAXES PAID TO FOREIGN STATE.

Inheritance taxes paid to foreign states should be deducted from the legacies that are taxed in such state, and not from the gross estate as an expense of administration; and where the order fixing the tax does not specifically state the amount on each legacy, the tax should be deducted from the respective legacies in proportion to the amount transferred to each taxable legatee.

Application by the executors of the estate of Raymon Guiteras, deceased, for instructions in an accounting proceeding. Decree in accordance with opinion.

Carter, Ledyard & Milburn, of New York City (Heber Smith, of New York City, of counsel), for executors.

COHALAN, S. The executors have filed their account and ask that the court instruct them as to whether the inheritance taxes paid to foreign states and the tax imposed by section 221b of the Tax Law of this state (Consol. Laws, c. 60) should, respectively, be deducted from the gross estate as an expense of administration, or proportionately from the interests of the various legatees.

There does not appear to be any reported decision in this state in relation to the method of deducting inheritance taxes paid by a local executor or administrator to foreign states. In New Hampshire it has been decided that such taxes should be deducted as an expense of administration. *Kingsbury v. Bazeley*, 75 N. H. 13, 70 Atl. 916, 139 Am. St. Rep. 664, 20 Ann. Cas. 1355. As the courts of this state have held that inheritance taxes paid to foreign states are not an expense of administration to be deducted from the gross estate (*Matter of Penfold*, 87 Misc. Rep. 525, 149 N. Y. Supp. 918; affirmed, 216 N. Y. 171, 110 N. E. 499), this court cannot follow the decision of the New Hampshire court.

Neither is *Matter of Hamlin*, 226 N. Y. 407, 124 N. E. 4, which held that the federal inheritance tax should be deducted from the gross estate, authority for the contention that the inheritance taxes imposed by foreign states are to be deducted as an expense of administration, as the federal tax is an estate tax, and the inheritance taxes of the various states of the United States are succession taxes, or taxes upon the right to succeed to the property of a deceased person. While it would probably simplify the preparation of the accounts of executors or administrators if foreign inheritance taxes were deducted as an expense of administration, such a method of deduction would scarcely be just to the residuary legatee. The latter must, under the decision in *Matter of Hamlin*, supra, pay the federal inheritance tax, and, unless there is an express direction in the will, he should not also be compelled to pay inheritance taxes imposed by foreign states. In practice it should not be difficult for an executor or administrator to de-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

termine the amount of foreign inheritance taxes to be paid by each legatee. The tax statutes of the different states provide generally that the rate of tax or the right to exemption from taxation shall depend upon the value of the property transferred or the relationship of the beneficiary to the decedent.

The order assessing the tax usually determines the amount assessed against each legatee, and the executor or administrator may deduct from the legacy given to such legatee the amount of inheritance tax paid upon the transfer of the legacy in any foreign state, as well as in this state. It seems to me, therefore, that the inheritance taxes paid to foreign states should be deducted from the legacies that are taxed in the foreign states, and not from the gross estate as an expense of administration. Where the taxing order or decree does not specifically state the amount of tax on each legacy, the tax should be deducted from the interests of the respective legatees in proportion to the amount transferred to each taxable legatee.

As the constitutionality of chapter 700 of the Laws of 1917 in relation to the additional tax on investments has not been finally determined, it seems inadvisable at this time to decide whether such a tax should be deducted from the gross estate or proportionately from the shares of the legatees. In the matter under consideration there is no apparent need of such a decision at this time, as the executors intimate that they will reserve from present distribution an amount necessary to pay any tax imposed under section 221b of the Tax Law until the constitutionality of the statute is finally determined. At that time, if the tax is assessable, the question of the method of its deduction may properly be presented to this court for determination.

Decreed accordingly.

PRICE v. PRICE.

(Supreme Court, Special Term, Nassau County. November 24, 1919.)

1. MARRIAGE §58(1)—ANNULMENT; AGE OF CONSENT.

Where plaintiff was 17 years of age, when she married without the consent of her parents, she may have the marriage annulled, where it was never consummated and she and her husband separated immediately after the ceremony, unless she is guilty of laches.

2. EVIDENCE §76—FAILURE OF PARTY TO TESTIFY.

Failure of defendant in a civil action to testify is not in or of itself evidence against him, failure to produce evidence in one's possession not making evidence, the only effect being to warrant the court or jury to make the deliberative inference, rather than the probative inference, that the evidence, if produced, would not be favorable to the defendant, and no presumption is created for or against either party.

3. MARRIAGE §60(7)—ANNULMENT; DEGREE OF PROOF.

In order to entitle one to annulment of marriage on the ground that she had not attained the age of legal consent, and that plaintiff's parents did not consent to the marriage, and that the marriage was not consummated, plaintiff must establish her case by a fair preponderance of the evidence.

4. MARRIAGE §60(7)—ANNULMENT; SUFFICIENCY OF EVIDENCE.

In an action to annul a marriage on the ground that plaintiff had not attained the age of legal consent, that plaintiff's parents did not consent to the marriage, and that the marriage was not consummated, evidence held insufficient to warrant a decree for plaintiff.

Action by Mrs. David Price against David Price to annul a marriage, upon the ground that the plaintiff had not attained the age of legal consent, and that the plaintiff's parents did not consent to the marriage. Complaint dismissed.

Maxson & Jones, of Hempstead (Henry L. Maxson, of Hempstead, of counsel), for plaintiff.

David Price, of New York City, in pro. per.

BENEDICT; J. This action is for annulment on account of plaintiff not having attained the age of 18 years at the date of the marriage and because the consent of her parents was not given. She was 17 years 6 months and 27 days old at the time of the marriage, according to the testimony offered on her behalf. She asserts that the marriage was never consummated, and that she and her husband separated immediately after the marriage ceremony had been performed by an alderman of the city of New York on March 15, 1913.

[1] If the testimony of the plaintiff and that of her witnesses be true, she is entitled to a decree of annulment, unless she has been guilty of laches in the bringing of her action. See *Macri v. Macri*, 177 App. Div. 292, 164 N. Y. Supp. 112, opinion by Mr. Justice Putnam. The proofs offered on her behalf included the testimony of her father and mother that she was born in the borough of Manhattan on August 17, 1895. An entry in a Bible claimed to have been made by her father was excluded by the court, both on account of its unsatisfactory appearance and also because, under the rule stated in *Chamberlayne's*

Handbook of Evidence, § 927, citing cases in note 14, the court was not required to receive it; the person who said that he had made it being himself a witness giving evidence of the date of birth.

The only other evidence as to the date of plaintiff's birth was given by her uncle and his wife; but the probative force of their testimony was not sufficient to overcome the weight of the evidence on the other side. No birth certificate was produced by the plaintiff from any official source, but a certificate of a search in the department of health was offered, which failed to show the filing of a birth certificate in that office either on August 17, 1895, or in August, 1892. The omission to file a birth certificate was sought to be explained by the statement that the plaintiff's mother was not attended by a physician, but only by a midwife, at the birth of the plaintiff. It was also stated that the present address of the midwife could not be ascertained.

[2] The defendant, who is himself an attorney, acted as his own counsel upon the trial, but did not take the witness stand in his own behalf. Very great stress is laid upon this fact by the learned counsel for the plaintiff; but it is well established that such failure is not, in or of itself, evidence against the defendant. The failure to produce evidence in one's possession does not make evidence. The only effect that it has is to warrant the court or jury to make the deliberative inference, rather than the probative inference, that the evidence, if produced, would not be favorable to the party. *Ferrari v. Interurban St. Ry.*, 118 App. Div. 155, 103 N. Y. Supp. 134. It does not create any presumption either for or against either party to the controversy in any given action. *Chamb. Handbook of Evidence*, § 435, and cases cited in notes. Especially is this the case where the opponent has failed to establish his own contention to the extent required by law.

The contention of the defendant was that the plaintiff was born in the year 1892, and not in the year 1895, and hence that she was 21 years of age at the date of the marriage. He also attempted to show that her parents knew of the intended marriage and consented to it, and that the marriage was fully consummated without objection on their part. To establish the earlier date of the plaintiff's birth the defendant produced the records of two public schools which the plaintiff had attended, which appeared to show that her mother had given the plaintiff's age upon entry into school as three years older than it would have been if she had been born in 1895. While this evidence is not conclusive, it is, from its presumably disinterested character when made, entitled to much weight, when considered in the light of the testimony of the plaintiff as to her business experience after leaving the high school.

[3, 4] The court was impressed, also, by the testimony of witnesses, who were not related to the plaintiff, as to her conduct towards the defendant after the marriage, which tended to support the defendant's claim that the marriage was consummated with the knowledge and consent of the plaintiff's parents. The court was also impressed with the fact that it was only after the plaintiff and her parents had realized that the colors in which the defendant had painted his legal and military attainments and his future prospects were not justified by the facts

existing at the time that she and they thought of some method of annulling the marriage contract. Instead of moving for an annulment promptly, however, the plaintiff waited from 1913 to 1919 before beginning this action. This delay on her part was not satisfactorily explained, and the court, in view of it, and more especially in view of the doubt which arises from the state of the record as to the real age of the plaintiff, is constrained to hold that the plaintiff has not established her case by the fair preponderance of evidence which is required of her.

The complaint is therefore dismissed, but without costs. The requests for findings have been passed upon.

(189 App. Div. 493)

WEDDLE et al. v. GRZECZEZAK.

(Supreme Court, Appellate Division, Second Department. November 21, 1919.)

1. EXECUTION $\Leftrightarrow$ 419—CONTEMPT FOR DISOBEDIENCE OF ORDER TO APPEAR; AMOUNT OF FINE.

If a contempt consisted solely of a disobedience of an order to appear and be examined, defendant could not be fined the amount of a judgment to be paid to plaintiff without showing that the failure to obey the order to appear resulted in loss to plaintiff of the amount of the judgment; but the fine should be limited to the costs and expenses of plaintiff, and an additional sum for punishment not exceeding the statutory limit under Judiciary Law, § 773.

2. EXECUTION $\Leftrightarrow$ 419—VIOLATION OF INJUNCTION; AMOUNT OF FINE.

If defendant withdraws money from a bank in violation of an injunction, a fine for contempt for the amount of a judgment in favor of plaintiff was proper, if the judgment was lost to the plaintiff following the violation of the injunction.

3. EXECUTION $\Leftrightarrow$ 419—VIOLATION OF INJUNCTION; AMOUNT OF FINE.

In order to reach the conclusion, in a contempt proceeding against defendant for withdrawing money from a bank in violation of an injunction, that loss of a judgment to plaintiff followed, authorizing fine in amount of judgment, there must be evidence that the money on deposit belonged to the defendant, so that the plaintiff could satisfy the judgment therefrom and that the defendant was a party to its withdrawal.

Kelly, J., dissenting.

Appeal from Nassau County Court.

Action by Calvin W. Weddle and Lemelly F. Bowne against Stanley Grzeczczak. From an order adjudging defendant, a judgment debtor, guilty of contempt of court for disobedience of an order in supplementary proceedings, and imposing on him a fine in the amount of the judgment, he appeals. Order reversed, and case remitted.

Argued before JENKS, P. J., and MILLS, RICH, BLACKMAR, and KELLY, JJ.

H. Willard Griffiths, of New York City (Jacob L. Kornicker, of New York City, on the brief), for appellant.

Harry W. Moore, of Mineola, for respondents.

BLACKMAR, J. The order adjudges that the defendant was guilty of contempt in having disobeyed the order for his examination by

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

failing to appear on the 24th day of May, 1919, and also "by reason of the sum of \$3,100 having been withdrawn from the joint bank account held by said judgment debtor and Josie Grzeczczak, his wife, after service of the order upon him and in violation of the injunction therein contained." The defendant was fined the amount of the judgment, to be paid to the plaintiff, and committed to the county jail until such payment should be made.

[1-3] If the contempt consisted solely of a disobedience of the order to appear and be examined, the defendant could not be fined the amount of the judgment, to be paid to plaintiff, without showing that the failure to obey the order to appear resulted in a loss to the plaintiff of the amount of the judgment. There was no evidence to that effect. For contempt in disobeying the order to appear, the fine should have been limited to the costs and expenses of the plaintiff and an additional sum for punishment, not exceeding the statutory limit. Section 773, Judiciary Law (Consol. Laws, c. 30); *Socialistic Co-op. Pub. Ass'n v. Kuhn*, 164 N. Y. 473, 58 N. E. 649. If the money was withdrawn from the bank in violation of the injunction, the loss of the judgment to the plaintiff followed, and the order was right. To reach the conclusion that loss of the judgment to the plaintiff followed, there must be evidence that the money on deposit belonged to the defendant, so that the plaintiff could satisfy the judgment therefrom, and that the defendant was a party to its withdrawal from the bank. In such case the fine could be for the benefit of plaintiff to the extent of his loss. Although these facts were probable, there was no evidence to establish them, and the adjudication that the defendant violated the injunction was, upon the evidence then before the court, unwarranted.

The order should be reversed, with \$10 costs and disbursements, and the case remitted to the County Court of Nassau County for further proceedings.

JENKS, P. J., and MILLS and RICH, JJ., concur.

KELLY, J., dissents upon the ground that the facts developed upon defendant's examination, coupled with the return of execution unsatisfied, warranted the county judge's decision that the money withdrawn by defendant's wife belonged to the defendant, and that the withdrawal damaged plaintiff to the amount of the fine imposed.

ASHDOWN v. ASHDOWN.

(Supreme Court, Special Term, Nassau County. November 21, 1919.)

1. PLEADING $\S$ 8(6)—CONCLUSIONS; ALLEGATION OF INVALIDITY OF DIVORCE INSUFFICIENT.

In action by wife for separation, allegation in defendant's answer that divorce procured by him in Nevada from his first wife was without force and effect in Connecticut, where he married plaintiff, is a legal conclusion, not sufficiently supported by bare allegation that former wife failed to appear in the Nevada action.

2. DIVORCE $\S$ 39—MARRIAGE $\S$ 36—ESTOPPEL TO DENY VALIDITY OF DIVORCE FROM FORMER WIFE.

An action for separation being statutory (Code Civ. Proc. $\S$ 1762 et seq.), and a marriage contracted by one whose husband or wife by a former marriage is living being void, unless the former marriage has been annulled or dissolved (Domestic Relations Law, $\S$ 6), in action by second wife for separation, invalidity of divorce which defendant obtained from his first wife is a good defense, and defendant is not estopped to assert it, for the doctrine of estoppel cannot be applied to establish a matrimonial relation under conditions inhibited by law.

Action for separation by Cressie Pankhurst Ashdown against Edward A. Ashdown. Demurrer to defendant's answer sustained. Judgment for plaintiff accordingly, with leave to defendant to serve amended answer.

The defendant as a separate defense pleaded that the parties to this action were married by a justice of the peace at Stamford, Conn., on March 23, 1917; that prior to this marriage the defendant had procured from his former wife, Leanora E. Ashdown, a divorce in the Second Judicial district court, Washoe county, at Reno, Nev., and that, his former wife failing to appear in that action, the decree of divorce obtained was without force and effect as against her; that on July 18, 1918, his first wife commenced a divorce action in the New York Supreme Court, Nassau county; that defendant has been advised by his attorney that at the time he married the above-named plaintiff he was still married to his first wife, Leanora E. Ashdown, and that the marriage in Connecticut was no marriage at all, in view of the fact that he had at that time a wife living; and that defendant has been further advised by his said counsel that, to be lawfully married to the plaintiff, he would have to go through another marriage proceeding after a final decree was entered in the divorce action in Nassau county.

To this separate defense the plaintiff demurred, upon the ground that it was insufficient in law upon the face thereof.

The undisputed facts, as shown by the pleadings, were that the defendant was married to Leanora E. Ashdown in 1900 at Hempstead, N. Y., and lived there for over 15 years; that a child was born of this marriage in 1903; that in 1916 the defendant left his wife, went to Nevada, and instituted an action for a divorce, and in February, 1917, procured an absolute divorce from his wife as above stated.

The first wife did not appear in the Nevada divorce action and was not served by process in that state. In July, 1918, the first wife brought an action for absolute divorce in the New York Supreme Court, Nassau county, claiming that the defendant was living in adulterous intercourse with his alleged second wife. The defendant appeared and defended that action and in March, 1919, a final judgment of divorce dissolving the first marriage was rendered in favor of defendant's first wife in said action.

In July, 1919, the defendant abandoned the plaintiff and this action was thereafter instituted. The foregoing facts are not in dispute.

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Maxson & Jones, of Hempstead (Henry L. Maxson, of Hempstead, of counsel), for plaintiff.

Henry P. Keith, of New York City, for defendant.

SCUDDER, J. [1] It seems to me that the allegation that the Nevada divorce decree which defendant procured against his first wife was without force and effect in the state of Connecticut is a legal conclusion, and that it is not sufficiently supported by the bare allegation that his former wife failed to appear in the Nevada action, without alleging that she was served with the summons by publication, that she was not a resident of Nevada, or any other fact to show that the Nevada court did not acquire jurisdiction. See *Schenker v. Schenker*, 181 App. Div. 621, 169 N. Y. Supp. 35. The facts alleged are therefore insufficient to constitute a defense.

[2] The demurrer cannot, however, be sustained on the ground that the defendant is estopped from asserting as against his second wife, the plaintiff in this action, the invalidity of the Nevada divorce decree which he obtained against his first wife. An action for separation is a statutory action. C. C. P. § 1762 et seq. It is based upon the existence of a lawful relation of husband and wife. Under the laws of this state a marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless such former marriage has been annulled or dissolved. Domestic Relations Law (Consol. Laws, c. 14) § 6. This law is declarative of public policy. To marriage contracts and to actions for their dissolution there are three interested parties—the state, the man, and the woman. 2 Bishop on Marriage and Divorce, § 230; *Winans v. Winans*, 124 N. Y. 140, 145, 26 N. E. 293. Unlike other contracts, they cannot be entered into at the discretion or caprice of the contracting parties, nor dissolved by mutual agreement.

The doctrine of estoppel cannot be applied to establish a matrimonial relation under conditions which the law inhibits. The state will not permit an estoppel. *Finn v. Finn*, 62 How. Prac. 83, 86. If the Nevada divorce secured by the defendant is invalid, his marriage with plaintiff is void. She is not his wife; he is under no legal obligation to live with her; she has no right of consortium; she needs no legal separation, because she has never been joined to him by legal ties. There is nothing to sever. The law commands them to live apart, and they cannot legally come together. To live otherwise would be concubinage. *Blinks v. Blinks*, 5 Misc. Rep. 193, 25 N. Y. Supp. 768.

The case of *Starbuck v. Starbuck*, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. Rep. 631, was not an action for divorce, but an action for dower. The judgment therein did not affect an existing matrimonial relation, and the question whether public policy forbade the application of the principle of estoppel invoked did not, therefore, arise and was not considered.

The demurrer, however, should be sustained, for the reason that the facts alleged are insufficient to constitute a defense as above stated. Judgment for plaintiff accordingly, with \$10 costs, and leave to defendant to serve an amended answer within 10 days after notice of entry of judgment on payment of costs.

(189 App. Div. 488)

SPATZ v. SPATZ.

(Supreme Court, Appellate Division, Second Department. November 14, 1919.)

1. DIVORCE $\S$ 214(3)—ALIMONY PENDENTE LITE; EVIDENCE OF MANNER OF LIVING.

That defendant and his wife and their child 12 years old lived above one of the dramshops of defendant and kept but one servant affords a criterion of the proper amount of alimony pendente lite.

2. DIVORCE $\S$ 213—TEMPORARY ALIMONY; WHEN REFUSED.

Where, within four or five weeks of the motion for alimony pendente lite, plaintiff wife secured \$700 of defendant husband's money, and it did not appear that it had been exhausted by expenditure necessary and proper to plaintiff's station in life, she could not ask the court for more money.

3. DIVORCE $\S$ 227(2)—COUNSEL FEES; ADEQUACY.

Where the case presented a simple issue, an allowance of \$75 counsel fees pendente lite held adequate.

Appeal from Special Term, Kings County.

Action by Louise Spatz against Harry L. Spatz. From an order granting plaintiff alimony and counsel fees, and also from an order denying a motion for a resettlement of the first-mentioned order, defendant appeals. Modified, and, as modified, affirmed.

Argued before JENKS, P. J., and MILLS, PUTNAM, BLACKMAR, and KELLY, JJ.

Anson Burlingame Cole, of New York City, for appellant.
Mann & Buxbaum, of Brooklyn, for respondent.

JENKS, P. J. [1, 2] Whether the defendant's income be handsome, as the plaintiff declares, or moderate, as the defendant deposes, it is not disputed that the husband and wife and their girl child 12 years old lived above one of the dramshops of the defendant and kept but one servant. This circumstance is germane, in that it affords a criterion of the proper amount of alimony pendente lite. I think that the amount awarded by the Special Term should be reduced substantially, so as to suffice for the support of the child only.

The husband charges that within four or five weeks of this motion the wife took from their joint safe deposit box his safe and his cash registers, securities, bank books, and moneys. The wife meets the charge by denial in the nature of a negative pregnant, by explanation, and by admission. If we resolve this dispute entirely in her favor, it appears that within the period named she thus became possessed of nearly \$700 of her husband's moneys. Until it appeared satisfactorily to the Special Term that these moneys had been exhausted by expenditures necessary and proper to her station in life and an appropriate mode of living, she could not ask the court for more moneys. *Osgood v. Osgood*, 2 Paige at page 624, cited in *Lake v. Lake*, infra; *Merritt v. Merritt*, 99 N. Y. 643, 1 N. E. 605; *Romaine v. Chauncey*, 129 N. Y. at page 570, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544; *Lake v. Lake*, 194 N. Y. at page 183, 87 N. E. 87. Her affidavit did not meet this requirement. Necessity must be the burden of her plea.

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[3] It was well that the girl child of such tender years was left with the mother, and the child should receive support from the father. I think that the alimony pendente lite should be reduced to \$10 a week, with express provision that such money must be devoted exclusively to the support of the child. The case presents a simple issue, and a counsel fee of \$75 is adequate.

The order is modified accordingly, and, as modified, is affirmed, without costs. All concur.

(109 Misc. Rep. 258)

SCHUYLER v. KIRK BROWN REALTY CO.

(Supreme Court, Special Term, Onondaga County. November 10, 1919.)

1. PLEADING §216(1)—DEMURRER.

On demurrer to the complaint, only matters that appear or fail to appear in the complaint are to be considered.

2. PLEADING §34(3)—SUFFICIENCY OF COMPLAINT.

In an action by an assignee of a contract of sale of land for specific performance, on demurrer to the complaint it will be assumed, in the absence of any allegations in the complaint, that the plaintiff assumed the obligations which rested upon the assignor.

3. SPECIFIC PERFORMANCE §6—MUTUALITY OF REMEDY.

A vendee in a contract of sale of land, entitled to a conveyance upon payment of a certain sum of money and execution of a mortgage and bond, was entitled to specific performance; the vendor having the right, in the event of his legal remedies becoming inadequate, to compel specific performance.

4. SPECIFIC PERFORMANCE §17—PERSONS ENTITLED TO ENFORCE; ASSIGNEE OF VENDEE IN CONTRACT OF SALE.

An assignee of a vendee in a contract of sale of land may compel specific performance thereof.

5. SPECIFIC PERFORMANCE §6—MUTUALITY OF REMEDY.

The true doctrine in regard to mutuality in specific performance is that a defendant should not be compelled to specifically perform his promise, unless equity is able to give him, at the time of the decree or later, such performance on plaintiff's part as defendant bargained for.

6. SPECIFIC PERFORMANCE §130—RELIEF TO DEFENDANT; OFFERS OF PLAINTIFF BINDING ON HIM.

In an action by an assignee of a vendee under a contract of sale of land, whereby vendee was entitled to conveyance upon payment of certain money and execution of a bond and mortgage, the court, where the plaintiff offers in his pleading to join with his assignor in a mortgage and bond, may enforce such offer as a basis and condition for any relief given him, although such offer is more than that required by the contract.

Action by William A. Schuyler against the Kirk Brown Realty Company. On demurrer by defendant to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. Demurrer overruled, with leave to the defendant to withdraw the demurrer and answer the complaint.

Hancock, Spriggs, Melvin & Hancock, of Syracuse (Stewart F. Hancock, of Syracuse, of counsel), for plaintiff.

Bond & Shoeneck, of Syracuse (George H. Bond, of Syracuse, of counsel), for defendant.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ROSS, J. This action is brought for specific performance on the part of the defendant of a certain agreement made on the 21st day of March, 1918, between the defendant and one T. Aaron Levy, whereby the defendant agreed to sell, and the second party to purchase, certain real property in the city of Syracuse for the sum of \$36,500; \$500 was to be paid at the time of signing the agreement, \$6,000 on the delivery of a good and sufficient warranty deed and an official abstract of title, and the balance to be paid in equal annual payments of \$1,000 each, beginning on May 1, 1919, to be secured by the bond of said second party (T. Aaron Levy), together with a purchase-money mortgage on said property. The complaint alleges:

That, prior to the commencement of the action, the aforesaid T. Aaron Levy sold, assigned, and transferred to the plaintiff, for a valuable consideration, all his right, title, and interest in and to the contract heretofore referred to; "that the plaintiff's assignor [T. Aaron Levy] has duly performed all of the conditions of said agreement on his part, and has always been ready and willing, and the plaintiff herein still is ready and willing, to fulfill all the obligations imposed upon the plaintiff's assignor, or upon himself as assignee, in and by said agreement, and for a marketable title of said premises described in the aforesaid contract. * * * Plaintiff is ready and willing, and hereby offers, to pay the residue of the purchase money to the defendant, and to give the purchase-money bond executed by the plaintiff's assignor, or by this plaintiff, or by both, as the defendant may elect, and the purchase-money mortgage as stipulated in the aforesaid written contract."

There are other allegations in the complaint in reference to a claimed inability of the defendant to convey all of the premises described in the aforesaid agreement, and for a just deduction from the purchase price on account of the deficiency of quantity due to the inability of the defendant to convey all of said premises, which last-mentioned claim is not relevant to the questions herein presented.

[1, 2] The defendant's claim, as presented by this demurrer, is, in substance, that the allegation in the complaint relative to the assignment of the contract in question shows that it does not impose any obligations or covenants or agreements on the part of the assignee to perform the obligations, covenants, and agreements which his assignor made to the Kirk Brown Realty Company. The defendant's counsel, as a part of his brief, furnished to this court a copy of the assignment executed by T. Aaron Levy on or about the 25th day of April, 1919, to the plaintiff, which assignment does not show the assumption by the plaintiff of any obligations. Strictly speaking, the only matters which I can consider upon this demurrer are the matters which appear or fail to appear in the complaint. The assignment in question is not in terms a part of the complaint, but, from the absence of any allegation in the complaint that the plaintiff did not in fact assume the obligations which rested upon the assignor, that fact may be assumed, although, as I view the questions presented, the failure of the plaintiff to assume in the assignment the obligations of his assignor does not affect his cause of action.

The basis of the claim of the defendant and of the cases which he cites rests upon the apparent doctrine of *Wadick v. Mace*, 191 N. Y. 1, 83 N. E. 571, upon what is termed "mutuality of remedy." The

learned judge, in the case referred to, stated in the opinion (191 N. Y. 5, 83 N. E. 571):

"Both parties, at the time when the contract is executed, must have the right to resort to equity for its specific performance, or it will not be specifically enforced; * * * the general rule being that an executory contract will not be specifically enforced, unless the remedy is mutual."

The action in this case was brought by the vendee against the executor of the vendor, and, as was stated by Mr. Justice Smith, in referring to this case in his dissenting opinion in the case of *Dittenfass v. Horsley*, 177 App. Div. 149, 163 N. Y. Supp. 630:

"There was an express surrender by one of the parties of the right of specific performance, which the court held to work a surrender by implication of the same right in the other party, and in addition the description of the property was held to be so indefinite that the court would not be able to decree specific performance, even if it were willing to do so."

And Judge Bartlett, writing for the court in the prevailing opinion (191 N. Y. on page 6, 83 N. E. on page 573), uses the following language:

"While I think this contract lacks the mutuality of remedy which has been so often essential to the right to a specific performance, there are other reasons which amply support the action of the trial court in denying that relief to the plaintiff. The uncontradicted evidence leaves no doubt that the minds of the parties never met in respect to the specific location and boundaries of the property to be conveyed."

And again (191 N. E. on page 7, 83 N. E. on page 573):

"These facts, I think, make it sufficiently plain that the real agreement between the parties * * * was either so vague and indefinite in essential respects, or would be so inequitable in its effect, if construed in accordance with the contention of the vendee, that it cannot be specifically enforced."

Thus it appears upon an examination of that case that the broad statement of the rule of mutuality went beyond the necessities of the decision in that case.

The language of the courts in reference to mutuality in specific performance, which sometimes has been carelessly applied, were frequently based upon the language used in Lord Justice Fry's treatise on Specific Performance. This doctrine was somewhat criticized by the late Prof. James Barr Ames in an article published in 3 *Columbia Law Review*, page 9, and also in Ames' *Lectures on Legal History*, page 370, in which Prof. Ames, while not disputing the general rule laid down by Lord Justice Fry, states eight separate exceptions, each of which is at variance with the general rule above referred to, and follows with a statement that:

"A rule so overloaded with exceptions is fairly open to this severe criticism by Prof. Langdell: 'The rule as to mutuality of remedy is obscure in principle and in extent, artificial and difficult to understand and to remember.'"

And continues:

"If, however, we examine the actual cases in which a plaintiff failed to obtain specific performance of a contract solely on the ground that equity

could not force him to perform his own counter promise, we shall find that the underlying principle of the decisions is simple and just, easy to grasp and to carry in the mind, and one that may be expressed in few words without qualifying exceptions. The principle may be stated as follows: Equity will not compel specific performance by a defendant if, after performance, the common-law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract."

Applying these principles to the case at bar, we have an agreement of purchase and sale of real property; the vendor (the defendant) retains the legal title as security for the payment of the purchase money; in addition to this, he has the agreement of plaintiff's assignor (T. Aaron Levy) to execute his bond; and of neither of the foregoing rights can he be deprived, except by his own agreement, so that, after performance, the common-law remedy of damages would not be his (the defendant's) sole security for the plaintiff's performance of the contract. As stated by Prof. Ames, *supra* (page 376):

"The reciprocity of remedy required is not the right of each party to the contract to maintain a bill for specific performance against the other, but simply the right of one party to refuse to perform unless performance by the other is given or assured."

The case specially relied upon by the defendants, *Dittenfass v. Horsley*, 177 App. Div. 143, 163 N. Y. Supp. 626, affirmed 224 N. Y. 560, 120 N. E. 861, was—

"a suit in equity for the specific performance of an agreement in writing made by the appellant, William Horsley, on the 8th day of February, 1913. * * * He alleges that in the month of February, 1913, one Selznick, mentioned in the agreement, duly assigned all his right, title, and interest therein to one Burt, who in the same month duly assigned all his right, title, and interest therein to the plaintiff. The agreement is as follows: 'In consideration of \$1, receipt whereof is hereby acknowledged, William Horsley of New York City, agrees to sell to Lewis J. Selznick, of New York City, 500 shares of common and 500 shares of preferred capital stock of the Universal Film Manufacturing Company, a New York corporation, the par value of said shares being \$100 each, for the sum of \$40,000, on the following terms and conditions: \$10,000 in cash to be paid on Monday, February 10th, on the payment of which he is to receive 125 shares of the preferred and 125 shares of the common. * * *'"

Then follow provisions in regard to the payment of the balance, and the last clause:

"In witness whereof, the parties hereto have hereunto set their hands and seals this eighth day of February, 1913, in the presence of witness E. H. Underhill.
William Horsley."

We have here an agreement which at most was an option given by Horsley to Selznick, which was assigned by the holder after the time for acceptance and performance had elapsed. As stated in the opinion (177 App. Div. on page 146, 163 N. Y. Supp. on page 628):

"Upon no theory was the agreement binding upon Selznick at the time of its execution, for he did not agree to perform, * * * and, even had he signed it, it could not be construed as obligating him to perform. * * * Assuming, however, that it was a valid option, the plaintiff fails to show that it was duly accepted by Selznick, or that the latter duly tendered the cash payment of \$10,000 and the notes, and offered to agree with respect to the depositary and to perform at the time specified in the writing therefor."

[3] The plaintiff's rights in the Dittenfass Case were based upon a naked offer, or, at best, an expired option, and no allegation of a tender of performance of the conditions of the option or offer; while in the case at bar we have, as a foundation of the action, a bilateral contract which can be enforced by the defendant against the vendee, Levy, and the plaintiff alleges performance, so far as his assignor or he were required to perform until the beginning of the action, and a tender of performance by both Levy and himself as to the matters yet to be performed, including a tender of the security of his own bond, in addition to that of Levy. In other words, the defendant has lost no rights which he had against Levy, but has the opportunity to acquire additional security by the voluntary action of the plaintiff, and retains the right, in the event of his legal remedies becoming inadequate, to compel specific performance against Levy.

[4] The right of an assignee of a vendee of a contract to compel specific performance is recognized in the cases. *Jones v. Lynds* (1838) 7 Paige's Ch. 301. In this case the learned Chancellor states as follows:

"In other words, the assignee of the contract takes it subject to all equities which existed between the parties thereto arising out of such contract. And the court will require him to perform all the stipulations which the assignor was bound to perform in favor of the adverse party, to entitle him to a decree for a specific performance."

See *Seaman v. Van Renssalaer*, 10 Barb. 81; *Dodge v. Miller*, 81 Hun, 103, 30 N. Y. Supp. 726. The statement of Hand, J., who wrote the opinion in the *Seaman* Case, on page 86, is instructive:

"On a valid contract for the purchase of land, the vendor, in equity, is deemed to stand seised for the benefit of the purchaser, and has a lien upon it for the purchase money. And as against the assignee of the vendee he may proceed in rem against it. And it is said the vendee, if he has paid, and the title be defective, also has a lien. They are trustees for each other—one of the land, and the other of the purchase money."

The cases cited by the defendant are distinguishable from the instant case, either in the facts or in the relief sought. In a general way, it may be stated that in those cases wherein the assignee of the vendee either sought specific performance, as plaintiff, or alleged and sought such relief by way of counterclaim, that he was either unable to perform, or had failed to tender performance of, all the obligations which the vendee, his assignor, immediate or remote, has obligated himself to perform.

[5] It seems to me that the true doctrine in regard to mutuality in specific performance is that a defendant should not be compelled to specifically perform his promise, unless equity is able to give the defendant, at the time of the decree or later, such performance on plaintiff's part as defendant bargained for. See article of Prof. William Draper Lewis, entitled "The Present Status of the Defense of Want of Mutuality in Specific Performance," in the *American Law Register*, New Series, volume 42 (1903), page 591, which gives the following rule (page 629):

"A plaintiff can have specific performance in all cases where the contract is fair and reasonable in all its parts, where he is not himself in default, and where the obligations of the defendant which he seeks to enforce are capable of being enforced by the court, and that to this rule there are no exceptions, either on the ground of want of mutuality in the remedy, or on the ground that the court cannot undo what it directs to be done."

[6] The plaintiff, in his complaint, stated that he—

"is ready and willing, and hereby offers, to pay the residue of the purchase money to the defendant, and to give the purchase-money bond executed by plaintiff's assignor, or by this plaintiff, or by both, as the defendant may elect, and the purchase-money mortgage as stipulated in the aforesaid written contract."

It may be doubted whether this offer would be sufficient foundation for a separate and subsequent action for its enforcement, but there can be no doubt that it can be enforced in this action, as a basis and condition for any relief given to the plaintiff. In brief, the defendant has every right, legal and equitable, he ever possessed against Levy, and in addition has acquired rights against the plaintiff which this court can and will enforce, and there is no good reason why in justice and equity the defendant should not be compelled to perform the obligations he owed to the plaintiff's assignor.

The demurrer overruled, with costs, but with leave to the defendant, within 20 days after service of the copy of the interlocutory judgment to be entered hereon, to withdraw said demurrer and answer the complaint.

(189 App. Div. 324)

In re WOODS.

In re PREUSS' WILL.

(Supreme Court, Appellate Division, Second Department. November 7, 1919.)

1. WILLS $\Leftrightarrow$ 166(1)—UNDUE INFLUENCE; EVIDENCE.

Evidence held not to justify finding that testatrix's will was executed under undue influence of a sister-in-law, nephews, and a niece, resident in the same city, whom she preferred to the exclusion of other nonresident nephews.

2. TRIAL $\Leftrightarrow$ 305—JURY; NO ACCESS DURING DELIBERATIONS, SAVE AS ORDERED.

An officer of the Surrogate's Court should not have gone into the jury room to pay their fees to a jury deliberating on the issue of undue influence in a will case; it being important that none should have access to the jury for any purpose, save as directly ordered by the court.

Appeal from Surrogate's Court, Kings County.

In the matter of the Petition of Charles Woods to prove the last will and testament of Carolina Preuss, late of the county of Kings, deceased. From a decree of the Surrogate's Court, denying the petition, and from an order denying petitioner's motion for new trial petitioner appeals. Decree and order reversed, and new trial ordered on issue of undue influence.

Argued before JENKS, P. J., and MILLS, RICH, PUTNAM, and JAYCOX, JJ.

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Charles Fischer, of New York City (Edward A. Kole, of New York City, and Harry L. Lewine, of Mt. Vernon, on the brief), for appellant.

Fred L. Gross, of Brooklyn, for respondents.

JENKS, P. J. [1] The jury answered that a competent testator duly executed the will, but under undue influence. I think that the proof did not justify finding that the will was not the act of the testator alone. I need not again discuss the rules of proof, stated frequently and recently by this court. *Matter of Powers*, 176 App. Div. 455, 162 N. Y. Supp. 828; *Matter of Fleischmann*, 176 App. Div. 785, 163 N. Y. Supp. 426; *Matter of Ruef*, 180 App. Div. 203, 167 N. Y. Supp. 498, affirmed 223 N. Y. 582, 119 N. E. 1075.

The testator was childless. The scheme of the will is natural. It provided first for the husband, and in the event of his death before the testator it divided the estate equally between a sister-in-law and certain nephews and a niece. The next of kin and heirs at law were nephews and this niece. There were four nephews, who were cut off with \$10 apiece. I fear that frequently, in such cases, jurors mistake their functions as those of an ultimate testator, and I surmise that in this case, in order to make a will just in their opinion, the jury found that the testator had never made a will of her own. There are not facts direct or pregnant sufficient to show duress, domination, fraud, or imposition of the will of another upon the testator. She was apparently a sprightly woman 72 years old, who lived in an apartment with her husband, where she did the housework. Nothing is shown to indicate senility, or unsoundness of mind, or subservience.

During the epidemic of influenza in November, 1918, her husband, an aged man, fell ill, and within a few days she likewise. Her husband died, and shortly after, when her influenza developed into pneumonia, she died. A few days before her death she made the will, and executed it before three witnesses. With her sister-in-law and her niece and nephews, all resident in the city of the testator, she appears to have been on intimate terms. The four nephews, all adults, whom she cut off, were residents of Michigan. It does not appear that she had seen them for many years or had any written intercourse with them. It does not seem startling or strange that she should have preferred those in intimate association to those who were comparative strangers and with no closer tie of kin.

There was, of course, opportunity for wrongdoing by the beneficiaries, because the sister-in-law and her daughter were in alternate constant attendance day and night in nursing the sick. But there is nothing sinister in that association, in view of the fact of the tie between them and the sick woman, and of the proof that there was a lack of nurses at a time when an attending physician testifies that he had 300 cases of influenza alone; and there was opportunity for wrongdoing by Woods, one of the favored nephews and the sole executor, for he caused the will to be prepared and brought it to the testator. Naturally enough, his mouth was closed by an objection made under section 829 of the Code of Civil Procedure, but without exception or motion it did crop

out that he saw the testator before the paper was drawn and that she gave him the facts. Opportunity alone is of little probative force.

There are two circumstances upon which stress is laid by the learned counsel for the respondent:

(1) When the will was prepared, the husband of the testator lay dead in another room. His death was never made known to the testator. She must have supposed that he still lived when the will was executed, for she bequeathed all of her estate to him, with provision, "In the event, however, of the death of my beloved husband, the said August Preuss, prior to my decease," then all of her property should be divided as I have described heretofore. Of course, there was a mistake; but it did not exclude any natural object of the testator's bounty. And we have no reason to infer that, if the testator had known that her husband was dead, she would not have made this provision that was effective only after his death. Nor have we reason to infer that, if she had known that her husband was dead, she would have changed the will to the benefit of the other nephews or to the detriment of the present beneficiaries. The effect of the mistake was but acceleration. Quite a different question would have been presented, if the mistake had excluded a natural object of bounty. Moreover, the objections raised no issue of mistake, and the proof was but adduced to indicate fraud by imposition. The reason given for the silence as to the death of the husband is not far-fetched. It was the fear of the effect of such tidings upon the condition of the testator, who then lay desperately ill.

(2) After the contents of the will were made known, the nephew Woods, one of the beneficiaries wrote to his cousin in Bay City, also a nephew of the testator, and sent to him a purported copy of the will, and later a waiver of citation and consent to probate. The will sent by Woods contained the same provisions as the will executed by the testator, but the former had an attestation clause, and the will had none, although it was subscribed by three witnesses. The will itself is inartistically drawn. Woods testified without dispute that he caused it to be prepared by a stenographer—a fellow employé, who was not a lawyer, but who had some experience in drawing wills, and owned a book of forms at home, which book the scrivener had in mind. The will forwarded by Woods is in technical language. The source of the copy is not made clear. It is possible that Woods may have used a form in the form book, of some approved character, or that he may have had a will drawn in technical language. The names signed to the attestation clause in the alleged copy are the same as the names of the witnesses to the original will. It is neither pretended nor alleged that the contestants were in any way misled or deceived by the will sent to them; and it does appear that they retained counsel, who made an examination of the matter, and who was afforded information by Woods.

[2] An irregularity of procedure is urged by the appellant. While the jury were in deliberation, it appears that one of the officers of the Surrogate's Court went in their room to pay them their fees. There is no evidence that this officer did anything wrong, or attempted to do

so; but it is important that none should have access to the jury for any purpose, save as directly ordered by the court.

Decree and order of the Surrogate's Court of Kings County, and verdict of the jury upon the issue of fraud and undue influence, reversed, and new trial ordered, but only upon that issue; costs to abide the final decree. Settle order before the Presiding Justice. All concur.

(189 App. Div. 238)

VEELDORANO v. UNION RY. CO. OF NEW YORK CITY.

(Supreme Court, Appellate Division, First Department. November 7, 1919.)

1. WITNESSES ¶275(6)—CROSS-EXAMINATION OF PLAINTIFF; NEGLIGENCE AT OTHER TIMES.

In action against street railway for injuries to wagon driver in crossing accident, it was improper to cross-examine the driver as to other accidents which he had had, the only question being as to the negligence which caused the particular accident involved in the action, and his negligence at any other time not being pertinent, and such cross-examination was not proper as an answer to testimony of plaintiff, "I have played safety first," in answer to question whether he had crossed the crossing without giving notice.

2. APPEAL AND ERROR ¶1048(6)—PREJUDICIAL ERROR IN CROSS-EXAMINATION OF WITNESS.

In action against street railway for injuries to wagon driver, cross-examination of plaintiff as to other accidents he had had, where it was not shown that the other accidents were due to his negligence, was prejudicial error; the inference being that he was generally careless.

3. STREET RAILROADS ¶99(16)—CONTRIBUTORY NEGLIGENCE OF DRIVER OF VEHICLE; LAW OF ROAD.

A water wagon driver, who upon approaching an intersecting street turned to the left and crossed over to water the south side of street, on which he had been traveling, without passing beyond point of intersection, and was struck by a street car as he was turning, held not contributorily negligent, where he crossed over before he came to the traffic upon intersecting street; neither the general rule nor the ordinance requiring vehicles turning to left into another street to go to right of and beyond intersection being applicable.

Appeal from Trial Term, New York County.

Action by Stanzy Veeldorano against the Union Railway Company of New York City. From a judgment for defendant upon a verdict of a jury, and from an order denying a motion for new trial, plaintiff appeals. Reversed, and new trial granted.

See, also, 183 App. Div. 575, 171 N. Y. Supp. 5.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

Thomas J. O'Neill, of New York City (L. F. Fish, of New York City, on the brief), for appellant.

Alfred T. Davison, of New York City (E. Crosby Kindleberger, of New York City, of counsel), for respondent.

SMITH, J. The action is one for negligence. The plaintiff was the driver of a water wagon in the department of street cleaning. He

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

was proceeding west upon 138th street towards the intersection with Mott avenue. Mott avenue was considerably wider at this point than it was further north. There was a plaza there. Mott avenue to the south went to the river and was little used; to the north it was much used. There was a pole upon which the railroad wires were strung in 138th street to the eastern part of this plaza. It was about 45 feet east from the east line of Mott avenue, extended from the north. It was somewhat west from the east line of Mott avenue as it turned in and made the plaza from the south. It was south of the property, owned by the New York Central Railroad, used as a station. The plaintiff was going west upon his water wagon, and did not desire to turn into Mott avenue, but desired to turn across the street from the north to the south, so as to proceed easterly and water the south side of the street. He swears that he looked to the east and saw a car about 150 feet away. The next he saw of the car was, when he was turning, the car struck his wagon, and pushed it against this trolley pole, and caused plaintiff's injury. The jury rendered a verdict for the defendant.

[1, 2] There are, I think, two errors which require a reversal of this judgment. The defendant was allowed to ask the plaintiff whether he had had four other accidents. Now, in one of those accidents presumably he was not guilty of negligence, because he was paid by the trolley company an amount for the damages which he suffered. As to the three other accidents, there is no proof of the circumstances under which they occurred. It is not proper to ask the plaintiff as to these accidents, any more than it would be to ask whether the defendant had not had other accidents through the same motorman. The question is as to what negligence caused this accident, and whether plaintiff had been negligent at other times, or even whether he was generally negligent, is not a pertinent fact. While it is not proven that these other accidents were caused by the fault of the plaintiff, nevertheless the general inference would be that he was a careless man generally. The defendant seeks to sustain this ruling as proper cross-examination in answer to other evidence given by him. He was asked whether he had crossed the crossing, giving notice, and he swore, "I have played safety first." This, also was upon cross-examination. It is claimed that, in view of that testimony, this cross-examination as to his other accidents was proper. I think it was not. It was extremely prejudicial to the plaintiff, and for this error the judgment should be reversed.

[3] There is another ground upon which the judgment should be reversed. There is an ordinance of the city which reads as follows:

"6. Turning to the Left into Another Street.—A vehicle turning to the left into another street shall pass to the right of and beyond the center of the street intersection before turning."

This ordinance was admitted in evidence over the plaintiff's objection. I do not think it was competent evidence. In the first place, the plaintiff was not turning into another street; so he was not subject to the provisions of the ordinance. In the second place, in my opinion, this point should not be deemed the intersection of the street. The

main travel upon Mott avenue to the north would be entirely to the west of this trolley pole, and in fact the main travel north upon Mott avenue, coming from the west upon 138th street, would be to the west of this trolley pole. I think that the plaintiff was not required to go beyond the trolley pole; but he had the right, if he exercised reasonable care, to go to the left of this trolley pole in turning around, so as to take the other side of the street. The mere introduction of this ordinance would probably not have caused much injury to the plaintiff, except for the charge as made. The charge was colorless. It did not state in any way what the plaintiff's duty was, or what was the defendant's duty, and at the end of the charge the defendant's counsel asked the court to charge that the plaintiff was presumed to know and called upon to know concerning these ordinances which had been read in evidence. This he charged. He was further asked to charge that disobedience of one of these ordinances is some evidence of negligence. His answer is:

"It is some evidence, that is to be taken in connection with all the other testimony as to whose negligence caused the accident."

The court then said:

"I have two requests from the plaintiff's counsel. It is undisputed in this case that the plaintiff, while going west on the north side of 138th street, was turning to the left for the purpose of crossing to the east side of the street, so that he could proceed in an easterly direction on the south side of the street. I refuse to so charge, for the reason that, as I understand the testimony, the plaintiff had gone to the intersection of Mott avenue and 138th street, and that he was just crossing inside of 138th street. He was crossing at an intersection of 138th street and Mott avenue; so I refuse to make that charge."

The plaintiff's counsel excepted.

"The Court: No. 2. If the jury find that the plaintiff was crossing from the north side of 138th street, he was not required by the city ordinances or police regulations in evidence to go to the west of the center of the intersection of 138th street and Mott avenue. The ordinance merely required that, in crossing from one side of the street to the other, he should do so by turning to the left, so as to keep in the same direction as the traffic on that side of the street. I refuse to so charge, for the same reason that the evidence is that the crossing was at the intersection of 138th street and Mott avenue, and not in the center of the street between the blocks."

To this the plaintiff's counsel excepted.

It seems clear that the jury must have drawn the inference from this charge of the court, and refusal to charge the plaintiff's requests, that the plaintiff was guilty of contributory negligence, or, at least, that it was evidence upon his contributory negligence that he did not pass the intersection of Mott avenue and go over upon the west side before turning around. Neither the ordinance nor the general rule applies. He was practically east of the traffic, both north and south upon Mott avenue, and it was perfectly proper for him to cross over the street where he did. This charge to the jury presents a wrong basis upon which to determine the plaintiff's contributory negligence. For this error, also, I think the judgment should be reversed.

Judgment and order should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

(108 Misc. Rep. 632)

PEOPLE ex rel. POST & McCORD, Inc., v. CANTOR et al., Com'rs of Taxes
and Assessments.

(Supreme Court, Special Term, New York County. August 5, 1919.)

TAXATION $\S$ 160, 161—ASSESSMENT; EXEMPTION AS "MANUFACTURING" OR
"MERCANTILE" CORPORATION.

A corporation engaged in furnishing steel structures erected in place on realty in accordance with plans and specifications of engineers or architects is neither a "manufacturing" nor a "mercantile" corporation, within Tax Law, $\S$ 208, as amended by Laws 1917, c. 726 and its application to vacate an assessment of its capital under Tax Law, $\S$ 12, on ground that it is required to pay a tax of 3 per cent. on net income, and is exempt from any tax on its personality or capital, will be dismissed.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Manufacturing Corporation; First and Second Series, Mercantile.]

Application by the People, on the relation of Post & McCord, Incorporated, against Jacob A. Cantor and others, as Commissioners of Taxes and Assessments of the City of New York, constituting the Board of Taxes and Assessments therein, to vacate a tax assessment. Writ dismissed.

Dixon & Holmes of New York City, for relator.

William P. Burr, Corp. Counsel, of New York City (Max Salomon, of New York City, of counsel), for defendants.

LEHMAN, J. The relator's capital has been assessed by the defendants under section 12 of the Tax Law (Consol. Laws, c. 60) at the sum of \$100,000. It seeks to have this assessment vacated on the ground that it is a manufacturing or mercantile corporation, and that by virtue of the provisions of chapter 726 of the Laws of 1917 it is required to pay a tax of 3 per cent. on its net income and is exempt from any tax on its personal property or capital. There is no doubt that the relator can be required to pay only one tax, but apparently the state tax commissioners have decided that it is a mercantile corporation, and as such subject to a tax on its income, while the tax commissioners of the city have decided that it is subject to a tax on its capital. The relator is engaged in the work of furnishing steel structures erected in place in accordance with the plans and specifications of engineers or architects. It furnishes preliminary advice for such specifications, then orders the steel to be fabricated or prepared at the mill, and erects it in place. It not only does the work of erecting the steel structures, but furnishes the steel and materials. It now claims that, because it purchases the steel from the mill and then transfers title to it when erected, it in effect sells the steel, and since the value of the steel is usually more than four times the cost of the labor and overhead expense of erecting the structure, its business must be considered principally that of buying and selling steel, and it is therefore a mercantile

$\S$ —For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

corporation. Section 208 of the Tax Law, as amended by Laws 1917, c. 726, contains the following definitions:

"3. The term 'manufacturing corporation' means a corporation principally engaged in the business of manufacturing tangible personal property for itself or for others.

"4. The term 'mercantile corporation' means a corporation principally engaged in the business of buying or selling tangible personal property for itself or for others."

It would seem quite clear that the corporation is not a manufacturing corporation, because the structures which it erects are not "personal" property, but are attached to the realty and become part thereof. Obviously, decisions of the bankruptcy courts construing a different statute, in which the word "manufacturing" can, through its context, be given a wider definition, have no application to the question before me. It seems to me that similar considerations must lead to the conclusion that the relator is not a mercantile corporation. Its contracts are in various forms, but apparently all the contracts require the relator in substance to furnish the work and materials for the complete erection of steel structures to become attached to the realty. It is true that in order to perform these contracts it must purchase steel, and that the cost of such steel represents the larger part of the price paid upon the contract. It does not, however, sell this steel as personal property, but passes title to the steel merely as part of the contract for the performance of work and the furnishing of materials and through the incorporation of this steel in the realty. In no case could a court construe its contract as a contract for sale and delivery of goods.

The contract which in its terms seems most favorable to the relator's contention is a contract for the "construction" of a part of a rapid transit railway. This contract was the largest contract of the relator for the year in which the assessment was laid, and the materials which went into the contract represent approximately 85 per cent. of the contract price. The relator, however, nowhere expressly or impliedly agreed to sell to the city these materials, but merely agrees to furnish them as part of the work of construction. The relator lays great stress upon the fact that the contract provides for payment of a specified sum when the steel was delivered on the job, but this fact seems to me immaterial. The contract is not for a lump sum, but for unit prices, payable in certain fixed amounts as the work progresses, and the payment for steel delivered represents one way of measuring the value of the work performed and materials furnished, and is evidently for the convenience of the parties, but in nowise detracts from the nature of the contract, as a complete contract for work, labor, and materials, and not a divisible contract in part for the sale of materials.

The relator is undoubtedly engaged in the business of buying tangible personal property, but such buying is not the principal part of its business, and I cannot find that it is engaged in the business of selling it. Its business is to incorporate the personal property it buys into realty and to supply this personal property as part of its business of

furnishing work, labor, and materials necessary for complete steel structures. The statute, I think, clearly does not include corporations which are principally engaged in the business of performing building or erection contracts. It follows that the writ must be dismissed.

Writ dismissed.

(189 App. Div. 184)

GOLDFEDER v. GREENBERG. (No. 1.)

(Supreme Court, Appellate Division, Second Department. November 7, 1919.)

1. VENUE $\S$ 88—NOTICE OF MOTION FOR CHANGE; DENIAL AS MADE TOO LATE.

Where personal injury action was brought in Westchester county, by plaintiff residing in Bronx county, against defendant residing in Kings county, and defendant served notice under Code Civ. Proc. § 986, demanding that place of trial be changed to Kings county, but neglected to follow this up by serving notice of motion to change the place of trial, but subsequently did serve such notice of motion, it was error to deny the motion on the ground that it was not made in time; the statute being directory merely, and the action being brought in the wrong county under section 984.

2. VENUE $\S$ 87—POWER OF COURT TO CHANGE OF HIS OWN MOTION.

Under Code Civ. Proc. § 987, where action is brought in wrong county, the court has power to change the place of trial, although no demand has been made.

Appeal from Special Term, Westchester County.

Action by Samuel Goldfeder against Simon Greenberg for damages for personal injuries from defendant's negligence. From an order denying his motion for change of venue, defendant appeals. Order reversed, and motion granted.

Argued before JENKS, P. J., and MILLS, RICH, BLACKMAR, and KELLY, JJ.

Matthew Swerling, of New York City, for appellant.

Sydney A. Syme, of Mt. Vernon, for respondent.

RICH, J. The action was brought in Westchester. Neither party resided there; the plaintiff being a resident of the county of Bronx and defendant residing in Kings county. Defendant served a notice under section 986 of the Code of Civil Procedure, demanding that the place of trial be changed to the county of Kings, but neglected to follow this up by serving a notice of motion to change the place of trial as provided in that section. He subsequently did serve a notice of motion to change the place of trial to the county of Kings, which was opposed upon the sole ground that it "was not made within the time in which defendant was entitled to make said motion." The motion was denied.

[1, 2] Section 986 of the Code is directory merely, and the court had power, under section 987, to change the place of trial, although no demand had been made. *Cronin v. Manhattan Transit Co.*, 124 App. Div. 543, 544, 108 N. Y. Supp. 963. Westchester county is not the proper county for the trial of this action. Section 984, Code of Civil Procedure. It was a mistake to bring it there, and the court is not

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without power to correct it. The motion ought to have been granted, and it follows that the order must be reversed.

Order reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. All concur.

GOLDFEDER v. GREENBERG. (No. 2.)

(Supreme Court, Appellate Division, Second Department. November 7, 1919.)

Appeal from Special Term, Westchester County.

Action by Samuel Goldfeder against Simon Greenberg. From adverse orders, defendant appeals. Orders reversed, and motion granted.

Argued before JENKS, P. J., and MILLS, RICH, BLACKMAR, and KELLY, JJ.

PER CURIAM. Orders reversed, without costs, and motion granted, on authority of Goldfeder v. Greenberg (Appeal No. 1) 189 App. Div. 184, 178 N. Y. Supp. 581, decided herewith.

(189 App. Div. 319)

In re HERBORN.

In re SCHULZ'S ESTATE.

(Supreme Court, Appellate Division, Second Department. November 7, 1919.)

1. EXECUTORS AND ADMINISTRATORS §=510(8)—ACCOUNTING; DETERMINATION ON APPEAL WHETHER LEGACIES ARE CHARGEABLE ON ENTIRE ESTATE.

On appeal from decision of the surrogate on petition of a surviving executor to render and settle his account, the executor having sought instruction as to all of the legacies in the will, the Appellate Division has power to pass on the question whether the legacies made by a particular clause of the will must be charged upon the entire estate.

2. WILLS §=732(2)—LEGACIES CHARGEABLE ON ENTIRE ESTATE.

Legacies to testatrix's niece and others, made by a particular clause of the will, *held* chargeable on the entire estate; testatrix having possessed personality only to the totally inadequate amount of \$366 when she executed the will, making large bequests therein.

3. WILLS §=807—NO COMMON ABATEMENT OF LEGACIES OF DIFFERENT CLASSES; "REMAINDER."

Where testatrix in the eighth clause of her will gave her husband \$18,000, in the ninth clause gave her grandniece \$1,000, in the tenth clause gave \$300 to her executors for care of her grave, and in the twelfth clause, on death of her husband, directed division of the "remainder" of her estate, \$5,000 to her niece and legacies of from \$1,000 to \$500 each, aggregating \$12,500, to eleven different persons, there can be no abatement common to both classes of legacies; those in the eighth, ninth, and tenth clauses being a charge on the estate, and those in the twelfth clause a charge only on the "remainder" or "residue," meaning what is left after some subtraction or separation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Remainder.]

Appeal from Surrogate's Court, Kings County.

In the matter of the petition of Otto Herborn to render and settle his account as surviving executor of Louisa Schulz, deceased. From

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a decree settling the account, Augusta Ambs appeals. Decree amended, and, as amended, affirmed.

Argued before JENKS, P. J., and MILLS, RICH, KELLY, and JAYCOX, JJ.

W. H. Janes, of New York City, for appellant.

M. Strassman, of New York City (James T. Hallinan, of New York City, of counsel), for respondent Dora Schulz.

Theodore Blum, of New York City, for respondent administratrix.

JENKS, P. J. This appeal presents a rehearing pursuant to our judgment in 187 App. Div. 938, 174 N. Y. Supp. 905. The appellant now confines her contention to propositions thus stated by her. That the legacies of the will were payable out of the proceeds of the property and were specific to that extent, that they were all of like character, contributed among themselves, and that all abate ratably.

After the usual provision for debts and for personal expenses and the bequest of personal chattels, the testator provided:

"Eighth—I give and bequeath to my husband, Eugene Schulz, the sum of eighteen thousand (\$18,000.00) dollars.

"Ninth—I give and bequeath unto my grand niece Louisa Ambs the sum of one thousand (\$1,000.00) dollars.

"Tenth—I give and bequeath the sum of three hundred dollars to my executors, to keep my grave in repair and proper condition.

"Eleventh—I give and bequeath the use, income and benefit of my remaining estate both real and personal to my husband Eugene Schulz during his natural life.

"Twelfth—Upon the death of my husband, I direct the remainder of my estate to be divided as follows: 1st—To my niece Augusta Ambs I give five thousand dollar [sic], or to her issue if she should die before such an event." Then follow six subdivisions that provide for legacies to 15 different persons, which legacies vary from \$1,000 to \$500 each, and which aggregate \$11,500.

"Thirteenth—All the rest, residue and remainder of my estate after the death of my said husband, shall go to and I hereby bequeath and give the same to Emma Herborn and Augusta Ambs.

"Fourteenth—I give hereby unto my executors full power and authority to sell and convey any portion or all of my real estate and give full and proper conveyance thereof."

Upon this trial it is established that the testator left only \$366 in personalty, and that this was the amount of such property at the time of the execution of the will. The estimated market value of the real estate was about \$71,000, subject to mortgages of about \$50,000. The learned surrogate has decreed that legacies provided in the eighth, ninth, and tenth clauses of the will must be charged upon the entire estate, but did not consider the legacies provided for in the twelfth clause, for the express reason that the question remitted by this court did not embrace them.

[1, 2] The first contention of the appellant, then, is not against the determination of the surrogate, but would extend it to the legacies of the twelfth clause. The executor sought instruction as to all of the legacies in the will, and I think this court has power to pass upon this question. *Robinson v. Raynor*, 28 N. Y. 494; *Matter of Rogers*, 10 App. Div. 593, 42 N. Y. Supp. 133; section 2763, Code of Civil Procedure. I am of opinion that the contention should prevail for the same reasons that apply to the legacies in the eighth, ninth, and tenth clauses. The total inadequacy of personalty of \$366 at the time of

the execution of the will indicates that, unless the testator sought to mock at her relatives, she must have intended that the legacies specified by her to the amount of \$35,800 were to be paid out of her entire estate. *Ely v. Megie*, 219 N. Y. 112, 113 N. E. 800; *Richardson v. Richardson*, 145 App. Div. 540-543, 129 N. Y. Supp. 941.

[3] I do not yield to the further contention of the appellant. In concrete form it is that the legacies provided in the eighth, ninth, and tenth clauses must abate equally with the legacies provided in the twelfth clause. The scheme of the will provides for the legacies of the eighth, ninth, and tenth clauses out of the estate intact. But thereafter the scheme but regards "my remaining estate," first to be charged with the life estate, and then, upon the termination thereof, the "remainder of my estate," which is to be "divided" into the legacies which are specified in the twelfth clause and its said subdivisions. Remainder means that which is left after some separation or subtraction. I think the word "remainder" was used, not in the strict legal sense of the term, but to describe that which was left after something had been taken from the estate. As to like use and construction of the word, or a word equipollent, see *McCorn v. McCorn*, 100 N. Y. 511, at page 514, 3 N. E. 480; *Chase v. Cartright*, 53 Ark. at page 365, 14 S. W. 90, 22 Am. St. Rep. 207; *Hubbard v. Hubbard*, 6 Metc. (Mass.) 50; *Hoyt v. Hoyt*, 85 N. Y. at pages 150, 151; *United States Trust Co. v. Black*, 146 N. Y. at pages 10 and 11, 40 N. E. 403.

If the legacies in the twelfth clause are to be charged like unto those in the eighth, ninth, and tenth clauses, then the latter are not charged upon the remaining estate, but upon the estate. If the legacies in the twelfth clause are in the same category as those in the eighth, ninth, and tenth clauses; then they are to be charged, not upon the estate, but upon the remaining estate. Either construction does violence to the plain language of the will. Further, the expression "remaining estate" is meaningless, unless there be some deduction, and yet there is no deduction, unless it be the legacies of the eighth, ninth, and tenth clauses. The legacies are of two classes; those in the eighth, ninth, and tenth clauses are a charge upon the estate, and those in the twelfth clause upon the remainder or residue of the estate. Wherefore there is no abatement common to both classes of legacies. *Roper on Legacies*, c. 7, § 1, star pp. 428, 429, et seq. See, too, *Am. & Eng. Ency. of Law* (2d Ed.) vol. 1, p. 42; *Matter of Title Guarantee & Trust Co.*, 195 N. Y. 339, 88 N. E. 375; *Thompson v. Thompson*, 3 Dem. Sur. 409; *Langstroth v. Golding*, 41 N. J. Eq. at page 53, 3 Atl. 151; *Hubbard v. Hubbard*, supra, 6 Metc. (Mass.) at page 63. To my mind, the principle is not affected by the fact that the legacies charged upon the remainder of the estate are of specific amounts. The testator may have erred in estimation of the amount of her remaining estate, but that affords no indication of her intent that charges thereon should be increased at the expense of the charges upon the entire estate. Moreover, in the case at bar, the remaining estate devoted to the payment of the legacies in the twelfth clause is postponed for the life estate, and the testator may have estimated that upon the termination of the life estate the realty would be of increased value. The con-

trolling fact is that the testator contemplated two different estates, and there is no indication of any intention that the general legatees should suffer for the benefit of the legatees of the "remaining estate."

The cases mainly relied upon by the learned counsel for the appellant may be discriminated, in that the legacies in each case were chargeable upon the same estate or fund. Thus in *Van Nest v. Van Nest*, 43 N. J. Eq. 126, 13 Atl. 179, the direction was that, of \$1,300, T. should have \$500 and the remaining \$800 to be equally divided among others; that is, all were to be paid out of the same fund, \$1,300, and so all abated. The decision in *Van Nest's Case* turns upon *Page v. Leapingwell*, 18 Ves. 463, also largely relied upon by the appellant. In *Page v. Leapingwell* the legacies of £7,800 and the over-plus both were charged upon the estimated fund of £10,000. In *Elwes v. Causton*, 30 Beav. 554, the charges were all upon £3 per cent. bank annuities. In *McCorn v. McCorn*, supra, the testator bequeathed \$1,000 to his wife and to his son Moses \$400, and the rest of the property was divided equally between certain persons, and the court but held that the widow was not entitled to full payment to the exclusion of the son.

The decree is amended in accord with this opinion, and, as amended, is affirmed, without costs of this appeal. All concur.

(108 Misc. Rep. 565)

JAMES et al. v. PEPPARD REALTY CO., Inc., et al

(Supreme Court, Special Term, Kings County. September, 1919.)

MORTGAGES **582—FORECLOSURE; ADDITIONAL COMPENSATION TO REFEREE.**

Where property sold under a judgment in foreclosure brings more than \$10,000, the referee to sell may not be allowed additional compensation, under Code Civ. Proc. § 3297, unless he has performed some unusual and exceptional labor, even though he has been unreasonably annoyed by attorney for owner of equity.

Action by Clinton R. James and others, as executors of John F. James, deceased, against the Peppard Realty Company, Incorporated, and others. On motion for an extra allowance to a referee upon a sale of real property upon foreclosure. Motion denied.

James P. Judge, of Troy, for plaintiffs.

Alvah W. Burlingame, Jr., of Brooklyn, for the motion.

James N. Catlow, of New York City, and John L. Danzillo, of Brooklyn (Edmund C. Viemeister, of Jamaica, of counsel), opposed.

FABER, J. This is a motion for an extra allowance to a referee upon the sale of real property on foreclosure, pursuant to section 3297 of the Code of Civil Procedure, which, among other things, provides:

"And a referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclose a mortgage, exceed fifty dollars, unless the property sold for ten thousand dollars or upwards, in which event the referee may receive such additional compensation as to the court may seem proper, or in any other cause [case] five hundred dollars."

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This statute fixes the referee's fees at a sum not to exceed \$50 where the property sold for less than \$10,000. The provision that, where the property sells for \$10,000 or upwards, the referee may receive such additional compensation as to the court may seem proper, not to exceed \$500, applies only to cases where some unusual or exceptional labor has been performed by the referee. It was never intended that, solely because the property was sold for more than \$10,000, as in this case, the referee is entitled to additional compensation. If that were so, there would be no reason for leaving the matter to the discretion of the court; there would be nothing but the amount realized to base a discretion upon. On this application there appears to have been no unusual or exceptional labor in connection with the referee's duties, and the motion for additional compensation is denied.

The referee contends that he was unreasonably annoyed by the attorney for the owner of the equity of redemption, who opposes this motion, but I know of no law or rule by which I can compensate him for such annoyance. He must find some other remedy.

Motion denied.

RICHARDSON v. MUSICAL BLUE BOOK CORPORATION.

(Supreme Court, Appellate Term, First Department. October 27, 1919.)

APPEAL AND ERROR $\Leftrightarrow$ 781(7)—COMPLIANCE WITH JUDGMENT; RIGHT TO COSTS.

A stay pending appeal from so much of an order allowing defendant to serve reply as granted \$10 costs, instead of full costs, having been denied, and trial had, resulting in verdict for plaintiff and judgment thereon, which has been satisfied, the court on appeal will not pass upon the merits of the order, since it can merely decide as to costs.

Bijur, J., dissenting.

Appeal from City Court of New York, Special Term.

Action by G. Dexter Richardson against the Musical Blue Book Corporation. From so much of an order granting plaintiff leave to serve a reply as granted \$10 costs, instead of full costs, defendant appeals. Appeal dismissed.

Argued October term, 1919, before GUY, BIJUR, and DELEHANTY, JJ.

Guernsey Price, of New York City, for appellant.

Arthur L. Fullman, of New York City, for respondent.

DELEHANTY, J. The court below made an order granting plaintiff leave to serve a reply upon payment of \$10 costs. Such reply was served, the costs tendered, and the case proceeded to trial. In the meantime defendant, having appealed from so much of said order as granted \$10 costs, instead of full costs to date thereof, applied for a stay pending determination of appeal, which was denied. The trial resulted in a verdict for plaintiff, and the judgment entered thereon was satisfied, and there is now no action pending.

The appeal for costs now comes on in due course to be heard, and the question to be determined is whether upon the facts presented the

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same should be considered. My conclusion is that it should not. The question involved is not a practical one, as the cause of action, out of which the order for costs sought to be reviewed arises, has been settled and extinguished by the acts of the parties themselves, and the court, under the circumstances related, ought not to pass upon the merits of an order which it can now neither affirm nor disaffirm, merely to decide as to the costs.

The rule is well established in this state that appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the rights of some party to the litigation (*Bryant v. Thompson*, 128 N. Y. 433, 28 N. E. 522, 13 L. R. A. 745); and where it appears that all substantial interest in the controversy has been parted with, or extinguished, the court will not hear the appeal merely to determine the right to costs (2 Cyc. p. 535, and cases there cited).

It follows that the appeal should be dismissed.

GUY, J., concurs.

BIJUR, J., dissents.

EDELMAN v. SCHWARTZ et al.

(Supreme Court, Special Term, Kings County. November 22, 1919.)

1. SET-OFF AND COUNTERCLAIM §44(1)—JOINT AND SEPARATE DEBTS.

At law a joint debt cannot be set off against a separate debt, nor a separate debt against a joint one.

2. SET-OFF AND COUNTERCLAIM §8(1)—IN EQUITY.

The general rule is as regards set-offs that equity follows the law.

3. SET-OFF AND COUNTERCLAIM §8(1)—IN EQUITY.

Something more than the mere existence of reciprocal and independent demands is required to authorize a set-off in equity, when not allowed under the statute.

4. PARTNERSHIP §178—ASSETS; PRIORITY OF FIRM CREDITORS.

The liability of partners is joint and several, but in marshaling the joint assets of the partnership and the individuals composing it, the partnership assets must first be used in the payment of partnership liabilities, and the individual assets in payment of individual liabilities.

5. JUDGMENT §883(6). — JUDGMENT AGAINST MEMBER CANNOT BE SET OFF AGAINST JUDGMENT FOR FIRM.

Plaintiff, who has a judgment against an insolvent member of a partnership, cannot, either at law or in equity, have the judgment set off against a judgment which the firm has against the plaintiff and his partner, since to do so would be inequitable; the creditors of the firm of which the insolvent partner is a member being entitled to have preserved unimpaired their right to collect the judgment against plaintiff and his partners.

Action by Benjamin Edelman against Harry Schwartz and others.
Judgment for defendants.

Joseph Goldstein, of Brooklyn, for plaintiff.

Allen M. Chamow, of New York City, for defendant Jacobs.

William Jacobs, of New York City, for defendants Schwartz.

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CROPSEY, J. An equitable set-off is sought. The plaintiff has a judgment against the defendant Harry Schwartz. The two defendants Schwartz, as copartners, have a judgment against the plaintiff and his partner, Levine, on a partnership liability. The plaintiff's judgment is larger than the other, and he seeks to have an assignment of the latter set aside, and then to have that judgment set off against the one he has. Harry Schwartz is insolvent.

[1] Without considering the assignment of the defendants' judgment, let us see if there can be a set-off. If this action were one at law, it seems plain the plaintiff's judgment could not be interposed as a counterclaim to defendants' action against plaintiff and his partner. This for the reason the claims are not between the same parties. The plaintiff has no cause of action against the firm that consists of the two Schwartzes. Civil Code, § 501. At law, a joint debt cannot be set off against a separate debt, nor a separate debt against a joint one. *Coffin v. McLean*, 80 N. Y. 560; *Hunter v. Booth*, 84 App. Div. 585, 82 N. Y. Supp. 1000; *Wolfe v. Washburn*, 6 Cow. 262; *Thomas v. Noonan*, 133 App. Div. 459, 118 N. Y. Supp. 25.

[2, 3] But this action is not one at law. It is brought in equity to bring about an equitable set-off. The general rule is, as regards set-offs, that equity follows the law. To this, however, there are exceptions. But "something more than the mere existence of reciprocal and independent demands is required to authorize a set-off in equity when not allowable under the statute of set-offs. Circumstances must be shown from which it can be inferred that one debt was contracted on the faith of the other, or that there was an agreement between the parties that the one should be deducted from the other, or some other intervening equity, which renders the interposition of that court necessary for the creditor's protection." *Pond v. Harwood*, 139 N. Y. 111, at page 119, 34 N. E. 768, 770. See, also, *Bathgate v. Haskin*, 59 N. Y. 533, 537, 538; *Smith v. Felton*, 43 N. Y. 419, 423; *Jordan v. Nat. Shoe & Leather Bank*, 74 N. Y. 467, 473, 30 Am. Rep. 319. Insolvency is one of the common causes for the exercise of this jurisdiction. But that may not justify the set-off. The question still is, Will it be equitable to do so?

[4] The liability of partners is joint and several, but "in marshaling the joint assets of persons composing a partnership and the assets of the individuals composing such partnership it is well established in equity that the partnership assets must first be used in the payment of partnership liabilities and the individual assets in the payment of individual liabilities." *Matter of Peck*, 206 N. Y. 55, at page 60, 99 N. E. 258, 41 L. R. A. (N. S.) 1223, Ann. Cas. 1914A, 798. See, also, *Matter of Dauchy*, 169 N. Y. 460, 464, 62 N. E. 573; *Hewitt v. Northrup*, 75 N. Y. 506, 509; *Matter of Roberts*, 214 N. Y. 369, 375, 108 N. E. 562; *Lansing Liquidation Corporation v. Heinze*, 184 App. Div. 129, 133, 136, 171 N. Y. Supp. 738.

[5] The only possible basis for a set-off here is the insolvency of Harry Schwartz. But that cannot justify the relief sought, for to do so would be inequitable. The creditors of the firm composed of the two defendants Schwartz are entitled to have preserved unimpaired

their right to collect their judgment against the plaintiff and his partner, because the collection of that judgment will increase the fund available for the satisfaction of their claims; and as the cases cited show their equity in this fund is superior to that of the creditors of the individual members of the partnership, one of whom is the plaintiff. To permit the sought set-off would result practically in the application of partnership funds to the payment of one partner's individual debts to the exclusion and prejudice of the partnership creditors. This cannot be permitted at law or in equity. *Howe v. Sheppard*, 2 Sumn. 409, Fed. Cas. No. 6,773; *Vose v. Philbrook*, 3 Story, 335, 348, Fed. Cas. No. 17,010; *Seligman v. Friedlander*, 199 N. Y. 373, 376, 380, 92 N. E. 1047.

Judgment for the defendants, with one bill of costs. Settle findings and judgment on notice.

(189 App. Div. 426)

SMITH v. H. J. BARTLE MFG. CORPORATION et al.

(Supreme Court, Appellate Division, Third Department. November 21, 1919.)

1. MASTER AND SERVANT §405(4)—WORKMEN'S COMPENSATION; EVIDENCE SUFFICIENT TO SUPPORT FINDING.

Evidence in support of a claim under the Workmen's Compensation Law for the death of a boy employed by the occupant of a building held to justify a finding that employer acquiesced in the use of an elevator in an adjoining building, and that deceased was engaged in his work at the time of the accident causing his death on the elevator.

2. MASTER AND SERVANT §878—WORKMEN'S COMPENSATION; EMPLOYE'S FAULT NO DEFENSE.

In view of Workmen's Compensation Law, §§ 10, 21, compensation for the death of a boy 16 years of age, who had never worked out before, is properly awarded, though somewhat at fault in the use of an elevator in a building not occupied by employer.

Woodward and Cochrane, JJ., dissenting.

Appeal from State Industrial Commission.

Claim by Savillia Smith under the Workmen's Compensation Law for the death of her minor son, Merlin Smith, opposed by the H. J. Bartle Manufacturing Corporation, employer, and the Standard Accident Insurance Company of Detroit, Mich., insurer. From an award of the State Industrial Commission, the employer and insurer appeal. Affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Neile F. Towner, of Albany, for appellants.

Charles D. Newton, Atty. Gen. (Bernard L. Shientag, of New York City, and E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

John F. Murray and William H. Murray, both of Troy, for respondent.

LYON, J. [1] The State Industrial Commission has found that Merlin Smith was 16 years of age in December, 1917. He had never

§—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

before worked out. He was a bundle boy in the employ of the H. J. Bartle Manufacturing Corporation, which was engaged in the manufacture of shelter tents for the United States government in the late war. They occupied the second, third, and fourth floors of the building having an entrance on Federal street in the city of Troy, N. Y. It adjoined a building with an entrance on River street. The two buildings were under one ownership and constituted the Tibbitts Block. Each had an elevator. These buildings were separated by brick walls. Through these walls were cut fire doors, which afforded easy access from one building to the other. One witness testified that a notice was posted on the wall near the fire door, saying, "No Admittance to This Building." Another witness testified that the notice merely said, "Fire Door."

The Bartle Corporation employed some 600 hands. Thirty of these were boys. George Tashjian rented an apartment in the River street building. He worked for the Bartle Corporation. He was accustomed to go up in the elevator in the river street building, passing through the fire doors 15 or 18 times daily. He would get work from the Bartle Corporation, would take it to his apartment, and when finished would take it back. He testified that he often found the iron doors open and the swinging gates up. The elevator was contiguous to the fire doors. One of the witnesses testified that she told the boys not to go through into the hallway; that they had no business there. The Smith boy, however, was not included in this warning. Another witness testified that the boys were accustomed to eating their luncheon in the hallway. It also appears that the boys were in the habit of playing with the elevator during the noon hour, and were forbidden to do so by one of the foreladies. It appears that the Bartle Corporation used the River street elevator to take up raw tent goods, which were unloaded from wagons. There is evidence that these fire doors were open much of the time.

The commission has found that the occupants of the Bartle Building used the elevator in the River street building with impunity. One of the witnesses testified that she ordered the Smith boy off the elevator the day before he was killed. At about 5 o'clock on the afternoon of December 12, 1917, the Smith boy was found wedged between the elevator on the fifth floor, and was so badly injured that he died within a short time. A three-wheeled truck of the Bartle Corporation, used to carry tent materials, was found on the elevator beside him. The forelady stated to the president of the Bartle Corporation that she had sent him on an errand to the fifth floor shortly before he was killed. Another employé testified that the last she saw the Smith boy the day he was killed was on the second floor going upstairs, on the corporation stairway, to the third floor, with tent material. This was where the work first started. Tashjian testified that he used this elevator a half hour before the accident, and that there was no truck on it then. Fellow employés, including Smith, used the elevator on the day before the accident, unloading goods from it without objection. The elevator was unattended at all times. A forelady testified that, if the boy used the River street elevator, he used it contrary to their wishes. Powell,

the superintendent of the Bartle Corporation, testified that several instances occurred where it was reported to him that the boys were in the habit of getting on the elevator. He seems to have made no order forbidding it. He did not consider it a violation of orders, or meriting a rebuke, much less a discharge.

The commission found a quasi acquiescence on the part of the employer in using the elevator. The facts and circumstances presented a question of fact for the commission. It cannot be said, that there is no evidence to support their finding. Upon the evidence it can be inferred that the deceased was engaged in work for the Bartle Corporation at the time he met with the accident.

[2] The fact that a boy 16 years of age, who had never worked out before, may have been somewhat at fault, if indeed he was at all at fault, does not deprive the claimant of the right of compensation. Workmen's Compensation Law [Consol. Laws, c. 67] § 10; *N. Y. Central Railroad Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, 1, R. A. 1917D, 1, Ann. Cas. 1917D, 629. The presumption is that the case comes within the Workmen's Compensation Law. Section 21.

The award should be affirmed. All concur, except WOODWARD, J., dissenting, with an opinion in which COCHRANE, J., concurs.

WOODWARD, J. (dissenting). The State Industrial Commission has found as conclusions of fact that on December 12, 1917, one Merlin Smith received injuries which resulted in his death; that he was employed by H. J. Bartle Manufacturing Corporation at Troy, N. Y., which company was engaged in manufacturing tents for the United States government, and that the said Smith was employed as a bundle boy; that on the day in question he "was working for his employer at Troy," and that "while engaged in the regular course of his employment and while apparently using an elevator, he was crushed by said elevator, and thereby sustained injuries, consisting of a rupture of a kidney and of the spleen, which injuries resulted in his death within an hour." It further adds, "The facts set forth in the opinion of Commissioner Lyon are adopted with the same force and effect as if herein set forth in full," and makes an award, from which the employer and the insurance carrier appeal.

The undisputed evidence in this case is that Merlin Smith, a boy 16 years of age, was employed as a bundle boy. His duties were to take material to and from the tables where it was in process of manufacture in the production of shelter tents, and at intervals to carry materials from one floor to the other of the building in which the manufacturing was carried on. Whenever the parcels to be carried from one floor to another were too heavy to be carried up the stairways, they were loaded into small trucks and these were placed in the elevator and carried to the desired floor. The company kept a man for the operation of this elevator in its own plant, and the accident in question did not occur in connection with this elevator.

The building occupied by the Bartle Manufacturing Corporation was constructed in close proximity to a second building, both owned by

the same person, but leased out to the Bartle Company and others for business purposes. They were separate buildings, with different floor levels, and up to two or three years ago there was no intercommunication between them. The public authorities, however, demanded the construction of a fire wall between these buildings, and when the wall was built it was provided with doorways, designed to afford opportunity to escape from either of the buildings in the event of fire to the other, and then by closing the doors to aid in the control of the fire. In other words, the police power of the state operated to produce a communication between these buildings, not for any of the purposes of the tenants, but for the safety and well-being of the employes and the public.

The building occupied by the Bartle Company was known as the Federal street building, having an entrance on Federal street, while the remaining building was known as the River street building, having an entrance on River street. In this latter building there was an elevator, operated by any one who happened to desire its use, by merely pulling a rope in one direction or the other, and it was upon this elevator, in a building neither occupied nor controlled by the Bartle Company, that the accident occurred. In the River street building a man by the name of George Tashjian carried on an independent contract for the Bartle Company. He made the button-holes in the tent materials, coming to the factory for the materials and returning them when the work was done, and this man appears to have made use of the doorway between his quarters in the River street building and the Federal street building, and there was evidence that on a few occasions, remote from the accident, when the elevator in the Federal street building was out of order, the Bartle Company had asked and received permission to use the elevator in the River street building; but, aside from these cases, there was no business communication between the two buildings, and the uncontradicted evidence is that the Bartle Company had not only posted notices that its employes were not to make use of these doorways in the fire wall, but that they were verbally told practically every day not to trespass upon the adjoining premises, and particularly not to make use of the elevator; some of the boys having been discharged for playing with the elevator in the River street building during the noon hour.

There is no evidence that Merlin Smith was in any manner, directly or indirectly, authorized or directed to be in the River street building at any time during his employment, nor that any one connected with the Bartle Company ever acquiesced in or gave any encouragement to trespassing upon the River street premises, and there is not the slightest evidence that it was necessary or proper for him to be upon such premises for any of the purposes of his employment. He might, so far as this record shows, have been upon the steamboats plying the Hudson river in front of the property with equal propriety and with equal relation to the master's business.

On the day in question Merlin Smith seems to have disappeared from view some time in the early part of the afternoon, and was found crushed and maimed by the elevator in the River street building be-

tween 4 and 5 o'clock. The only possible connection with the master's business is found in the fact that one of the little trucks, used by the Bartle Company in sending goods from one point to another, was found empty near the elevator in the River street building where the accident occurred. The forelady of the Bartle Company who had immediate charge of the boy testifies that she should and did have in her room two of these trucks at the time of the accident; that this was her equipment, and that it was present in the Federal street building and under her charge at the time this third truck was found near the accident, and the evidence is without dispute that Tashjian, the independent contractor, made use of these trucks at times in delivering his work to the factory or taking it away, and it is not shown that the Smith boy had anything to do with the truck being in the River street building near the elevator. In short, there is no evidence whatever that the claimant's intestate was performing any part of his duties as an employé of the Bartle Company at the time the accident occurred.

The fact that the accident occurred during the hours that he should have been doing his work is not evidence that he was actually engaged in such employment, while the fact that he received his injuries while upon the premises of a third person, without right or authority from any one, is conclusive, it seems to us, that he was not engaged in the master's business at the time of the occurrence. Nothing that the master required of him required his presence in this River street building; everything that was within the scope of his employment demanded his presence in the Federal street building, and the presumptions which might attach to his case, if he had been found where it was his duty to be, cannot be made to reach out and cover a case where the decedent was where he had no legal or practical right to be in the performance of his duties. The master had provided an elevator, with an operator, for moving things from one floor to another, and even if the decedent had been shown to be actually engaged in transporting goods from one point in the factory to another, no reason suggests itself why the burden of compensation should be borne because the employé chose to commit a trespass and to go outside of his regular employment. He was not employed to operate an elevator; certainly not to operate an elevator upon the premises of a third party. That was no part of the business of the Bartle Company, and it is only those accidents which arise out of and in the course of his employment (Workmen's Compensation Law, § 10) which are to be compensated. When he left the premises of his employer, and abandoned the duties of a floor boy, to operate an elevator upon the premises of a third party, he ceased to be an employé within the meaning of the statute.

An employé is defined in the act as a person engaged in one of the hazardous employments "upon the premises or at the plant, or in the course of his employment away from the plant of his employer." Section 3, subd. 4. There was no employment of the claimant's intestate "away from the plant of his employer." His employment was "upon the premises or at the plant" of his employer. No duties were

required of him at any other point than at the factory in the Federal street building, and he was forbidden to make use of the fire doors for the purpose of reaching the point where the accident occurred.

The decedent was clearly not within the provisions of the act, and the award cannot lawfully be sustained.

The award should be reversed, and the claim dismissed.

(189 App. Div. 458)

REEDY ELEVATOR CO. v. MONOK CO. et al.

(Supreme Court, Appellate Division, Second Department. November 14, 1919.)

1. MECHANICS' LIENS § 291(2)—JUDGMENT BY DEFAULT; LIENOR NOT PARTY UNLESS SERVED WITH NOTICE OF TRIAL.

A mechanic's lienor, which by its answer had made itself a necessary party under Lien Law, § 44, to any judgment in action to foreclose and enforce another lien, was not in legal default, in the absence of service of a notice of trial upon its attorney, though it had not appeared on trial.

2. APPEAL AND ERROR § 1212(3)—LAW OF THE CASE AFTER REMAND; MECHANICS' LIENS.

On appeal in an action to foreclose mechanic's lien, the direction of the Appellate Division to adjust the equities between plaintiff and another lienor, made a party, did not reopen the amount and merits of plaintiff's lien, already determined.

Appeal from Special Term, Kings County.

Action by the Reedy Elevator Company against the Monok Company and others. From a judgment sustaining plaintiff's lien, defendant Anna C. Farrell appeals. Judgment affirmed.

Argued before JENKS, P. J., and MILLS, RICH, PUTNAM, and JAYCOX, JJ.

George F. Alexander, of Brooklyn, for appellant.

Harry Lesser, of New York City, for respondent.

PER CURIAM. [1] After our reversal of the prior judgment the cause went back to adjust the equities. 171 App. Div. 653, 157 N. Y. Supp. 565. The opinion explained as the reason that "other liens may be involved." The Special Term was to adjust the equities under section 45 of the Lien Law (Consol. Laws, c. 33). Such other lien was that of the Felber Engineering Works, which by its answer had made itself a necessary party (Lien Law, § 44) to any judgment in this action. The Felber Engineering Works had not appeared on that trial, but the record showed no proof of service of a notice of trial upon its attorney, so as to constitute it in legal default. *Hinkle v. Sullivan*, 108 App. Div. 316, 95 N. Y. Supp. 788. Of course, the silence of that lienor for over four years now may raise an inference that its lien has been satisfied or waived.

[2] Such direction to adjust the equities in our former decision did not reopen the amount and merits of plaintiff's lien, which had been already determined.

The judgment appealed from is therefore affirmed, with costs.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

(109 Misc. Rep. 248)

PEOPLE ex rel. GABRIEL v. WARDEN OF NEW YORK COUNTY PENITENTIARY, WARDS ISLAND.

(Supreme Court, Special Term, Kings County. November 15, 1919.)

1. STATUTES §264—RETROACTIVE EFFECT; REMEDIAL STATUTES.

While ordinarily a statute will not be construed so as to give it a retroactive operation, unless its language either expressly or by implication requires it to be so construed, the rule does not apply to remedial statutes, or those extending benefits, where vested or constitutional rights are not affected.

2. STATUTES §181(1)—CONSTRUCTION BY ASCERTAINING LEGISLATIVE INTENT.

Where it was contended that a provision in a remedial statute had retroactive effect, the court must ascertain the legislative intent from the language used and the circumstances surrounding the enactment of the statute; but in so doing the court must not interpolate anything into the statute.

3. CRIMINAL LAW §1216(1)—CONSIDERATION IN PUNISHMENT OF INCARCERATION AWAITING TRIAL.

The courts always have had the discretionary power to take into account the time spent in prison awaiting trial in fixing the punishment.

4. CRIMINAL LAW §1206(3)—STATUTE GIVING PERSON CONVICTED BENEFIT OF INCARCERATION PENDING TRIAL; RETROACTIVE EFFECT.

Laws 1919, c. 410, amending Penal Law, § 2193, which provides that time spent by person convicted of crime in prison or jail prior to conviction and before sentence, shall be calculated as part of the sentence, whether it be indeterminate or for a definite term, should, in view of its remedial and beneficial effect, be given a retroactive construction, so as to apply to one convicted prior to enactment.

5. HABEAS CORPUS §3—PARDON §2—RIGHT OF CONVICT TO DISCHARGE.

Under Laws 1919, c. 410, amending Penal Law, § 2193, and providing that time spent by person convicted of crime in prison or jail prior to conviction and before sentence shall be calculated as part of the term of sentence, and deducted under provisions of Prison Law, art. 9, one convicted is not, where the period of his incarceration in penitentiary, coupled with incarceration pending trial, has equaled amount of sentence, entitled to discharge on habeas corpus, but the matter must be reported to the Governor, and deduction approved by him before it can be effected; hence the act can in no way be attacked as infringing the pardoning power.

Application by the People of the State of New York, on the relation of Frank Gabriel, for writ of habeas corpus against the Warden of New York County Penitentiary, Wards Island. Writ dismissed.

John Leary, of New York City, for relator.

Charles R. Weeks, Dist. Atty., of Mineola, for respondent.

CROPSEY, J. [1, 2] The question involved is the construction and validity of chapter 410 of the Laws of 1919. That statute amended section 2193 of the Penal Law (Consol. Laws, c. 40). All of the former section was omitted, so the present section is entirely new. The first sentence of the section now reads:

"Any time spent by a person convicted of a crime in a prison or jail prior to his conviction and before sentence has been pronounced upon him, shall become and be calculated as a part of the term of the sentence imposed upon him, whether such sentence is an indeterminate one or for a definite period

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of time; and such time shall, in addition to the time allowed for good conduct and earned as compensation, be deducted from the term of the sentence so imposed, under the provisions of article 9 of the Prison Law."

The relator is confined in a penitentiary under sentence for one year. If the time he spent in jail awaiting his trial was deducted from the term of his sentence he would now be entitled to his discharge. The first question is whether this statute has any retroactive effect. The claim of the respondent is that it has merely a prospective effect—that it applies only to prisoners convicted after it became a law, and that it does not apply to those previously convicted. It is unquestioned that the general rule is that a statute will not be construed so as to give it a retroactive operation, unless its language, either expressly or by necessary implication, requires it to be so construed. *Sanford v. Bennett*, 24 N. Y. 20, 23; *People ex rel. Leet v. Keller*, 157 N. Y. 90, 99, 51 N. E. 431; *Jacobus v. Colgate*, 217 N. Y. 235, 240, 111 N. E. 837, Ann. Cas. 1917E, 369. But this rule is not an inflexible one. It does not apply to remedial statutes, or to those extending benefits where vested or constitutional rights are not affected. *People ex rel. Collins v. Spicer*, 99 N. Y. 225, 233, 234, 1 N. E. 680; *Brower v. Bowlers*, 1 Abb. Dec. 214; *Burch v. Newbury*, 10 N. Y. 374, 392.

Concededly, the statute in question is not, by express terms, given a retroactive effect. Nor is there a necessary implication from its provisions that it must have that effect. On the other hand, there is no express language in it indicating that the Legislature intended it to have only a prospective effect. Nor must that construction necessarily follow by implication from the language used. In other words, the statute is not expressly or by necessary implication given either a prospective or a retroactive operation; and as it does not affect any vested or constitutional right, it must be construed so as to give effect to the intention of the Legislature. The statute being a beneficent one, the general rule of construction already mentioned is not conclusive. The question of intention is open for the court's decision; and that may be determined not only from the language used, but also from the circumstances surrounding its enactment. *People ex rel. Collins v. Spicer*, 99 N. Y. 225, 233, 234, 1 N. E. 680, and cases cited. In so doing the court must not interpolate anything into the statute, nor render a decision which, in effect, is a legislative enactment. In *re Second Ave. M. E. Church*, 66 N. Y. 395; *McKuskie v. Hendrickson*, 128 N. Y. 555, 28 N. E. 650; *Leach v. Auwell*, 154 App. Div. 170, 138 N. Y. Supp. 975.

[3, 4] What was the intention of the Legislature in enacting this amendment to the Penal Law, which, in terms, is stated to be a provision having to do with "calculating terms of imprisonment"? If only the language of the amendment be considered, it seems plainly to be comprehensive. It is broad enough, construed by itself, without the insertion or omission of a word, to cover all prisoners, whether convicted before or after its enactment. Unless express language was used that the statute was to have both a past and a future effect, it is difficult to conceive how more broad or comprehensive language could have been employed.

Attention has been called to other statutes which in terms are expressly made applicable either to past convictions or to both past and future convictions. Sections 211, 211a, 230, 240, Prison Law (Consol. Laws, c. 43). But it does not follow that the language of the present statute must be construed to have only a prospective operation. Where language is used broad enough to cover both a prospective and a retroactive operation, it should not be narrowed, or its natural meaning restricted, because in some other statutes other words have been used to express the same idea. *P. R. T. Co. v. Dash*, 125 N. Y. 93, 98, 26 N. E. 25, 10 L. R. A. 728. And this is particularly true where, as here, the statute in question is worded entirely differently from the other statutes and is in an entirely different form. The legislative intent cannot be gathered from a reading of the other statutes, because at least one of them provides that it shall take effect only from the date of its passage. Section 230, Prison Law, subd. 3, as amended by chapter 358, Laws of 1916. See *People ex rel. Roache v. Carter*, 181 App. Div. 833, 168 N. Y. Supp. 1037; *People ex rel. McDonald v. Carter*, 103 Misc. Rep. 596, 171 N. Y. Supp. 945, affirmed 186 App. Div. 905, 172 N. Y. Supp. 913. No inference, therefore, can arise from the fact that the statute in question is not in terms made applicable, both to the past and the future, that such was not its purpose.

The provisions of other statutes show that the Legislature has, at times, made them expressly applicable to the past or to the future, or to both. Hence they furnish no aid to the construction of a statute where no such express provision is contained. And although sections 231 and 232 of the Prison Law are lacking in such express provisions, it seems clear that they were intended to apply to past as well as future cases. It is public knowledge that for years there has been persistent agitation against what was claimed to be the injustice of not crediting people convicted of crime with the term they had served in jail pending trial. The contention was not merely that future convicts should have such credit, but that those already under sentence also should have it. Finally this sentiment found expression in this enactment; and the Legislature provided that it should take effect immediately. While this is not conclusive upon the question of intention, it does show that the benefits under the act were to take effect at once, and not to be deferred. If the act had been made to take effect at a future date, it would show that it was intended not to have a retroactive operation, for then prisoners whose terms would expire between the time of its enactment and the time it became effective would not receive its benefits.

But it is claimed that the last sentence of the amended section in question shows it was intended to have only a prospective effect. This sentence provides that, at the time of commitment, it shall be the duty of the judge to indorse upon the commitment the length of time spent by the person convicted in jail prior to his sentence. This provision, however, seems to be only procedural. It does not make for the construction claimed. The judge, in imposing the sentence, was not directed to make this allowance, and this would have been the simple

method to adopt if the statute was to be merely of prospective operation. Before this amendment, the court always had the discretion to take into account the time spent in prison awaiting trial (*People ex rel. Stokes v. Warden, etc.*, 66 N. Y. 342), but there was no way of knowing, in most cases at least, whether such an allowance had been made.

The Criminal Code (section 954) provides that no part of it "is retroactive unless expressly so declared." But there is no similar provision in the Penal Law. Section 38 of the latter plainly indicates that an enactment by which punishment for an offense is mitigated may be retroactive, although not expressly so provided. Nor is the claim that no machinery is provided for carrying out the provisions of the amended statute well founded. The section expressly states that the deduction of the time in question shall be made "under the provisions of article nine of the Prison Law." That article provides the machinery. Under it, reports are to be made monthly from each state prison and penitentiary, with recommendations and a statement of the expiration of the convicts' terms, etc. (section 235). Rules governing this matter are to be made for state prisons and penitentiaries (section 235). And section 236 provides for the appointment of a board in each institution charged with the duty of reporting upon the parole or commutation or termination of prisoners' sentences. Thus there is a complete method provided. This statute affects no vested right. There is no reason why it should not be given full effect, and why it should not be held to apply to all convicts. Its language permits such a holding. Humanity dictates it. It is a beneficent statute, and should not receive a strained, restricted, or unnatural construction. The interests of justice require that its plain language be given its full and fair meaning.

[5] But, while the statute is held to be retroactive in operation, the question still remains whether the relator can be released upon this writ. His contention is that he is entitled absolutely to the deduction, without regard to the action of the Governor or any prison board. If this is so, then he would be entitled to his discharge now. But the language of the statute already mentioned shows that the deduction is to be made according to the provisions of the Prison Law; that is, the boards in the various institutions must make reports to the Governor, and he must then act thereon. This is the procedure that must be followed under this statute before the deduction in question becomes effective. This makes it unnecessary to determine whether the enactment would be constitutional if it provided for the deduction absolutely and without the approval of the Governor; that is, whether, as to those theretofore convicted, such a provision would conflict with the constitutional power of the governor to pardon and commute. While there seems to be a conflict in the authorities upon that question, there can be no serious doubt of the validity of a statute which, in the last analysis, leaves the decision with the Governor, as does the present one. See *Singleton v. State*, 38 Fla. 297, 21 South. 21, 34 L. R. A. 251, and cases in note, 56 Am. St. Rep. 177; *Fite v. State ex rel. Snider*, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. (N. S.) 520, and cases in note; *Laird v. Sims*, 16 Ariz. 521, 147 Pac. 738, L. R. A.

1915F, 519, and cases in note; *People v. Joyce*, 246 Ill. 124, 92 N. E. 607, 20 Am. Cas. 472; *State v. Duff*, 144 Iowa, 142, 122 N. W. 829, 24 L. R. A. (N. S.) 625, 138 Am. St. Rep. 269; *Ware v. Sanders*, 146 Iowa, 233, 124 N. W. 1081, 1086; *State v. Kirby*, 96 Miss. 629, 51 South. 811; *People v. Fox*, 77 App. Div. 245, 79 N. Y. Supp. 56; *People v. Adams*, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675; *People v. Madden*, 120 App. Div. 338, 105 N. Y. Supp. 554.

The relator must seek the benefit of the statute as provided by the Prison Law, and hence the writ must be dismissed.

(189 App. Div. 400)

SALISBURY v. SEGAL et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

1. LANDLORD AND TENANT §161(1)—TITLE TO PROPERTY LEFT ON PREMISES.

Accumulation of copper sulphate underneath railroad freight station on leased land, resulting from the waste from operation of battery system of a telegraph company located in a portion of the freight station, belonged either to such company or to the owner of the soil, not to the lessee railroad.

2. TROVER AND CONVERSION §15—TITLE AND RIGHT TO POSSESSION.

Plaintiff's right to recover for a conversion of property depends on title being in him, and is not aided by casting doubt on its ownership by others.

3. SALES §149—BILL OF SALE.

Where a railroad, selling scrap material on the site of its freight house removed from leased land, believed through its officer that it was selling only slate, scrap iron, and coal, with lumber, which also the purchaser believed, such material being fairly worth the \$100 consideration, the bill of sale to the purchaser did not cover several hundred dollars worth of copper sulphate gradually deposited under the old freight house from the waste of a telegraph company's batteries.

Action by Edward B. Salisbury against Joseph Segal, impleaded with the Block Iron & Metal Company, Incorporated. From a judgment for plaintiff, and from an order denying defendant's motion for nonsuit, and directing general verdict for plaintiff, and also from the part of the order denying defendant's motion for new trial, made upon the minutes, defendant Joseph Segal appeals. Judgment and orders reversed, and new trial granted.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, and COCHRANE, JJ.

Robert Frazier, of Mechanicville, for appellant.

McKelvey & Stenacher, of Saratoga Springs (George H. Stenacher, of Saratoga Springs, of counsel), for respondent.

WOODWARD, J. The complaint alleges, aside from the formal averments, that "on or about the 20th day of May, 1916, plaintiff was the owner and entitled to the possession of 2,900 pounds of copper sulphate, generally known as blue vitriol, of the reasonable value of 30

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cents per pound, or \$870," and that "on or about the 20th day of May, 1916, the defendant Joseph Segal unlawfully and wrongfully took and carried away the said goods, and converted them to his own use," and that the plaintiff has demanded and been refused the possession of the same. Demand for judgment is for \$870.

The defendant denies the ownership of the goods in the plaintiff, and the unlawful taking of the same, and the evidence was directed to the issue thus raised. At the close of the plaintiff's evidence, and again at the close of the defendant's evidence, motions were made for a nonsuit and denied. The court submitted to the jury, not the ownership of the property, but (1) "Did the defendant take and dispose of the property in question?" (answered in the affirmative by the jury) and (2) "What was the damage?" This was placed by the jury at \$125, which was subsequently reduced by the court to the sum of \$54, for reasons not material to be considered on this appeal. There was a stipulation:

"That the questions are to be decided by the court, and that a nonsuit or general verdict may be directed upon the findings, with the same force and effect as if the jury were present."

But we assume that the court was not authorized to make any findings which could not be legitimately deduced from the evidence, any more than the jury were authorized to reach determinations which were wholly without support in the evidence. We are therefore unable to find justification for the judgment in this case, first, because there is no evidence whatever that the defendant took and disposed of the property in question; and, second, because there is no evidence that the plaintiff was the owner of the particular property.

The case is peculiar in its facts, but that does not justify a verdict without support in the evidence, even though, as suggested by counsel for the respondent, the defendant's father-in-law is "a characteristic, long-bearded, old-fashioned, pack peddler," which alleged fact nowhere appears in the evidence. It appears from the evidence that the Boston & Maine Railroad Company maintained a freight station upon leased lands on Saratoga avenue in the city of Mechanicville for a number of years, and that the Western Union Telegraph Company occupied a portion of this building for the maintenance of its old-fashioned battery system, used in connection with the operation of its lines which, in turn, were used in the conduct of the Boston & Maine Railroad; that is, the Western Union Telegraph Company, in the operation of so much of its lines as was devoted to the business of the Boston & Maine Railroad, made use of a portion of the railroad company's freight station in Mechanicville, and in course of time the practical operation of the battery room resulted in the accumulation of a considerable quantity of copper sulphate underneath the building. This resulted from the practice of emptying the battery cells into a sink with an outlet into the excavation beneath the building. It is entirely evident from the testimony that it was not realized that this material had any practical value, and so long as copper remained at normal figures it is doubtful if it would have been of sufficient con-

sequence to give rise to litigation. It was just one of the wastes which have been so common in this country.

In the year 1916, however, the Boston & Maine Railroad demolished the freight station, and, the Western Union having in the meantime developed a new system of generating current, the battery room was discontinued, and the local representative of the Western Union Telegraph Company was directed to ship the materials on hand or to otherwise dispose of them. When the freight station building was torn down, the local engineer of the Boston & Maine Railroad, it is conceded, had authority to sell or dispose of such personal property as remained upon the premises belonging to said company, and he did execute a bill of sale to one S. F. Campbell of "all the material on the site of the old freight and office building situated on Saratoga avenue, Mechanicville," and it is conceded that the word "material" is broad enough to include the sulphate of copper, without admitting that this material belonged to the Boston & Maine Railroad, or that its resident engineer had a right to dispose of it.

[1] There is no evidence in the case that the resident engineer, in disposing of the materials upon the premises, had any idea that he was selling this sulphate of copper; no one appears to have regarded it as anything more than a dirt heap at the time of the making of the bill of sale on the 17th of April, 1916, and as it is admitted that there were several wagon loads of lumber, five or six tons of soft coal, some slate roofing, and a considerable amount of scrap iron, and the consideration named in the bill of sale was only \$100, it is entirely evident that there was no intention of passing title to nearly \$900 worth of copper, such as is claimed in the complaint, and it can hardly be doubted that the materials resulting from the waste of the Western Union Telegraph Company belonged either to that corporation, or to the owner of the soil, with which it was mingled, and not to the Boston & Maine Railroad, which was merely a lessee of the premises. It is a significant fact that Salisbury, the plaintiff, who succeeded to the rights of Campbell, drew away the coal, the iron, the slate, and the lumber, without doing anything toward reducing the sulphate of copper to possession, and that nothing was done in that direction until after the copper was taken away.

[2] After the materials above enumerated had been removed, some one appears to have discovered the presence of this heap of refuse, which had accumulated underneath the old building, and one William B. Murray, who testified that he was employed by the Western Union Telegraph Company as a lineman, and that he had charge of the materials of the said company, with authority to ship or dispose of the same, at the time of the demolition of the freight station, testifies that he sold this sulphate of copper, not to the defendant, but to one Rome, the father-in-law of the defendant, and the evidence is wholly undisputed, from unimpeached witnesses, that Rome was the man who took the material away and sold it. There is an effort on the part of the plaintiff's attorney to show that the father-in-law was working for the defendant; that he was using the defendant's horse and wagon in removing the materials; but a careful reading of the evidence shows

that this entirely failed. Rome testified that he hired the defendant's horse, that he used him to carry on a separate business, and that he alone had what was made. The defendant testifies to the same effect. There is no one who testifies that the defendant took the material from the premises. The direct and uncontradicted evidence is that he did not, and that Rome, who did take it, was not his agent or employé in the matter; and yet the jury has found that he took the property and disposed of it, and the court appears to have assumed that the sulphate of copper belonged to the Boston & Maine Railroad, and that its resident engineer sold it under the general terms of the bill of sale, though it is entirely obvious that the resident engineer, who was not produced as a witness, had no idea that he was selling a valuable property for the trifling sum of \$100.

If we leave out of consideration the general language of the bill of sale, which alone gives character to the transaction, there is not the slightest evidence in the case that the Boston & Maine Railroad had any ownership of this particular property, or that its resident engineer had it in contemplation when he issued the bill of sale in its general language. The court intimated strongly that the plaintiff should produce this witness, but the plaintiff elected to stand upon a vague and uncertain stipulation, afterward modified, which did not concede at any point ownership in the Boston & Maine Railroad Company, and we can discover no good reason for the assumption of such ownership. If the ownership of the Western Union Telegraph Company be conceded to be uncertain, it does not help the plaintiff. His right to recover depends upon the title being in the plaintiff, and to cast a doubt upon the ownership of the Western Union Telegraph Company, or of Rome, does not operate to establish title in the plaintiff, and without such title there is no ground for the judgment in this case.

[3] The language of the bill of sale is satisfied by the transfer of the property which concededly belonged to the Boston & Maine Railroad Company, the lumber, the slate, the scrap iron, and the coal; and this undoubtedly, was fairly worth the \$100 given in consideration, and everything points to the fact that Campbell, the purchaser, as well as the plaintiff, thought that this was what was included in the bill of sale, and it was only when this alleged "characteristic, long-bearded, old-fashioned pack peddler" thought to make a venture that the plaintiff conceived the forced construction which would enable him to claim title. It is significant that we find in the evidence no mention of the consideration between Campbell, the original purchaser, and Salisbury, the assignee of his rights.

The judgment and orders appealed from should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

(189 App. Div. 486)

ANDERSON v. SCHORN et al.

(Supreme Court, Appellate Division, Second Department. November 21, 1919.)

1. MUNICIPAL CORPORATIONS ¶706(6)—AUTOMOBILE ACCIDENT; NEGLIGENCE OF CHAUFFEUR FOR JURY.

In action for injuries sustained by plaintiff pedestrian, while crossing an intersecting street, due to auto truck approaching from opposite direction, skidding when chauffeur turned to the right into intersecting street, but did not keep as near the right-hand curb as possible, as required by Code of Ordinances of City of New York, c. 24, art. 2, § 11, *held*, question of negligence was for the jury.

2. APPEAL AND ERROR ¶827(3)—NONSUIT; ACCEPTANCE OF PLAINTIFF'S EVIDENCE.

On appeal from order of nonsuit, the court must accept plaintiff's evidence.

Jenks, P. J., and Blackmar, J., dissenting.

Appeal from Trial Term, Kings County.

Action by Gustaf Anderson against Gustave H. Schorn and another, copartners, etc. Judgment dismissing complaint, upon a nonsuit ordered at the close of plaintiff's case, and plaintiff appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and MILLS, PUTNAM, BLACKMAR, and KELLY, JJ.

Henry M. Dater, of Brooklyn (Jay S. Jones, Edward J. Fanning, and L. Victor Fleckles, all of Brooklyn, on the brief), for appellant.

Murray G. Jenkins, of New York City (William B. Shelton, of New York City, on the brief), for respondents.

KELLY, J. We adopt the location of the streets agreed upon by the parties at the trial. On May 16, 1917, about half past 4 in the afternoon, the plaintiff, walking in an easterly direction on the north, or left-hand, side of Broadway, in the borough of Brooklyn, reached the northwest corner of Broadway and Havemeyer street, which latter street crosses Broadway, and the parties agree that it runs, substantially, north and south. The plaintiff was on his way to the elevated railroad station at Marcy avenue and Broadway, which was one block east of Havemeyer street. When he reached the northwest corner, he observed the defendants' motor truck coming west on Broadway, in the opposite direction to plaintiff's course, and at that time it had reached the northeast, or opposite, corner of Broadway and Havemeyer street. The defendants' truck was from 15 to 18 feet in length, was partially loaded with empty boxes, and was equipped with solid wheels. Havemeyer street is 45 feet in width between the curbs and has an asphalt roadway. Broadway is paved with cobblestones.

Plaintiff started to cross Havemeyer street at the crosswalk. The street pavement was wet; it had been raining previous to the accident. At the time the plaintiff stepped from the curb, the automobile had not changed its course; but as he did so, and after he had taken two steps from the curb, it began to turn into Havemeyer street to the north,

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When the plaintiff saw the truck turning, he stopped. The truck did not turn at the northeast corner, but, instead, turned beyond the middle of Havemeyer street. The plaintiff testified that when he stopped he was about 6 or 7 feet out from the west curb of Havemeyer street. The truck came around in front of him, the head of the truck passing him; but the hind end skidded and struck him, knocking him down, and inflicting the injuries for which he sought to recover in this action. He testified that he heard no gong or warning from the truck, and that it proceeded on its way 60 or 70, or maybe 100, feet after it struck him, before stopping.

At the end of plaintiff's case, the learned trial judge expressing some doubt whether there was proof of negligence in the operation of the truck, the plaintiff called the truck driver as his witness. The driver testified that he first saw the plaintiff as the truck was turning, and that plaintiff was then in the middle of Havemeyer street, about 22½ feet from the west curb; that his machine was then about midway between the center of the street and the east curb, and he said later that it was 6 or 7 feet from the east curb. He said that he did not slow up when he saw the plaintiff; that he blew his horn and "hollered at the man"; that the truck was going slowly. At the time he saw plaintiff his truck was skidding, the front going straight, but "the rear was skidding around." The rear of the truck struck the plaintiff, and the driver testified that he went 15 feet after striking him.

[1] The learned trial judge dismissed the complaint, on the ground that there was no evidence of negligence on the part of the truck driver. It is not contended that plaintiff was guilty of contributory negligence. The learned judge said he thought the accident was occasioned by the skidding of the defendants' truck, but that there was nothing in the case to show that the skidding was the result of negligent operation, and he was of opinion that the method in which the turn was made as claimed by plaintiff—that is, the failure of the driver to make the turn as near to the east curb of Havemeyer street as practicable, as directed by the city ordinance—was not a proximate cause of the accident. The ordinance in question (Code of Ordinances of City of New York, c. 24, art. 2, § 11) provides, *inter alia*:

"Sec. 11. *Driving.* 1. *Keeping to the Right.*—Vehicles shall keep to the right, and as near the right-hand curb as possible. * * *

"5. *Turning to the Right into Another Street.*—A vehicle turning to the right into another street shall turn the corner as near to the curb as practicable."

The learned counsel for the respondent argues that it has been held that the mere fact that an automobile skidded does not justify a finding of negligence on the part of the driver. *Rango v. Fennell* (App. Term, 1st Dept.) 168 N. Y. Supp. 646; *Philpot v. Fifth Avenue Coach Co.*, 142 App. Div. 811, 821, 128 N. Y. Supp. 35; *Iannone v. Weber-McLoughlin Co.*, 186 App. Div. 594, 174 N. Y. Supp. 580. The facts in the cases cited, however, are entirely dissimilar from those in the case at bar. The defendants' automobile in the present case had been stopped on its westerly course by the traffic officer at the northeast corner of Broadway and Havemeyer street. Starting up in response to

his signal, it came ahead and made the turn from the cobble pavement on Broadway to the wet asphalt pavement on Havemeyer street.

[2] If we accept the plaintiff's evidence, as we must on the nonsuit, the driver of the automobile had the easterly half of Havemeyer street, 22½ feet in width, in which to make his right-hand turn, and the ordinance required him to keep as near to the easterly curb as practicable. The plaintiff at this time had taken but two steps, 6 or 7 feet, from the west curb of Havemeyer street, so that he was at least 15 feet west of the center line of the street; yet the defendants' automobile was so operated that it struck the plaintiff. The driver says that as the automobile passed plaintiff he was about 6 or 7 feet from him. It is true that the driver says that at this time plaintiff was in the middle of Havemeyer street; but the plaintiff contradicts him, and the police officer testified that plaintiff was about 6 feet from the west curb of Havemeyer street when he was struck.

In my opinion, this method of operation in violation of the city ordinance, coupled with the skidding of the rear wheels of the truck on a wet pavement, and the fact that the driver testifies that while he was making the turn, and when he first saw the plaintiff, he knew that his truck was skidding, presented a question of fact for the jury as to whether the driver used reasonable care. If it be true, as argued by the respondents, that automobiles skid in ordinary operation, if the rear part of such a vehicle under normal conditions is apt to swing or skid from side to side, it would appear to call for care on the part of the driver of such a vehicle commensurate with the danger to be avoided, especially to pedestrians at street crossings. This plaintiff, pursuing his course to the east on the north side of Broadway, observed the automobile coming down Broadway. If it continued on its course, it would in no way interfere with him. If it turned to the left, or south, at Havemeyer street, it would not cross his pathway. If it turned to the right, or north, he was not in its ordinary or legal course while he was west of the center line of Havemeyer street. When but 6 or 7 feet out from the west curb, this vehicle is found over on the left, or wrong, side of Havemeyer street, operated in such manner that the rear end collides with him. I think all these facts presented an issue as to negligent operation, to be determined by a jury.

Judgment reversed, and new trial granted, with costs to appellant to abide the event.

MILLS and PUTNAM, JJ., concur.

BLACKMAR, J. (dissenting). The complaint alleges that the plaintiff was injured by being struck by an automobile that was turning a corner from Broadway into Havemeyer street in the borough of Brooklyn, and it assigns negligence in control as the cause of action.

The evidence was that an automobile truck, driven by an employé of the defendants, was turning the corner from Broadway, which has a granite pavement, into Havemeyer street, which is paved with asphalt; that the plaintiff stood in the roadway of Havemeyer street, at or near the street crossing, waiting for the truck to pass, and as it

passed the rear skidded outward towards him and struck him. Evidence was given that it had been raining and that the pavement was wet; that the motor truck was going neither fast nor slowly, but at the usual rate of speed; and that in turning to the right, as it did, it did not turn as near as practicable to the curb. It does not appear what kind of tires was on the machine; whether there were chains on them or not; how long it had been raining; how fast the automobile was being driven in turning the corner; nor were any other facts or circumstances proved that might bear upon the solution of the question whether the skidding was due to carelessness in control.

A violation of the city ordinance, of which this court must take judicial notice, to the effect that a vehicle turning to the right into another street should turn as near to the curb as practicable, has no causal relation to the happening of such an accident. The plaintiff stood in the street, waiting for the motor truck to pass. It was driven in a line that would have carried it safely by him, except for the skidding, and the accident was due solely to the skidding of the rear of the truck. The question is whether, from this fact alone, an inference of negligence of the chauffeur may be drawn.

The authorities on this subject are meager. *Rango v. Fennell*, 168 N. Y. Supp. 646, was decided by the Appellate Term, First Department, and the conclusion reached that skidding alone was no evidence of negligence in management. To the same effect is *Williams v. Holbrook*, 216 Mass. 239, 103 N. E. 633; and the case of *Philpot v. Fifth Avenue Coach Co.*, 142 App. Div. 811, 128 N. Y. Supp. 35, seems to approve that view. In *Huddy on Automobiles*, § 111, the rule is laid down that skidding alone is no evidence of negligence in management. The case of *Wing v. London General Omnibus Company, Limited*, 101 Law Times Reports (N. S.) 411, and *Parker v. London General Omnibus Company, Limited* (K. B. Div.) 100 Law Times Reports (N. S.) 409, are cited to sustain the doctrine. To the contrary is *Babbitt on the Law Applied to Motor Vehicles*, § 189, in which *Isaac Walton & Co. v. Vanguard Motorbus Company*, 25 Times L. Reports (K. B. Div.) 13, is cited as an authority.

In these three English cases the question of negligence in the management of motor vehicles was eliminated, either by consent of the plaintiff's counsel, by the finding of the jury, or by the determination of the court, and the question discussed was whether, in view of the known tendency of motor vehicles to skid on damp pavements, it is negligence or a nuisance to operate them in a highway under those conditions. The case of *Isaac Walton & Co. v. Vanguard Motorbus Company* really turns on the proposition that as the plaintiff's property was on the sidewalk, and was injured by a motor vehicle constructed to operate in the roadway, there is an issue of fact, as to negligence, that should be submitted to a jury. The weight of authority seems to be that the fact that an automobile skidded, taken alone, is not evidence of negligence.

The same result seems to be reached upon principle. It is a matter of common experience that motor vehicles on rubber tires often skid in the public streets when a light rain has fallen, or where there are

other conditions, such as oil on the pavement, and this apparently without negligence on the part of the driver. Under such conditions a slight increase in speed, or the checking of speed by the application of the brakes, or the centrifugal force developed in turning the corner, or even the inequalities due to the crowning of a road, might cause skidding.

The assignment of negligence in the complaint is the want of care in the management of the machine. The skidding might have been due to negligence or to other causes. Before the plaintiff can recover, he must establish that his injury was due to defendant's negligence. The inference of negligence cannot be drawn from skidding alone, as it is equally probable that the skidding might have been due to other causes. *Ruppert v. Brooklyn Heights R. R. Co.*, 154 N. Y. 90, 47 N. E. 971.

I think that the disposition made by the learned trial court was correct, and that the judgment should be affirmed.

JENKS, P. J., concurs.

SALEMBIER, LEVIN & CO., Inc., v. NORTH ADAMS MFG. CO.
(Supreme Court, Special Term, New York County. November 17, 1919.)

1. ATTACHMENT §120—SUFFICIENCY OF AFFIDAVITS; ANNEXING COPY OF WRITING.

In action on sales contract, papers on which warrant of attachment was granted were not defective in attaching a copy, instead of the original, of an unsigned writing containing terms of agreement, since the writing was merely a memorandum, and since, even if it was a signed agreement, courts will not refuse an attachment, or vacate one merely because some of the evidence in affidavits might be excluded, if objected to upon trial, unless something further is shown.

2. ATTACHMENT §92—SUFFICIENCY OF AFFIDAVITS.

Evidence, instead of mere allegations or conclusions, should be submitted when an attachment is sought; but court will not refuse an attachment, or vacate one, merely because some of the evidence contained in the affidavits on which attachment is granted might be excluded, if objected to upon the trial, unless something further is shown.

3. ATTACHMENT §92—AFFIDAVITS MAKING PRIMA FACIE CASE SUFFICIENT.

One who obtains an attachment is required merely to make out a prima facie case, and not to anticipate the possibility of a defense, or of a denial, or an avoidance.

4. DAMAGES §62(4)—EFFORT REQUIRED TO MITIGATE DAMAGES.

Injured party to contract is not required to make extraordinary effort to save party in default from damage; a reasonable effort being sufficient.

5. SALES §172—IMPOSSIBILITY OF PERFORMANCE; WAR CONDITIONS.

Seller, having contracted to make deliveries of woolen goods, was not relieved from liability for failure to so do by fact that United States government had pre-empted practically the entire woolen goods supply on account of war.

6. ATTACHMENT §107—SUFFICIENCY OF AFFIDAVITS; DAMAGES.

In buyer's action for seller's failure to deliver, attachment papers held to set forth sufficient facts to establish buyer's right to recover the damages claimed.

7. SALES §71(3)—QUANTITY OF GOODS; MINIMUM.

Seller, having agreed to deliver "50,000 to 55,000 yards," was bound to deliver only the minimum amount.

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Action by Salembier, Levin & Co., Incorporated, against the North Adams Manufacturing Company. On motion to vacate warrant of attachment. Granted, to extent indicated in opinion, but in all other respects denied.

Cohen, Gutman & Richter, of New York City (Julius Henry Cohen and Theodore B. Richter, both of New York City, of counsel), for the motion.

Ivins, Wolff & Hoguet, of New York City (Robert Louis Hoguet, of New York City, of counsel), opposed.

GIEGERICH, J. The defendant appears specially for the purpose of moving to vacate and set aside a warrant of attachment upon the ground that the court was without jurisdiction to grant the same, and that the papers upon which it was granted were insufficient to give the court jurisdiction, in that the complaint and papers in support of the warrant fail to establish a cause of action, and do not establish plaintiff's right to recover the damages for which the attachment was granted, or any damages.

The action is brought to recover damages for the defendant's failure to complete its contract to sell and deliver to the plaintiff from 50,000 to 55,000 yards of cloth at the contract price of \$3.25 per yard. The contract was entered into between one of the plaintiff's assignors and the representative of the defendant in a personal interview. In the affidavit on which the attachment was procured, such one of the plaintiff's assignors states that the representative of the defendant, after the agreement was reached orally, "drew up a written agreement embodying all the terms of the transaction, a copy of which is hereto annexed marked Exhibit A." It is not stated that this written memorandum was signed, and the copy annexed does not show that it was signed. The said affidavit further states that no part of the cloth contracted for had been delivered, except 91 pieces, averaging 40 yards per piece, and that the defendant had failed and refused to deliver the balance, amounting to 51,360 yards. It is further stated that the plaintiff's assignors had been for many years prior to the date of the contract, and at the times set for the delivery of the goods in question, jobbers, purchasing goods from manufacturers and reselling them throughout the United States, and that the deponent at various times prior to the making of this contract had informed the defendant's agent and the defendant to such effect, and that the merchandise contracted for was intended for resale to the plaintiff's assignors' customers. It is further stated that after the making of the contract the plaintiff's assignors entered into agreements with various concerns in different parts of the United States for the resale of the goods at an average price of slightly over \$3.75 per yard, with customers financially responsible and able to perform their contracts.

A supplemental affidavit, filed later by permission of the court under the provisions of section 768 of the Code of Civil Procedure, sets forth in detail 13 of these resale contracts, including the date, the name of the buyer, the buyer's address, the number of yards so resold in each case, and the price, which 13 contracts aggregate 28,880 yards.

The supplemental affidavit further states that the deponent at a subsequent date received an order for 16,000 yards of the goods and another order for 12,000 yards of the goods at \$3.75 a yard. The contract price in each instance of a resale is shown to be \$3.75, except in one case, in which it was \$3.87½. It is further stated that the goods contracted for were unusually wide, measuring 66 inches, whereas the usual width in the trade was from 54 to 56 inches, and that in all deponent's experience, extending over 15 years, he had never handled or heard of any goods of this width, except the goods in question. He further states that, after it became apparent that the defendant was not going to deliver the goods in question, he and one of his associates made inquiry among the various concerns from which they had been accustomed to buy goods, and from all possible concerns from which they thought such goods might be obtained, but were unable to obtain any goods having any such width or at all similar in characteristics or substance, and that no one they approached could make any offer of any goods at all similar to those involved, or that could have been delivered on the contracts for resale. The affidavit further sets forth the names and locations of numerous factories visited by the deponent and by his associate in their endeavor to secure similar goods. The affiant further adds that at the time in question practically the entire woolen goods supply of the United States had been pre-empted by the United States government and it was virtually impossible to obtain any woolen goods of any sort whatsoever, and further states that he is familiar with the manufacture and wholesale markets for such goods, and that he knew of no sales of goods of the kind and sort covered by the contract, and that, except in so far as the resales referred to would show a market value for the goods in question of \$3.75 a yard, such goods had no market value at the time and place of delivery.

[1] The learned counsel for the defendant attack the papers on which the warrant of attachment was granted with great acuteness and vigor, but I cannot agree with their criticisms, except in one respect, which will be referred to later. The first objection urged is that the attachment papers are fatally defective in failing to annex the original contract upon which the plaintiff's cause of action is based. The argument is made that the plaintiff could not upon the trial introduce the purported copy without first showing what had become of the original, thus laying the basis for secondary evidence. I think there are two sufficient answers to this objection. The first is that the writing, not being signed, is not in fact the agreement between the parties, but is merely a memorandum of the terms which they agreed to orally. But even if it had been a signed agreement, I do not know of any case which has gone so far as to hold that the original must be annexed to the affidavits or produced to the judge who granted the warrant of attachment, and I cannot see any reason why the courts should go to that extent.

[2] It is true that the courts are careful, and properly so, to see that evidence, instead of mere allegations or conclusions, should be submitted when an attachment is sought; but it is not true that the court will refuse an attachment or vacate one merely because some of

the evidence contained in the affidavits on which the attachment is granted might be excluded, if objected to upon the trial, unless something further is shown. In *Hanson v. Marcus*, 8 App. Div. 318, 40 N. Y. Supp. 951, the argument was made that the allegation in the affidavit that the amount claimed in the complaint was due above all counterclaims should have been made by the plaintiff, and the rule was invoked that in such cases it is the duty of the party asking for the attachment to furnish to the judge the best evidence which can be procured. The court said (8 App. Div. 319, 320, 40 N. Y. Supp. 952):

"The law does not so require. The provision of the Code requires that the facts must be proved to the satisfaction of the judge. Code Civ. Proc. § 636. That is done, not necessarily by presenting to him the best evidence, but by presenting such evidence as is competent in its nature and sufficient to prove the fact, and when that has been done the requirements of the statute have been complied with."

In the present case, so far as concerns the exact terms of the contract, there is abundant ground to be satisfied that the copy annexed to the affidavit is in fact a correct copy of the original, because there is the affidavit of one of the plaintiff's assignors who negotiated the contract in suit and a sworn copy of the written memorandum which was made at the time. The suggestion made on behalf of the defendant that the paper on which the written memorandum was made was an order blank, and that it is well known that many of these blanks contain general provisions, such as those relieving the seller of liability for contingencies beyond his control, and that the order blank in question may have contained such a provision, cannot avail against the affidavit that the copy set forth is a correct copy.

[3] The observations I have made above substantially answer the second objection advanced, which is that the papers are defective in failing to annex complete copies of various letters, instead of the excerpts taken therefrom. It must be remembered that one who obtains an attachment is required merely to make out a prima facie case, and not to anticipate the possibility of a defense or of a denial or an avoidance. As was said in *Crook v. Lipton*, 182 App. Div. 858, 860, 170 N. Y. Supp. 345, 347:

"The rule is that where the motion to vacate is made solely upon the original papers, and where on those papers a prima facie case is made out, sworn to on personal knowledge, the court will uphold the attachment. *Stiner v. Tennessee Copper Co.* (No. 1) 176 App. Div. 209 [161 N. Y. Supp. 986]. If a prima facie case is made out, that should be sufficient until there is some denial."

It is possible, of course, that the omitted portions of the letters may contain something to qualify or contradict the portions set forth; but that possibility is not enough to require the entire letter to be set forth, which might in many cases lead to the incorporation of a great mass of wholly immaterial matter. If the facts exist which the defendant's counsel suggest may exist, then the defendant has its remedy by setting forth those facts. In his supplemental affidavit, after showing what mills had been visited in an effort to get other goods, after it became apparent that the defendant was not going to deliver those contracted for, the affiant says:

"I may add that at the time in question practically the entire woolen goods supply of the United States had been pre-empted by the United States government and it was virtually impossible to obtain any woolen goods of any sort whatever."

[4] This, the defendant's counsel argue, shows the impossibility of the performance of its contract by the defendant and relieves it of responsibility to the plaintiff. This is an unwarranted construction of the words used. In the first place, the period of time referred to was after it became apparent that the defendant was not going to deliver. It may have been impossible at that late day for the plaintiff to procure goods in substitution, and that, at most, is all that is stated. There is nothing in the statement to warrant the construction that the defendant could not have performed in full had it taken proper preparatory steps in season. Furthermore, it would not be fair to impose upon the injured party to a contract the duty of extraordinary effort to save the party in default from damage. This would shift the burden of performance from the shoulders of the one who undertook the obligation to the shoulders of the one who contracted that the other should assume that burden. If the injured party makes reasonable efforts on behalf of the one in default, he has done all he is required to do, and reasonable efforts are shown in this case.

[5] If anything more were needed on this point, attention might be called to the fact that the words above quoted do not contain the full explanation given by the affiant for the failure of the plaintiff in its efforts to procure other goods. Such additional reasons stated included the falling off of production due to the war, decreased importation of raw wool, and shortage of labor. But even on the defendant's own construction of the words quoted it would not be relieved of liability under the decision made in *Mawhinney v. Millbrook Woolen Mills*, 105 Misc. Rep. 99, 110, 172 N. Y. Supp. 461, 467, where it was said:

"As to this defendant overstates the rule when it says that impossibility of performance, arising from acts of the Legislature and executive branches of the sovereignty, is an excuse for a contract breach. Reference to the authorities cited in support (*United States v. Dietrich* [C. C.] 126 Fed. 671; *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 171, 176; *Jones v. Judd*, 4 N. Y. 411; *Labaree Co. v. Crossman*, 100 App. Div. 499, 502, 92 N. Y. Supp. 565, *aff'd* 184 N. Y. 586, 77 N. E. 1189; *Gesualdi v. Personeni* [Sup.] 128 N. Y. Supp. 683; *Adler v. Miles*, 69 Misc. Rep. 601, 126 N. Y. Supp. 135) shows that they were cases really enforcing the true rule, which is that, where performance of a contract, legal when made, becomes illegal by some event, statute, decision, or lawful act of public authorities, both parties are excused from further performance. Here, without an order placed under the National Defense Act [Act June 3, 1916, c. 184, 39 Stat. 166], the effect of the contracts with the government was simply a rush of business, which is not an excuse. *L. R. A. 1916F, 18.*"

[6, 7] Another objection made is that the papers fail to set forth facts sufficient to establish the plaintiff's right to recover the damages claimed. Whatever merit there may have been in this objection when the original papers alone were considered, I do not think it can prevail in view of the facts set forth in the supplemental affidavit. The affidavits, taken together, in my opinion, set forth all the facts necessary

to entitle the plaintiff's assignors to their profits of 50 cents per yard on their resales up to the amount of the contract for 50,000 yards. The memorandum referred to in the column headed "Quantity" contains the words "50,000 to 55,000 yards." I cannot accede to the plaintiff's argument that this bound the defendant to furnish the larger amount named. On the contrary, I think it was bound only to furnish the minimum amount, and the attachment should be reduced accordingly.

Motion granted to the extent indicated, but in all other respects denied without costs. Settle order on notice.

(108 Misc. Rep. 582)

BULLVILLE MILK PRODUCERS' ASS'N, Inc. v. ARMSTRONG.*

(Supreme Court, Special Term, Orange County. September, 1919.)

1. PLEADING ~~§~~343—JUDGMENT ON THE PLEADINGS; DEMURRER TO COMPLAINT.

Where defendant demurred to plaintiff's complaint on the ground that it did not state facts sufficient to constitute a cause of action, plaintiff's motion for judgment on the pleadings, under Code Civ. Proc. § 547, was proper.

2. CONTRACTS ~~§~~116(4)—RESTRAINT OF TRADE; CO-OPERATIVE CREAMERY CONTRACTS WITH FARMERS.

Where dairymen formed a co-operative association, later incorporated, their signed agreement to deliver all milk produced by them to it, except that retailed and needed for stock raising and family use, with a provision for liquidated damages in case of breach, was not void as against public policy and in restraint of trade.

Action by the Bullville Milk Producers' Association, Incorporated, against Frank C. Armstrong. Plaintiff's motion for judgment on the pleadings granted, with leave to defendant to answer, etc.

Watts, Oakes & Bright, of Middletown, for plaintiff.

Frank H. Finn, of Middletown (Harry T. Crist, of Middletown, of counsel), for defendant.

SEGER, J. In October, 1916, certain dairymen, engaged in business in the vicinity of Bullville, met and formed a co-operative association which later resulted in the formation of a corporation in which some 63 farmers subscribed for shares of stock and signed an agreement to deliver all milk produced by them to the corporation, except such as they needed for stock raising and family use, and also excepting such as the subscribers might desire to dispose of at retail to families residing in the village of Bullville, and also making some exceptions in the winter time in the case of members living at a distance from the creamery who would have difficulty during that time of the year in delivering their milk. The agreement also provided that in case of the failure of any member to deliver milk as provided in the contract the delinquent should pay the said corporation at the rate of \$10 per cow per year for such violation as long as it continued; the said \$10 per cow to be considered as liquidated damages, and not as a penalty. The corporation erected a creamery, but defendant has

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*Order affirmed — App. Div. —, 180 N. Y. Supp. —.

not delivered any milk to that creamery. The plaintiff corporation has, therefore, brought this action to recover the sum of \$350, being the amount of the liquidated damages for one year for defendant's alleged failure to deliver the milk from 35 cows.

Defendant demurred to plaintiff's complaint upon the ground that it does not state facts sufficient to constitute a cause of action. Plaintiff moves for judgment on the pleadings, and upon the argument defendant raised two questions: First, that plaintiff's motion for judgment on the pleadings is not the proper procedure to obtain a determination of the issues raised by demurrer; and, second, that the facts as stated in plaintiff's complaint are not sufficient to constitute a cause of action because the contract upon which the action is based, and which is set forth at length in plaintiff's complaint, is void, as being against public policy and in restraint of trade:

[1] It is well settled that a demurrer may be tested by a motion for judgment under section 547 of the Code of Civil Procedure. The plaintiff's motion is therefore proper. *Dahm v. O'Connell*, 179 App. Div. 363, 166 N. Y. Supp. 450.

[2] In regard to the other point raised by plaintiff, it seems to me that the agreement in question constitutes a valid and binding contract, and is not void as being against public policy or in restraint of trade. The incorporators of this association desired to engage in the business of shipping milk, and it was quite necessary that they be assured of the continued patronage of their members in order to justify the association in going to the expense of acquiring or erecting a creamery. It cannot be said that an agreement such as this would tend to restrain trade or stifle competition; on the contrary, it seems to me that it encourages competition by bringing a new creamery into being.

There are no cases cited in the defendant's brief which sustain his contention that a contract such as this one is void as being against public policy and in restraint of trade. On the other hand, my attention has been called to an unreported decision in Supreme Court, Lewis county, made by Mr. Justice Emerson in an action brought by Castorland Milk & Cheese Co. v. Schantz, 179 N. Y. Supp. 131, in which the facts are almost identical with the case at bar, and in which Judge Emerson upheld the contract.

Plaintiff's motion for judgment on the pleadings should therefore be granted, with \$10 costs, with leave to defendant to answer within 20 days upon payment of such costs.

Ordered accordingly.

(189 App. Div. 276)

PEOPLE v. DURKEE

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

1. FOOD §5—ADULTERATION; SALAD DRESSING.

A salad dressing, which is a compound under a secret formula of vinegar, mustard, salt, and other ingredients, none of which are harmful in any way, cannot be said to be adulterated, under Agricultural Law, § 201.

2. FOOD §15—MISBRANDING; EFFECT OF "PROVISO."

The proviso following the three subdivisions relating to misbranding in Agricultural Law, § 201, is not an added prohibition, but qualifies and limits the prohibitions already contained in the section; that is, the acts before mentioned are prohibited unless they are saved by the proviso, a "proviso" being a clause making what precedes conditional on what follows.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proviso.]

3. FOOD §15—MISBRANDING; SALAD DRESSING.

A salad dressing, "Durkee's Salad Dressing and Meat Sauce," a compound under a secret formula of vinegar, mustard, salt, and other ingredients, none of which are harmful in any way, cannot be said to be misbranded, under Agricultural Law, § 201, in that it is not sold under its own distinctive name, and that the ingredients of which it is composed are not stated in the label.

4. STATUTES §219—CONSTRUCTION BY PUBLIC OFFICERS; MISBRANDING OF FOOD.

The fact that "Durkee's Salad Dressing and Meat Sauce" has been in use for a great many years without complaint being made that it was misbranded, and that opinions of the Attorney Generals of the state uniformly have treated such product and similar products as falling within the proviso in Agricultural Law, § 201, as articles sold under their own distinctive names, is of great importance to the court in its interpretation of such statute, in an action wherein it is claimed that such salad dressing is misbranded.

Appeal from Trial Term, Albany County.

Proceeding by the People of the State of New York against Eugene W. Durkee. From a judgment (101 Misc. Rep. 331, 166 N. Y. Supp. 987) dismissing their complaint, the People appeal. Unanimously affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and H. T. KELLOGG, JJ.

Charles D. Newton, Atty. Gen., and C. T. Dawes, Deputy Atty. Gen., for the People.

Breed, Abbott & Morgan, of New York City, for respondent.

JOHN M. KELLOGG, P. J. [1] The appellants complain that "Durkee's Salad Dressing and Meat Sauce" is sold in violation of section 201 of the Agricultural Law (Consol. Laws, c. 1), defining and prohibiting the sale of adulterated and misbranded foods. The salad dressing has been upon the market for about 50 years, under the same name and of the same ingredients. It is a compound under a secret formula of vinegar, mustard, salt, and other ingredients, none of which

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are harmful in any way. Clearly the dressing does not fall within any of the definitions of adulterated articles. It is urged, however, that it is misbranded, in that it is not sold under its own distinctive name, and that the ingredients of which it is composed are not stated in the label.

The section, in three subdivisions, defines misbranded articles. Subdivision 1 relates to an imitation, or an article sold under the distinctive name of another. Subdivision 2 relates to an article colored, powdered, stained, or mixed, so as to conceal inferiority, thus deceiving or tending to deceive the public. Subdivision 3 relates to false or misleading statements upon packages or labels. It cannot be, and is not, claimed that the defendant's product comes within the spirit of any one of these subdivisions. There are no other affirmative provisions in the statute as to misbranding articles. The question here concededly arises under the following proviso, following the provisions of section 201 which we have referred to:

"Provided, that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded in the following cases: First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not included in definition first or third of misbranded articles of food in this section. Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are mixtures, compounds, combinations, imitations or blends: Provided, that the same shall be labeled, branded or tagged so as to show the character and constituents thereof: And provided, further, that nothing in this article shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, except in so far as the provisions of this article may require to secure freedom from adulteration or imitation."

[2, 3] It is clear that this proviso is not an added prohibition. Upon the contrary, it qualifies and limits the prohibitions already contained in the section. In other words, the acts before mentioned are prohibited, unless they are saved from prohibition by the proviso. The Standard Dictionary defines "provided":

"This [or it] being understood, conceded, or established; on [this] condition; on these terms; in this sense, always introducing a clause of condition or exception and followed by 'that' expressed or understood."

"Proviso" is defined as a "clause making what precedes conditional on what follows." The proviso, therefore, does not prevent the defendant from using his label.

[4] As we have seen, this dressing has been in use for a great many years. No complaint has ever been made that it was misbranded. The opinions of the Attorney Generals of the state uniformly have treated this product, and similar products, as falling within the proviso as articles sold under their own distinctive names.

"There is no question that the practical construction of a statute by those for whom the law was enacted, or by public officers whose duty it is to enforce it, acquiesced in by all for a long period of time, is of great importance in its interpretation in a case of serious ambiguity." *Grimmer v. Tenen* and *House Department of City of New York*, 205 N. Y. 549, 550, 98 N. E. 332.

This quotation seems to apply with force here, and indicates that at this late day a forced construction should not be put upon the statute, if there is a reasonable doubt about its meaning.

The judgment should therefore be affirmed, with costs. All concur.

BOYD v. McADOO, Director General of Railroads.

(Supreme Court, Appellate Division, Third Department. November 12, 1919).

Appeal from Trial Term, Ulster County.

Action by Isabelle Boyd, as administratrix of John G. Boyd, deceased, against William G. McAdoo, Director General of Railroads, in place of the New York Central Railroad. From a judgment for plaintiff, and an order denying his motion for new trial on the minutes, and an order denying his motion to set aside the verdict and to direct new trial, defendant appeals. Judgment and orders affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Amos Van Etten, of Kingston, for appellant.

Palmer Canfield, Jr., of Kingston, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. All concur, except JOHN M. KELLOGG, P. J., who dissents, with a memorandum in which LYON, J., concurs.

JOHN M. KELLOGG, P. J. (dissenting). The intestate, a policeman, while riding on the front platform of a trolley car, was killed by a collision between that car and an engine upon the defendant's road. The principal question litigated was whether the defendant was negligent in the management of the gates at the crossing; the plaintiff alleging that the gates were not lowered, while the defendant claimed to the contrary. A very close question of fact was presented, and it cannot be said that a finding either way could be disturbed, as not fairly sustained by the evidence. The trial occupied three days, and the question was fully litigated upon both sides. When the defendant rested, the plaintiff called a witness (who had been examined at the coroner's inquest) and offered to prove by him that he saw the accident and that the gates were not closed at the time. The court sustained the defendant's objection to the evidence as not being in rebuttal, saying:

"For the purposes of the record, that each side has been given about three days to litigate the questions as to the position of the gates and the other questions involved, and I do not think at this late day either side ought to be permitted to reopen the case."

It was a question resting in the sound discretion of the court, and it cannot be said that there was an abuse of that discretion. Thereupon the plaintiff called four other witnesses (one of whom had been sworn before the coroner), and showed, in substance, that each was

in a position to know the position of the gates, and sought to prove by them that the gates were up at the time of the accident. The defendant objected to the examination, as a reopening of the case, claiming that the practice was improper and unprofessional after the ruling of the court. The court, in substance, repeated its former ruling. Apparently there was no reason for calling the four additional witnesses, unless the plaintiff sought improperly to influence the jury by leaving them to believe that the four additional witnesses would swear in his favor, if the court would permit. It was an attempt to sway the jury, not by evidence, but by offers of evidence, after the evidence had been excluded.

Upon the argument this court sought to ascertain the motive of the plaintiff's attorney in putting these witnesses upon the stand; but no explanation was given, except that the witnesses were in court and the defendant had not called them. The case is so evenly balanced upon the question of fact that this irregular practice evidently influenced the result.

The judgment and order should be reversed, as the result of a mistrial, and a new trial granted, with costs to the appellant to abide the event.

(189 App. Div. 315)

IN re EIGHTY-FOURTH STREET IN BOROUGH OF QUEENS, CITY OF
NEW YORK.

Appeal of LONG ISLAND R. CO.

(Supreme Court, Appellate Division, Second Department. November 7, 1919.)

1. RAILROADS ~~§ 90~~—EXTENDING STREET OVER TRACKS; REVIEW.

The Public Service Commission cannot go back of a resolution of the board of estimate and apportionment, reciting that there is a necessity for the extension of a street in the city of New York over the tracks of a railroad.

2. RAILROADS ~~§ 90~~—EXTENSION OF STREET OVER RAILROAD; TEST OF NECESSITY.

On application by the city of New York to extend a street across the tracks of a railroad, the question of fact before the board of estimate and apportionment is, under Railroad Law, § 90, whether in view of the locality of other facilities for crossing with proper safety within reasonable access to travel in that place, and of other streets of the vicinage where safe crossings could be ordered, the volume of public travel now and presently convinces the board that the crossing is reasonably needful.

3. RAILROADS ~~§ 90~~—EXTENDING STREET OVER TRACKS; "NECESSITY."

Findings by the board of estimate and apportionment, on application by the city of New York to extend a street over a railroad, that "the public interest" required a continuance of a street, was a finding that there was a "necessity," within the meaning of Railroad Law, § 90, for the extension of the street, although the word "necessary" was not used, the principal consideration of the "necessity" being the public welfare; but mere convenience should not satisfy the term, in view of the fact that a part of the cost of crossing is upon the railroad.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessity.]

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4. RAILROADS ~~§ 90~~—EXTENDING STREET OVER TRACKS; REVIEW OF FACTS.

Action of the Public Service Commission, extending a street across the tracks of a railroad, under Railroad Law, § 90, will not be reversed on appeal, where its determination had sufficient support, and there are no facts that indicate any abuse of the discretion reposed in such board.

Appeal from Public Service Commission.

In the matter of the application of the City of New York, etc., as to Eighty-Fourth Street (Digby Street), Borough of Queens. From an order and determination of the Public Service Commission in procedure of extending a street across its tracks, the Long Island Railroad Company appeals. Order and determination affirmed.

Argued before JENKS, P. J., and MILLS, RICH, PUTNAM, and JAYCOX, JJ.

Louis J. Carruthers, of New York City, for appellant.

Harry Myron Chamberlain, of New York City, for respondent Public Service Commission.

Vincent Victory, of New York City (William P. Burr, Corp. Counsel, and J. P. O'Brien, both of New York City, on the brief), for respondent city of New York.

JENKS, P. J. This appeal is from an order and determination of the Public Service Commission in procedure of extending a street in the city of New York across the tracks of a railroad corporation. The appeal challenges the jurisdiction of the commission, in that the board of estimate and apportionment did not conform to the procedure prescribed by section 90 of the Railroad Law (Consol. Laws, c. 49) necessary to confer that jurisdiction. The board of estimate and apportionment did proceed under the statute to finality. Although it seems that the appellant had the right to appeal from the final determination of the board of estimate and apportionment (Matter of Delavan Avenue, 167 N. Y. 256, 60 N. E. 589; Matter of North Third Avenue, 32 App. Div. 394, 53 N. Y. Supp. 46), the appellant did not.

[1] As to the power of the Public Service Commission to pass upon these jurisdictional questions, it is well said by this court in its First Department:

"But so far as the Public Service Commission is concerned, it cannot go back of the resolution of the board of estimate and apportionment, which recites that the necessity for the change has been duly found." *Matter of City of New York [Third Avenue]*, 183 App. Div. 688, 170 N. Y. Supp. 470.

Nevertheless, as the questions are jurisdictional, I shall consider them so far as seems necessary upon this appeal.

I think that the appellant, the Long Island Railroad Company, was afforded a hearing before the board of estimate and apportionment upon the "necessity" of the improvement, within the contemplation of section 90 of the Railroad Law. There was not and is not contention that the notice required by the said statute in the procedure of the board of estimate and apportionment was not duly published and advertised. And it was conceded at the hearing before the Public

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Service Commission that the notice of the hearing before the board of estimate and apportionment also provided that the said board would at the time stated "grant a public hearing to the Long Island Railroad Company pursuant to the provisions of the Railroad Law under necessity" (on the necessity?) "of laying out the aforesaid pedestrian crossing," and that such notice was served upon that company. The record shows that that board held the hearing at the time and place prescribed. There is no contention that the Long Island Railroad Company was misled or precluded, so that it could not appear to be heard.

I think that the procedure of the board of estimate and apportionment satisfies the statute (section 90 of the Railroad Law), in that there was a determination that the extension was "necessary." The word "necessary" does not appear in the final resolves of the said board. But the question is whether the determination satisfies the spirit of the statute, not whether it uses this apt word.

"The word 'necessary' * * * has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports." *McCulloch v. State of Maryland*, 4 Wheat. at page 414, 4 L. Ed. 579.

"Necessary" may mean indispensable, or needful, or even reasonably convenient. It has been held with respect to crossings that necessity means, not the absolute, but the practical, necessity, and that even the "reasonable convenience" satisfies the word. *Vice v. Eden*, 113 Ky. 255, 68 S. W. 125; *Railway Co. v. Odeneal*, 73 Miss. 40, 19 South. 202; *Chalcraft v. L., E. & St. L. R. R. Co.*, 113 Ill. at page 87. See, too, *Jones v. Seligman*, 81 N. Y. at page 195; *Matter of North Third Avenue*, 32 App. Div. at page 396, 53 N. Y. Supp. 46.

[2] The work contemplated by the statute in this instance is the extension of a city street across the tracks of a railroad corporation in that city in such fashion as secures the immunity of pedestrians from the danger of the cars worked by the railroad corporation. The necessity imported in this statute is not absolute or indispensable, because in the nature of things the public could cross at grade, if the street were but extended. Such necessity presumably is not absolute or indispensable at this point, because normally in a city other streets not far away afford crossings, either absolutely or reasonably safe. Mere convenience should not satisfy the term, in view of the law that casts a part of the cost of the improvement upon the railroad corporation. The question of fact before the board of estimate and apportionment is whether, in view of the locality of other facilities for crossing with proper safety within reasonable access to travelers in that place, and of other streets of the vicinage where safe crossings could be ordered, the volume of public travel now and presently convinces the board that this crossing is reasonably needful. This court in its first department (ut supra, 183 App. Div. at page 694, 170 N. Y. Supp. 475) uses this expression:

"Doubtless the widening must be a reasonable one and made for the honest purpose," etc.

[3] After all said, the principal consideration of the "necessity" is the public welfare. We find that in direct proceedings on the contemplated improvement the board of estimate and apportionment did resolve that "the public interest" required a continuance of the street by a change in the map or plan of the city, that such change was thereupon made, and that thereupon the board by its formal resolve made formal request for the proceedings taken by the Public Service Commission. I think that the requirement of necessity was satisfied.

[4] The final determination of the board had sufficient support, and as there are no facts that indicate any abuse of the discretion reposed in the board, there is no reason for disturbance by this court either upon the merits or for error of procedure. See *Matter of Town Board v. Fitchburg R. R. Co.*, 53 App. Div. 16, 65 N. Y. Supp. 498, affirmed 169 N. Y. 609, 62 N. E. 1101.

Order and determination affirmed, with \$10 costs and disbursements. All concur.

(189 App. Div. 185)

LEONE v. BOOTH S. S. CO., Limited.

(Supreme Court, Appellate Division, Second Department. November 7, 1919.)

1. SEAMEN §11—MEDICAL TREATMENT OF INJURED SEAMAN AS QUESTION FOR JURY.

In a seaman's action against his employing steamship company for negligent treatment of a broken arm received in the course of his duties, evidence held insufficient to take to the jury the question whether the company was liable for negligence because those in charge of the ship did not send him to a hospital at Barbadoes, or at one of the vessel's South American ports of call.

2. EVIDENCE §5(2)—JUDICIAL NOTICE; USE OF X-RAY.

Courts are not bound to take judicial notice of matters of fact, as that X-ray apparatus is in general use in hospitals at Barbadoes and in South American ports.

3. SEAMEN §11—MEDICAL TREATMENT OF INJURED SEAMAN PROPER ON BOARD SHIP.

Where the ship's doctor was competent, and the appliances and facilities in the ship's hospital were sufficient for treatment of the injury to a seaman, the steamship company was not liable for failure to send him ashore at Barbadoes or South American ports of call to receive hospital treatment there, because the captain did not overrule the instructions within his own department of the ship's doctor.

Appeal from Trial Term, Kings County.

Action by Antonio Leone against the Booth Steamship Company, Limited. From a judgment for plaintiff, and from an order denying its motion for new trial, defendant appeals. Judgment and order reversed, and complaint dismissed.

The plaintiff respondent was employed as an able seaman on board the steamship *Boniface*, owned by defendant, and on February 16, 1916, three days after she sailed from New York, while he was engaged in assisting in the work of raising the wireless apparatus in place, he fell from the foremast of the vessel and received severe injuries. He was carried to the ship's hospital where he was treated by the ship's doctor.

There are two causes of action alleged in the complaint. In the first cause

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of action it is set forth that the mast was not properly equipped with ladders, ropes, guards, and other devices, and was an unsafe and unseaworthy appliance, but upon the trial there was no evidence of defective appliances and equipment, and the court dismissed the first cause of action.

In the second cause of action the plaintiff alleges the duty of the defendant owner of the steamship, after the accident, to furnish the plaintiff, a sailor, with proper care in the way of medical and surgical treatment, such as the plaintiff's injuries required, and it is alleged that defendant failed and neglected to furnish such treatment, and that while the plaintiff was in a crippled and helpless condition the master of the vessel compelled him to perform his regular duties as a sailor and other hard and manual labor. And plaintiff charges that the physician employed on the steamship was incompetent, and that he did not treat plaintiff properly, and that "said physician was not equipped with proper tools, instruments, etc., for the treatment of plaintiff's injuries."

The plaintiff charges that the ship's doctor failed to properly diagnose his injuries; that he failed to discover a fracture of the large tuberosity of the humerus of plaintiff's right arm. Plaintiff testifies that his complaints to the doctor and to the master of the vessel, and requests that he be sent to a hospital at one of the ports at which the vessel called, were refused, and that he was compelled to go to work despite the fact that he was at all times suffering severe pain. He testifies that the doctor and the master accused him of malingering, and forced him to work. When the steamship returned to Brooklyn on April 22, 1917, some 11 weeks after the accident, plaintiff was sent to the Long Island College Hospital, where by use of the X-ray the fracture was discovered and, after operation, healed. Plaintiff was relieved to some extent of his pain, but he claims that the arm is permanently disabled.

According to the testimony, the first port at which the vessel touched after the accident was "Barbadoes." Barbadoes is not a port, but is an island. The port of Barbadoes is Bridgetown. The plaintiff claims that he desired to go ashore for hospital treatment at this port, but that he was not permitted to do so. He testifies that the doctor said he would take him ashore at Barbadoes and have an X-ray taken of his shoulder. When the vessel arrived at this port, six days after the accident, the plaintiff testifies that he was waiting in the ship's hospital to be taken ashore, but that the mate told him the doctor had examined him when he was sleeping, and that the captain said to him, "There is no need to you going in the hospital, there is nothing the matter with you." The plaintiff says the captain told him, "There is no necessity to send you in a hospital; there is nothing the matter with you; they won't take you in the hospital." The plaintiff testifies that the ship's doctor told him at that time that there was nothing the matter with him. The ship was at "Barbadoes" about 20 hours. The plaintiff says that he had been ashore at this place at previous times, and that Barbadoes is a city as large as Brooklyn, and that there are plenty of hospitals and doctors there.

The next port at which the vessel touched was Para, in Brazil. Plaintiff says they have many hospitals there, and that he said to the captain, "Will you send me to a hospital in Para?" The captain said, "You try there; yes." The plaintiff testified that he went ashore and to the office of the British consul. While at the office, he says the mate came to him, with the captain and the vice consul. The vice consul said to the captain, "Is this the man you are talking about?" and the captain answered, "Yes; this is the man; * * * happened an accident, and we treated him right." "Then," says the plaintiff, "the consul told me, 'You better go aboard; no hospital here; you will die of sickness; you go back aboard, and they will treat you right.' I said, 'They put me in the fore-castle.' I said, 'I can't live in the fore-castle without treatment; and after that they put me to work, I am sure.' He said, 'They won't put you to work; you better go back aboard;' and I went back aboard the ship." Subsequently the vessel touched at different ports in Brazil. Plaintiff testifies that these are small ports, but that they have hospitals. The captain never at any time called a shore doctor to examine him, or sent him to a hospital. Plaintiff claims he repeatedly requested that he be

sent to a hospital. He claims, also, that he was obliged to work about the ship, causing him additional pain and suffering.

The captain and mate of the vessel and the ship's doctor, Dynan, denied that plaintiff was treated improperly. The doctor, 40 years of age, had some 14 years' experience as a physician and surgeon in various hospitals, and had been engaged for several years in general practice. He testifies that he found a dislocation of plaintiff's right shoulder joint; that plaintiff refused to allow any examination of the injury at the time of the accident, but that on the following day he put the shoulder joint in place, and immobilized the joint and arm by bandages. He says he suspected that there might be a fracture of one of the tuberosities on the humerus; but he says the plaintiff would not allow examination. He says the fracture of the tuberosity subsequently developed by the X-ray photograph at the Long Island College Hospital was a small fracture, the separation of a small part of the bone about the size of his finger nail, a separation of about one-sixteenth or one-eighth of an inch, and that if he had been positive that there was such a fracture the treatment would have been the same; that is, immobilization and bandaging. The defendant's witnesses testified that the plaintiff was kept in the ship's hospital for two weeks, and then sent to his quarters in the forecabin with his arm bandaged; that he was not forced to work at any time; that light work and gradual use of the arm was proper and necessary, but that at no time was the plaintiff forced to work against his will, and that on any complaint of pain he was allowed to lay off work. The defendant's witnesses testify that the plaintiff was a troublesome patient, resenting any attempt to examine the injury, and that on one occasion at Manaus, in Brazil, after his removal from the ship's hospital, he, with sailors, members of the crew, obtained liquor from the shore contrary to the regulations and became intoxicated and violent. Dr. Dynan testified that he did not know whether there was any X-ray apparatus at any of the hospitals in the ports at which the vessel called, and that the treatment given the plaintiff in the ship's hospital was the same as would have been given at any other hospital. There was no X-ray apparatus on the ship, but the evidence is that the hospital was in every other respect fully equipped.

After plaintiff's treatment at the Long Island College Hospital, he consulted counsel, and was sent to the New York Hospital, where he was examined by Dr. Hoag, who did not treat him, but who testified in his behalf. Dr. Hoag says, from an examination of the X-ray photograph, that it would have been possible to have discovered the condition of the broken tuberosity without the use of an X-ray. He said, in answer to questions of plaintiff's counsel, which did not state any hypothetical facts or conditions, that treatment for such a fracture should be to immobilize the arm "in external rotation," by turning the arm out, and that this should be followed by massage and baking. No proper hypothetical question was addressed to Dr. Hoag by the plaintiff, reciting the conditions or facts as stated by him concerning his injury or treatment, nor was he asked to testify whether the treatment of plaintiff, as related by him, was or was not the ordinary treatment in such cases. He testified that it was absolutely necessary to have the co-operation of the patient. Dr. Dynan, for the defendant, testified after Dr. Hoag, that his (Dynan's) treatment was proper under the conditions existing in plaintiff's case.

The trial justice said: "The only question I will submit to the jury is this: Whether in view of the fact that the injury did not become cured, or, in other words, in view of the fact that the man did not get well, within a reasonable time, or did not improve within a reasonable time, whether, in view of all the circumstances in this case, it was the duty of those in charge of the steamship to have sent him to a hospital either at Barbadoes or in South America, to be examined, so as to determine, if possible, what was the condition of his shoulder or arm at this time. I shall tell the jury that there can be no liability predicated here upon the failure of the ship to employ a competent physician, because the testimony here shows that there was a competent physician on board. I shall tell the jury that no liability can be predicated upon the fact that the doctor may or may not have made a wrong diagnosis of the case. I shall only submit to them the question as to whether

or not those in charge of the ship acted prudently in not sending this man to a hospital in one of those ports."

And in his charge to the jury he said: "I have taken away from you the first cause of action, which alleges negligence on the part of the steamship company in sending this man aloft to do some work, and I have taken away from you any question as to whether or not the doctor was guilty of what we know as malpractice, in other words, a failure to properly diagnose and treat this case, because the doctor is, according to the testimony, a duly qualified physician, a man of some experience, of middle age, or past, and was thoroughly competent to discharge his duties as a physician on board this vessel. So that no liability can be predicated here for anything which the doctor did in his failure to properly diagnose or treat this case. So we come down to this one proposition, and that is the only point which you may consider in this case: Should those in charge of this vessel, acting as reasonably prudent men, have sent this man to a hospital in Barbadoes, or in one of the South American ports, for the purpose of having his condition diagnosed, so that they might be able to properly treat him?"

Again the court charges the jury: "So in this case concededly this man asked the captain at Barbadoes if he might go to a hospital. The question for you to determine is whether or not the captain acted as a reasonably prudent man in not sending this man to the hospital at Barbadoes, or when they got to South America. The testimony shows that this ship made half a dozen calls at different ports in Brazil, and the plaintiff claims that he then requested to be sent to a hospital. At any rate he did not go to a hospital. And it is assigned here as a reason for not sending him to the hospital that the British consul advised, in one instance, that it would be extremely dangerous for him to remain in that port. Upon all the testimony, it comes back to the proposition which I laid down to you before: Did those in charge of the ship discharge their full duty towards this plaintiff? If you find that they did, that ends the case, and your verdict would be for the defendant."

The counsel for the defendant excepted to the charge as to the possibility that the jury might find from any evidence in the case that there was an X-ray machine at Barbadoes. Counsel for the defendant made the following request: "I ask your honor to charge that the ship's officers may fairly be entitled to conform their conduct touching any medical or surgical question, or the work this man was doing, to the instructions of Dr. Dynan." The court said: "I so charge."

Argued before JENKS, P. J., and MILLS, RICH, KELLY, and JAYCOX, JJ.

Henry M. Hewitt, of New York City, for appellant.
Silas B. Axtell, of New York City, for respondent.

KELLY, J. [1, 2] We all agree that upon the evidence in the record the learned trial justice erred in submitting to the jury the question whether the defendant was liable for negligence because those in charge of the ship did not send the plaintiff to a hospital at Barbadoes, or at one of the ports in South America at which the vessel called. There is nothing in the case to show that, if plaintiff had been sent ashore, he would have or should have received other or different treatment from that given him by the ship's doctor. The evidence as to the location of hospitals at Barbadoes, or the other ports mentioned by the plaintiff, is of little probative value; nor is there any evidence, if there were hospitals at these ports of call, that they had any better or different facilities for treating the plaintiff than those found in the ship's hospital, which on the evidence was supplied with the usual appliances, instruments, and apparatus found upon a modern passenger

steamship. It is true that there was no X-ray apparatus on the ship, but there is no suggestion in the case that such apparatus is used or can be used on a vessel such as the defendant's steamship, nor is there evidence that there was X-ray apparatus at the hospitals in the southern ports.

The plaintiff's knowledge of conditions in these West Indian and South American ports is evidently meager. He testifies, for instance, that he had been ashore at "Barbadoes" at other times; that it is a "big city"; "it is as big as Brooklyn is; I don't know Brooklyn; * * * they got plenty hospitals certainly, and doctors." We know that Barbadoes is not a city, but an island; the port is Bridgetown. The population of Bridgetown is stated in the International Encyclopedia to be from 30,000 to 35,000, while the population of the entire island of Barbadoes in 1913 is stated to be 197,792. The Encyclopedia Britannica gives the population of Bridgetown as 23,000. These encyclopedias mention the fact that there is a hospital at Bridgetown, but give no details as to its capacity or equipment. The plaintiff argues that the trial court might take judicial notice that X-ray apparatus was in general use in hospitals at Bridgetown and in South American ports (citing *Field v. Empire Case Goods Co.*, 179 App. Div. 253, 166 N. Y. Supp. 509; *Powell v. Hill* [Sup.] 170 N. Y. Supp. 915; *Rochester, etc., v. Joel*, 41 App. Div. 43, 58 N. Y. Supp. 346). But none of these cases are applicable to the facts here.

"Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved, and the apparent justice of the case. The rule that permits a court to do so is of practical value in the law of appeal, where the evidence is clearly insufficient to support the judgment. In such case judicial notice may be taken of facts which are a part of the general knowledge of the country, and which are generally known and have been duly authenticated in repositories of facts open to all, and especially so of facts of official, scientific, or historical character." *Hunter v. N. Y., O. & W. R. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246.

In *Robinson v. Insurance Co.*, 198 N. Y. 523, 91 N. E. 373, the Court of Appeals, expressing some doubt whether a trial judge might take judicial notice of the harbors and location thereof within his district, said that, even if such judicial notice might be taken of the location of the harbors, the condition prevailing in the harbor at a given time presents a question of fact. In *Town of North Hempstead v. Gregory*, 53 App. Div. 350, 65 N. Y. Supp. 867, this court had before it the question whether judicial notice might be taken of conditions prevailing in one of the harbors on Long Island as to ice and the effect thereof upon docks and piers in such harbor, and Mr. Justice Jenks, writing for the court, discussed the subject and collated the authorities. He said in part:

"In *Brown v. Piper*, 91 U. S. 37 [23 L. Ed. 200], the court further say: 'This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.' * * * Phillips, in his book on Evidence, states as a further principle that the matters within judicial notice are generally collateral to and unconnected with the point in issue, so that to dispense with strict proof is of no risk, while to require it might be inconvenient by reason of expense or of difficulty."

Dr. Hoag, the medical expert called by the plaintiff, testified that the fracture of the tuberosity might be determined without use of the X-ray. He says he ascertains this condition in the majority of cases without any X-ray. He says an operation is not necessary to cure or remedy such a condition, as most patients get well without it. He says that his treatment of such a fracture would have been to "immobilize the arm in external rotation," which he explains is to turn the arm out and keep it immobilized in that position for three or four weeks. He also testifies that it is absolutely necessary to have the co-operation of the patient. But Dr. Hoag's testimony, at the most, is that he might have used a different method of treatment from that adopted by the ship's doctor in immobilizing plaintiff's arm, and it is difficult, on the record, to perceive what the difference is. Dr. Hoag did not criticize the treatment given plaintiff by the ship's doctor, nor was he asked to express any opinion as to whether it was the usual treatment in such cases or whether it was proper or improper. No question was framed or presented to plaintiff's medical witness, containing a statement of the facts of the case as claimed by the plaintiff's evidence, asking the expert's opinion as to Dr. Dynan's treatment. We think that upon the evidence in this case it was error to permit the jury to decide as a matter of common knowledge that the hospital in Bridgetown possessed an X-ray apparatus, or that if the plaintiff had been sent there he would have received any different treatment from that given him.

[3] But upon the law of the case, as charged by the learned trial justice without objection or exception by the plaintiff, I think there was no evidence justifying the submission of the case to the jury, and that defendant's motion at the close of the testimony for nonsuit should have been granted. The complaint alleged that the ship's doctor was incompetent and that the treatment of the plaintiff was improper. There was no evidence in the case that he was incompetent, and the trial judge charged the jury without objection or exception that the ship's doctor was—

"a duly qualified physician, a man of some experience, of middle age, or past, and was thoroughly competent to discharge his duties as a physician on board this vessel. So that no liability can be predicated here for anything which the doctor did in his failure to properly diagnose or treat this case."

The medical witness called by the plaintiff was not asked whether the diagnosis or treatment of plaintiff by the ship's doctor was proper or improper, or whether it was or was not the usual and customary treatment in such cases. If there had been evidence of malpractice, coupled with plaintiff's testimony as to his complaints to the master of the ship, denied by the defendant's witnesses, an issue might have been presented for the jury. But if the ship's doctor was competent, and the appliances and facilities in the ship's hospital were sufficient, the defendant was not liable.

"The question to be determined was a medical one, the advice of a competent physician was sought and followed, and the ship's officers should not be held negligent because they followed his advice. * * * The ship's officers might fairly be entitled to conform their conduct touching any medical

or surgical question to the instructions of men thus qualified to decide it." The *Sarnia*, 147 Fed. 106, 108, 77 C. C. A. 332, 334 (C. C. A., Second Circuit).

And in *Allan v. Steamship Co.*, 132 N. Y. 91, 99, 30 N. E. 482, 485 (15 L. R. A. 166, 28 Am. St. Rep. 556), the Court of Appeals, in discussing the duty of a vessel owner to provide medical care and treatment for passengers, said:

"When the shipowner has employed a competent physician, duly qualified, as required by the law, and has placed in his charge a supply of medicines sufficient in quantity and quality for the purposes required, which meet the approval of the government officials, and has furnished to the physician a proper place in which to keep them, we think it has performed its duty to its passengers; that from that time the responsible person is the physician, and errors and mistakes occurring in the use of the medicines are not chargeable to the shipowner; and that no different rule is applicable to such mistakes as are the result of improper arrangement in the care of the medicines than to those which are the result of errors in judgment. The work which the physician does after the vessel starts on the voyage is his, and not the shipowner's."

And at page 98 of 132 N. Y., at page 484 of 30 N. E. (15 L. R. A. 166, 28 Am. St. Rep. 556), the court said:

"Any other construction must assume that the shipowner is bound to exercise some supervision over the physician in his treatment of the passengers and his arrangement of the medicine. But no officer on the ship is competent to do that"—citing *Laubheim v. De K. N. S. Co.*, 107 N. Y. 229, 13 N. E. 781, 1 Am. St. Rep. 815; *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329.

In the case at bar there being no evidence of incompetency on the part of the ship's doctor or improper treatment, the defendant cannot be held in damages because the captain of the vessel did not overrule the instructions of the physician. I think no issue was presented for submission to the jury, and that the judgment and order appealed from should be reversed, with costs, and the complaint dismissed, with costs. All concur.

(189 App. Div. 279)

DI CAPRIO v. NEW YORK CENT. R. CO.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

1. APPEAL AND ERROR ⇐866(1)—QUESTION CONSIDERED ON APPEAL FROM GENERAL NONSUIT.

On appeal from judgment of nonsuit, where the motion for nonsuit was general in its terms, the appellate court will consider only the question actually decided and litigated at the trial.

2. RAILROADS ⇐361—FAILURE TO FENCE; EVIDENCE OF NEGLIGENCE AS TO CHILD INJURED BY TRAIN.

Failure of a railroad company to comply with the requirement of railroad Law, § 52, to fence its road to prevent live stock going thereon, is evidence of negligence in favor of one suing for the death of a child, struck by a train on an unfenced track onto which he had strayed.

Appeal from Trial Term, Montgomery County.

Action by Tony Di Caprio, as administrator of the goods, chattels, and credits of Peter Di Caprio, deceased, against the New York Cen-

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tral Railroad Company. From a judgment of nonsuit upon a jury trial, plaintiff appeals. Reversed, and new trial granted.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Harry V. Borst, of Amsterdam, for appellant.

Kernan & Kernan, of Utica (Warnick J. Kernan, of Utica, of counsel), for respondent.

JOHN M. KELLOGG, P. J. The defendant's four-track road, with three side tracks, runs through the plaintiff's farm, on which were kept horses and cows. There was no fence between the track and the plaintiff's house. The house was about 70 feet distant from the nearest rail. The ground between the house and the track was substantially level at the place in question. The plaintiff's family consisted of himself, wife, and four children. Another family in the house had seven children. Upon the day of the intestate's death he was under observation by his family, but in some manner he slipped away from them and was killed upon the track by the Empire State Express, which was running at about 60 miles per hour. The intestate was about two years old. The defendant and its employes knew of the conditions existing at this place, and, in a general way, that the house was occupied, in part, by small children.

[1] Concededly the defendant did not maintain a fence along its track, as required by section 52 of the Railroad Law (Consol. Laws, c. 49). The plaintiff, in this action to recover for the death of his intestate, was nonsuited, upon the ground that the statute relates, not to persons, but only to the domestic animals mentioned in it. The trial proceeded upon the theory that the defendant failed to maintain a fence as required by statute; the defendant claimed freedom from liability because a person, and not a domestic animal, had been killed. The motion for a nonsuit was general in its terms, and we therefore will consider only the question actually decided and litigated at the trial. *Bromley v. Miles*, 51 App. Div. 95, 96, 64 N. Y. Supp. 353). No other question was raised or argued upon this appeal.

[2] The appellant contends that the failure to maintain the fence, as required by the statute, was a violation of duty on the part of the defendant, and was some evidence of negligence, which, with the other facts shown, should have been submitted to the jury on the question of the defendant's negligence. Section 52 of the Railroad Law requires the company to maintain a fence on the sides of its road—

"of height and strength sufficient to prevent cattle, horses, sheep and hogs from going upon its road from the adjacent lands. * * * So long as such fences and cattleguards are not made, or are not in good repair, the corporation, its lessee or other person in possession of its road, shall be liable for all damages done by their agents or engines or cars to any domestic animals thereon. * * * No railroad need be fenced, when not necessary to prevent horses, cattle, sheep and hogs from going upon its track from the adjoining lands."

Fully to understand this statute we must remember that it was enacted to remedy, in part, a defect of the common law. The owners

of horses, cows, sheep, and hogs were required, at common law, to restrain them, and, if such animals strayed upon the premises of another, they became trespassers, so that the owner could not recover for injury to them while so trespassing, unless the injury was intentionally and willfully committed. *Knight v. N. Y., Lake Erie & W. R. R. Co.*, 99 N. Y. 25, 1 N. E. 108.

[3] The statute was not intended to legalize such trespass, but it was enacted for the benefit of the public and the occupant of the adjoining premises. The railroad company was required to build the fence. If it did not, it was liable for any injuries sustained by domestic animals caused by the railroad's agents, engines, or cars. It was properly held in the *Knight Case*, supra, where the trespassing cow fell through a railroad bridge and was killed, that this statute gave no remedy. To a like effect is *Jimerson v. Erie R. R. Co.*, 203 N. Y. 518, 97 N. E. 48, 37 L. R. A. (N. S.) 1181. The statute expressly provides what damages should be paid by the company in case of injury to cattle, and leaves the owner to bear any other loss coming to his cattle from a violation of the statute.

In *Donnegan v. Erhardt*, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527, because of the absence of a fence, the train collided with a horse upon the track, and a brakeman was injured. The recovery was sustained, the court saying (119 N. Y. 473, 23 N. E. 1051, 7 L. R. A. 527):

"But, whatever the rule would be independently of the statute, there is no reasonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed, not only to protect the lives of animals, but also to protect human beings upon railroad trains. It is made an unqualified duty, and for a violation thereof, causing injury, the railroad company incurs responsibility. The sole consequence of an omission of the statutory duty is not specified, and was not intended to be specified, in the statute. Responsibility for injuries to animals was specially imposed, because in most cases there would, independently of the statute, have been no such responsibility, as at common law the owner of animals was bound to restrain them, and if they trespassed upon a railroad there was no liability for their destruction, unless it was willfully or intentionally caused."

The case also determines that irrespective of the statute the judgment against the defendant could stand upon the facts shown, and the facts shown were not stronger proof of negligence than in the instant case. On principle, if the accident in the *Donnegan Case* had been caused by running over a child, instead of a cow, the negligence under the statute would have been the same.

In *Leggett v. Rome, W. & O. R. R. Co.*, 41 Hun, 80, by the failure of the railroad company to build its fence along the track, the plaintiff was unable to pasture his land, and he recovered damages against the company therefor.

In *Union Pacific R. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, a Colorado statute, obliging the owners of coal mines to fence their slack piles and abandoned pits, required them to be so fenced as to afford permanent protection to all stock endangered thereby, and made the violation of the act a misdemeanor. A child

injured by an unfenced slack pile sustained a recovery against the owner.

In *Kelley v. N. Y. State Railways*, 207 N. Y. 342, 100 N. E. 1115, plaintiff's steam roller was traveling upon the highway in violation of section 329 of the Highway Law (Consol. Laws, c. 25), which required that a person should precede the roller at least one-eighth of a mile to "notify and warn persons traveling and using such highway or street with horses or other domestic animals, of the approach thereof," etc. The steam roller collided with the defendant's car, apparently by the defendant's negligence. The court charged, under exception, that this statute did not have any application on the question of plaintiff's contributory negligence. Subdivision 11 of section 1425 of the Penal Law (Consol. Laws, c. 40), in effect, makes a violation of section 329 of the Highway law a misdemeanor, without however referring specifically to that section. In calling attention to this subdivision of the Penal Law, the defendant requested the court to charge that it "is general in its terms, and does not speak of horses or domestic animals, and applies to this case," which request was denied, and the defendant excepted. The Court of Appeals says that the defendant may have been negligent in going at a high rate of speed, but that the plaintiff was violating the Penal Law at the time, and that fact was a proper subject for consideration, and continues:

"The statute, of course, affords persons belonging to the class which it expressly mentions greater protection than to those outside that class; but it is some evidence in favor of the latter. It is evidence for the jury to consider on the question of negligence with all the other evidence in the case. The court, therefore, erred in taking the statute from the consideration of the jury. The United States Supreme Court, in the case of *Union Pacific Railway Co. v. McDonald* (152 U. S. 262 [14 Sup. Ct. 619, 38 L. Ed. 434]), held that a statute analogous to the Highway Law applied under circumstances somewhat similar to the facts shown in this action."

Manifestly the statute was intended to prevent the frightening of horses and animals upon the highway; the court, however, did not limit it to such cases. Clearly there was no danger that the trolley car would be frightened. The case can stand only upon the broad theory that the statute imposes an absolute duty upon a person running a steam roller upon the highway, and the violation of that duty is evidence of negligence in favor of any one who sustains an injury thereby. It is apparent that the court was considering the two rulings—first, as to the Penal Law; and, second, as to the statute. It had already held that the violation of the Penal Law was some evidence of negligence, and, in the quotation we have just made, the court, when it refers to the statute, must refer to the highway statute, and not to the Penal Law. If we are right in that view, the case is controlling authority here.

In *Amberg v. Kinley*, 214 N. Y. 531, 108 N. E. 830, L. R. A. 1915E, 530, in showing the distinction between an action to recover damages for the breach of a statutory duty and one based solely upon negligence, the court says (214 N. Y. 536, 108 N. E. 831, L. R. A. 1915E, 530):

"This principle of law is illustrated in *Union Pacific Railway Co. v. McDonald and Fluker v. Ziegele Brewing Co.*, supra [201 N. Y. 40, 93 N. E. 1112, Ann. Cas. 1912A, 793]. In *Union Pacific Ry. Co. v. McDonald* the defendant failed to erect a fence required by statute to protect cattle and horses, and by reason of the absence of the fence a child was injured. The court, quoting, said: 'And although, in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence.'"

If the defendant had carried on its business in the manner required by law, the accident would not have happened. The defendant violated a duty imposed upon it by statute, and the violation of that duty is evidence of negligence.

It must be conceded that the decisions in the various states are not in harmony on these fence statutes, but I think that our Court of Appeals has given such recognition to the *Union Pacific Case* that we are required to follow it. The Court of Appeals, in the *Donnegan Case*, does not refer to the *Knight Case*, although it was cited in the briefs. Neither does the *Jimerson Case* refer to the *Donnegan Case*, although that likewise was in the brief. The Court of Appeals must therefore have considered that the cases stand upon different grounds—the *Knight* and *Jimerson Cases*, upon the theory that the statute has fixed a certain liability for the loss of animals, and thereby has excluded other liabilities on their account; the *Donnegan Case*, upon the theory that the company did not build the fence which the statute required it to build, and therefore the violation of the statute is at least some evidence of negligence. The *Union Pacific Case* is the only authority cited in the opinion in the *Kelley Case*.

Accordingly I favor a reversal of the judgment and a new trial, with costs to the appellant to abide the event. All concur; COCHRANE, J., with an opinion.

COCHRANE, J. (concurring). Section 52 of the Railroad Law, requiring the railroad company to maintain fences, has this provision:

"No railroad need be fenced, when not necessary to prevent horses, cattle, sheep and hogs from going upon its track from the adjoining lands."

The boy lived on a farm of about 100 acres, on which horses and cattle were kept. It appears that some time before this accident a cow had been killed, apparently because it strayed from the farm on to the railroad. It would seem, therefore, that a jury might properly have been permitted to say that there was an absolute duty on the defendant to fence its track along the farm in question. If the necessity for the fence existed, the willful omission to erect it was a misdemeanor. Penal Law, § 1984, subd. 2.

The violation of a statute or an ordinance, if it has some connection with the injury complained of, is some evidence of negligence. *Amberg v. Kinley*, 214 N. Y. 531, 536, 108 N. E. 830, L. R. A. 1915E, 519; *Fluker v. Ziegele Brewing Co.*, 201 N. Y. 40, 93 N. E. 1112, Ann. Cas. 1912A, 793; *Union Pacific Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; *Kelley v. New York State Railways*, 207 N. Y. 342, 100 N. E. 1115.

In *Union Pacific Railway Co. v. McDonald*, supra, there was a statute requiring that ground covered with slack coal in such quantities as to produce spontaneous combustion should be fenced "in such manner as to prevent loose cattle or horses from having access to such slack piles," and making the violation of the act a misdemeanor. The railroad company failed to observe this statute, and a boy on its premises fell into the burning slack and was injured. The court said:

"Primarily that statute was intended for the protection of cattle and horses. But it was not, for that reason, wholly inapplicable to the present case upon the issue as to negligence. * * * The nonperformance by the railroad company of the duty, imposed by statute, of putting a fence around its slack pit, was a breach of its duty to the public, and therefore evidence of negligence, for which it was liable in this case, if the injuries in question were, in a substantial sense, the result of such violation of duty."

That case was cited in *Kelley v. New York State Railroads*, supra. I am unable to distinguish those cases in principle from the instant case.

The cases of *Knight v. New York, Lake Erie & Western Railroad Co.*, 99 N. Y. 25, 1 N. E. 108, and *Jimerson v. Erie Railroad Co.*, 203 N. Y. 518, 97 N. E. 48, 37 L. R. A. (N. S.) 1181, are distinguishable. Both of those actions were for injuries to domestic animals in falling through bridges on the tracks, and turned on the express provision in the statute limiting liability in respect to animals. In the *Jimerson* Case Chief Judge Cullen quotes from the *Knight* Case, where it was stated that the statute does not leave the question open as to liability to the owners of cattle and horses, but that it defines in express terms the consequences of liability to such owners "for damages which shall be done by the engines or agents of any such corporation," and adds:

"It was held that the bridge was not an agent, and that the defendant was not liable."

On the other hand, the case of *Donnegan v. Erhardt*, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527, establishes that there may be a liability for personal injuries for a failure to comply with this very statute.

I think, therefore, the judgment should be reversed.

(109 Misc. Rep. 233)

FORD v. McADOO, Director General of Railroads.

(Supreme Court, Special Term, Chemung County. August, 1919.)

1. MASTER AND SERVANT ⇐286(12)—VIOLATION OF FEDERAL BOILER INSPECTION ACT; INJURIES THEREFROM QUESTION FOR JURY.

In an action for the death of a brakeman, thrown under the train when his clothing came into contact with an unguarded hook on the tender of the locomotive, where there was evidence that the hook could have been guarded when not in use, the question whether the locomotive was equipped with a safe and suitable boiler and appurtenances, as required by section 2 of the federal Boiler Inspection Act (U. S. Comp. St. § 8631), and the acts amendatory thereof, was for the jury.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. MASTER AND SERVANT §285(7)—PROXIMATE CAUSE OF INJURY JURY QUESTION.

In an action under the federal Boiler Inspection Acts for the death of a brakeman, alleged to have been caused by contact with an ungarded hook on the tender of the locomotive, whether the hook was proximate cause of death *held* to be a question for the jury.

3. MASTER AND SERVANT §111(1)—INJURIES FROM RAILROAD'S VIOLATION OF SAFETY APPLIANCE ACT.

One of the class for whose special benefit the federal Safety Appliance Act was enacted can recover damages from party violating it, regardless of whether party in default was negligent in the general sense of want of care.

Action by Margaret H. Ford, as administratrix, against William G. McAdoo, Director General of Railroads of the United States. Verdict for plaintiff.

Judgment affirmed — App. Div. —, 178 N. Y. Supp. 890.

Mortimer L. Sullivan, of Elmira, for plaintiff.

Stanchfield, Lovell, Falck & Sayles, of Elmira, for defendant.

A. L. KELLOGG, J. This is a motion for a new trial, resultant from the verdict of a jury in favor of the plaintiff in the sum of \$12,500.

The action was brought by the plaintiff, Margaret H. Ford, as administratrix of the estate of her husband, Truman C. Ford, against the defendant, Delaware, Lackawanna & Western Railroad Company, to recover damages alleged to have been sustained by the widow and next of kin by reason of his death, on or about the 29th day of April, 1918, while he was in defendant's employ as head brakeman on its railroad. Before the trial of the action William G. McAdoo, the Railroad Administrator of the United States, was substituted as party defendant.

It was contended by the plaintiff that her husband's death was caused solely by the negligence of the defendant in failing to comply with the provisions of the federal Boiler Inspection Act (Act Feb. 17, 1911, c. 103, 36 Stat. 914 [U. S. Comp. St. §§ 8630-8639]) and the acts amendatory thereof, passed by the Congress of the United States, and known as an act to promote the safety of employes and travelers upon railroads, by compelling common carriers, engaged in interstate commerce, to equip their locomotives with safe and suitable boilers and appurtenances thereto, including the tender and all parts and appurtenances thereof.

It appears that, upon the style of locomotive upon which the decedent was working at the time of the accident which resulted in his death, a certain hook was located on the left side of the tank, about 23½ inches from the grab handle used in connection with the steps leading up and down between the tender and locomotive, about 7 inches from the bottom of the tank, of the height of about 1½ inches, and extending from the tank about 1¼ inches, which was used for the purpose of drawing water from the tank into a pail to be hung on this hook for various purposes, to wit, for hot journals, for employes to

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

wash in, and at times to drink. It was the claim of the plaintiff that the construction and maintenance of said hook was in itself dangerous, in that it was liable to come in contact with the clothing of the employes of the defendant, including the decedent, in passing up and down the steps between the locomotive and tender, while in the discharge of their duties, and thereby rendered them liable to accidents and injury by reason of the close proximity thereof, and that the hook in question was the proximate cause of the death of Truman H. Ford, in that in some manner his clothing came in contact with the same, by means whereof he was thrown under the wheels of the cars of his train, and his death resulted therefrom.

It was the contention of the defendant, on the contrary, that it was not negligent in any of the respects mentioned, and that in any event there was nothing whatsoever with respect to the construction of the locomotive which was the proximate cause of the death of plaintiff's intestate; that it was of approved make and design, and had been duly and properly inspected by its own, as well as by the inspectors of the Interstate Commerce Commission of the United States; and that no question of fact was presented at any time for the consideration of the jury.

The law and facts as they are applicable to the case, as well as to the contentions of the plaintiff and defendant in relation thereto, were presented with some care by the court in its charge to the jury. The only questions for consideration here are:

(1) Was the maintenance and use by the defendant of the locomotive in question, at the time of the accident, in view of its construction, with the hook on the outside of the tender, as described, a violation of the Boiler Inspection Acts of the United States? And, if so, was a question of fact, with respect thereto, presented for the consideration of the jury? Or was the construction of the locomotive, in its entirety, under the evidence, a question of law solely for the court?

(2) If it may be assumed that a question of fact was presented for the jury under the first proposition, was there a further question of fact for them to consider as to whether or not the hook was the proximate cause of death of plaintiff's intestate?

The federal Boiler Inspection Act, and the acts amendatory thereof, passed by the Congress of the United States, and known as an act to promote the safety of its travelers on railroads, by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto, in section 1, provides as follows:

"The provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad,' as used in this act, shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement,

or lease, and the term 'employés' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train."

Section 2:

"From and after the first day of July, 1911, it shall be unlawful for any common carrier, its officers or agents, subject to this act, to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The amendatory act (Act March 4, 1915, c. 169, 38 Stat. 1192 [U. S. Comp. St. § 8639a]) provides as follows:

"An act to amend an act entitled 'An act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto; approved February 17, 1911.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 2 of the act entitled 'An act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto,' approved February 17, 1911, shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof."

These acts clearly require common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto, and these acts apply to and include the entire locomotive and tender, and all parts and appurtenances thereof.

Let us assume, for the sake of the argument, that the question as to whether or not, in some manner, the decedent came in contact with the hook, was removed from all doubt, and that it was a conceded fact in the case that it was the proximate cause of his death, then, in that event, for whose consideration would have been the question as to whether or not the entire locomotive, including the tender, and all parts and appurtenances thereof, was in a proper condition, and safe and suitable to operate in the service to which the same is put, taking into consideration the hook upon the tender in the place where it was located.

[1] Under these statutes, would that have presented a question of fact for the jury, or of law for the court only? Would that have been asking the jury to pass upon the question of engineering, or, in other words, as to the proper construction of locomotives and appurtenances, and as to whether or not that particular type of locomotive, with the hook attachment, was safe and suitable to operate in the service to which the same is put? Under such an assumed and conceded state of facts, it would have been established that an accident had taken place whereby one of the parts of the locomotive, as constructed, including the hook, was the proximate cause of the death of an employé engaged in Interstate Commerce.

I am of the opinion that, under such a conceded state of facts, the question would have been for the jury, and not one of law for the court. If my reasoning is correct, it would be true as well of the case at bar.

[2] It will be recalled that Riegel, one of the defendant's expert witnesses, admitted that this hook could be guarded when not in use, but that no thought or attention had been given to it. It would seem to follow from this evidence standing by itself, that there was a question of fact for the jury to say as to whether or not there had been a violation of the Boiler Inspection Acts, to wit: Was, or not, the locomotive in question equipped with a safe and suitable boiler, tender, and all parts and appurtenances thereof?

In the case of *Cline v. Northern Central R. R. Co. and Erie R. R. Co.*, 181 App. Div. 203, 168 N. Y. Supp. 303, the plaintiff was injured by having his gauntlet caught on the bolt upon a box car which projected one inch beyond the nut, and was located near the handhold and stirrup necessarily used by Cline in getting on and off the car. This was an action under the common law, and the question of the defendant's negligence was held to be for the jury.

Similar in some respects to the case under consideration is *Calhoun v. Great Northern R. R. Co.*, decided by the Supreme Court of Wisconsin, reported in 162 Wis. 264, 156 N. W. 198. In that case an action was maintained to recover for the killing of plaintiff's intestate, and the negligence asserted was the violation of the safety appliance statute (Act April 14, 1910, c. 160, 36 Stat. 298, § 2 [U. S. Comp. St. § 8618]), requiring the maintenance of secure running boards. The defect complained of was that one of the boards, constituting the running board, projected above the other, a distance of from one-fourth to five-eighths of an inch. Kerwin, J., writing for the court (162 Wis. at page 267, 156 N. W. at page 200) said:

"The serious question in this case is whether there is sufficient evidence to support the verdict. The jury found that the end of one of the boards of the running board projected above the adjacent board to such an extent as to constitute a defect or insufficiency in the car; that deceased stumbled over the projecting board, and as a result of such stumbling fell from the car; that defendant was negligent in allowing the defect to be in existence at the time of the injury."

The court continued as follows (162 Wis. at page 270, 156 N. W. at page 201):

"There is also much argument by counsel on both sides upon the common-law rule of proximate cause which has no relevancy to the case. It is conceded that the case is governed by the federal act, which fixes right of recovery for injury 'resulting in whole or in part' from negligence. It is sufficient that the defect contributed in any manner to the cause of the injury. *Alexander v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 158 Wis. 477, 146 N. W. 510. The Safety Appliance Act passed in April, 1910, and quoted from in the statement of facts, also imperatively requires common carriers to equip their cars with 'secure running boards.' This statute imposes an absolute duty upon the common carrier to comply with the statute. *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 81 Sup. Ct. 617, 55 L. Ed. 590."

On the proposition as to whether a question of fact is presented in an action under the federal Employers' Liability Act,¹ Mr. Justice

¹ Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. §§ 8657-8665).

Day, in writing for the court, in *Tex. & Pac. R. R. Co. v. Harvey*, 228 U. S. at page 324, 33 Sup. Ct. at page 520, 57 L. Ed. 852, said:

"Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony or because, the facts being undisputed, fair-minded men might honestly draw different conclusions therefrom, the question is not one of law." *Richmond & Danville R. R. Co. v. Powers*, 149 U. S. 43, 45, 13 Sup. Ct. 748, 37 L. Ed. 642.

The Supreme Court of the United States in *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, affirmed a judgment in favor of the plaintiff, where the question as to proper construction of the tank and appliances of a water spout was submitted to the jury.

I am also of the opinion that as to whether or not the hook was the proximate cause of the death of Truman H. Ford was, under all of the circumstances, a question of fact for the jury; that is, it was one for their determination how and in what manner he met his death, although it had to be necessarily arrived at more or less from inference. The jury was told, however, in that respect, that they could not guess or surmise or speculate that the accident may or may not have happened in a certain way, but that a finding in that respect must be based upon a fair preponderance of evidence, which convinced their reason and judgment. *Cline v. Northern Cent. R. Co.*, 181 App. Div. 203, 168 N. Y. Supp. 303; *Johnson v. H. R. R. Co.*, 20 N. Y. 65, 73, 74, 75 Am. Dec. 375; *Galvin v. Mayor*, 112 N. Y. 223, 228, 229, 230, 19 N. E. 675; *McHugh v. Manhattan*, 179 N. Y. 378, 382, 72 N. E. 312; *Russell v. Erie R. R. Co.*, 177 App. Div. 13, 15, 163 N. Y. Supp. 893; *Wazenski v. N. Y. C. & H. R. R. Co.*, 180 N. Y. 466, 73 N. E. 229.

There is no doubt whatsoever that the charge to the jury with respect to the degree of care the defendant was required to exercise in furnishing the decedent with a safe and suitable locomotive, and not causing the same to be properly inspected for the purpose of discovering defects, if any, was more favorable to the defendant than it had a right to expect. The mere fact that the defendant had used diligence or care to keep cars in a reasonably safe condition has been held to be not a question for the jury, and no defense to the suit; that the statute is commanding. *Wabash R. Co. v. U. S.*, 172 Fed. 864, 97 C. C. A. 284.

[3] A disregard of the command of the statute (Safety Appliance Act [U. S. Comp. St. §§ 8617-8619, 8621-8623]) is a wrongful act, and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover damages from the party in default is implied. If this act is violated, the question of negligence in the general sense of want of care is immaterial. *Tex. & Pac. R. R. Co. v. Rigsby*, 241 U. S. 43, 36 Sup. Ct. 482, 60 L. Ed. 874; *St. Louis Iron Mountain Co. v. Taylor*, 210 U. S. 281, 294, 295, 28 Sup. Ct. 616, 52 L. Ed. 1061. Roberts on Federal Liability of Common Carriers says, with respect to the safety appliance laws, at page 1309, § 1775:

"The federal Safety Appliance Act imposes an absolute and unqualified duty to maintain the equipment and appliances, required by its provisions, in secure condition. That the defect was not known, or could not have become known to the railroad company by the exercise of any care, is entirely immaterial in both personal injury actions and in suits for penalties."

For the reasons above stated, therefore, the motion for a new trial must be denied, with \$10 costs. Ordered accordingly.

MILES v. NEW YORK CENT. R. CO.

(Supreme Court, Special Term, Madison County. November 29, 1919.)

1. RELEASE $\Leftrightarrow$ 16—MUTUAL MISTAKE OF FACT.

A release given by an injured railway mail clerk to the railroad whose negligence caused his injuries can be said to have been given under "mutual mistake of fact" only when the clerk did not anticipate his injuries would later cause the development of spinal meningitis and his death, while the railroad, through its claim agent, also did not anticipate such facts.

2. RELEASE $\Leftrightarrow$ 16—MISTAKE OR FRAUD.

If plaintiff can say that by a mutual mistake of the parties, or its equivalent, a mistake on his part and fraud on the part of his adversary, the cause of action was embraced in a release given by plaintiff, contrary to the intent of the parties, or contrary to plaintiff's interest, if fraud is proven, he is entitled to an instruction that the release does not bar his right to recover.

3. RELEASE $\Leftrightarrow$ 57(2)—MUTUALITY OF MISTAKE; INSUFFICIENCY OF EVIDENCE.

In an action against a railroad by the widow of a railway mail clerk for his death, evidence *held* insufficient to show that the release which the clerk, after his injuries, gave the claim agent of the road, not under the influence of fraud, or active or passive misrepresentation, was void for mutual mistake.

Action by Bertha Miles, as administratrix, against the New York Central Railroad Company, resulting in verdict for plaintiff. On defendant's motion for new trial. Motion granted, verdict set aside, and new trial granted.

Campbell & Woolsey, of Canastota, for plaintiff.
Kernan & Kernan, of Utica, for defendant.

KILEY, J. At a term of this court commencing May 5, 1919, the above action was tried, resulting in a verdict in favor of the plaintiff. Plaintiff's intestate, her husband, for several years prior to December 13, 1915, was a mail clerk, working as such on defendant's train, over its road between Syracuse and New York. On the 13th day of December, 1915, the train upon which he was working collided with another train at Utica, N. Y. Plaintiff's intestate was thrown to the floor of the car and was injured. He continued as far as Albany and returned home. A physician was called the day he returned. The injuries suffered, by reason of the collision and fall upon the floor of the car, were the result of defendant's negligence, so conceded upon the trial.

On the 14th day of December, 1915, one E. S. Bavis, claim agent of

defendant, called upon Mr. Miles at his home in the village of Canastota, N. Y., and paid him \$250, for which Mr. Miles executed, acknowledged, and delivered to defendant a release, in part as follows:

"Witnesseth, that said railroad company hereby agrees that it will pay to said claimant the sum of two hundred fifty and no/100 dollars as the sole consideration and without any other promise or agreement, the said claimant hereby agrees that he will accept and receive the said sum from said railroad company in full payment, satisfaction, and discharge of all claims, demands, and causes of action against said railroad company, and especially from all claims and demands arising from injuries received by said claimant at or near Utica, state of New York, on or about the 13th day of December, 1915."

Mr. Miles died May 31, 1916. Subsequently plaintiff, as administratrix of her husband's estate, brought this action, alleging that from the injuries received at the time of the collision there developed spinal meningitis which resulted in the death of her husband. Plaintiff set out in her complaint the release given by her husband to defendant, and sought to avoid it on the ground that the parties were laboring under a mutual mistake as to the extent of the injuries involved. No claim was made in the complaint or upon the trial that any fraud was practiced upon or toward the plaintiff's intestate; no claim that any advantage was taken of Mr. Miles; no claim that he was incompetent.

Upon this motion defendant argues that, under the circumstances surrounding the execution and delivery of release, it should stand; also that the verdict is against the weight of evidence as to the cause of death. The verdict of the jury should not be disturbed on the last proposition.

[1] The validity of the release presents a different and more difficult question. The plaintiff urges that the only question to be decided upon this motion is whether or not the release was based upon a mutual mistake of fact. In view of the important principle involved here, it is necessary to consider what constitutes a "mutual mistake of fact," so far as the circumstances disclosed by the evidence are applicable to the expression and what it is intended to represent. It can mean but one thing in this case, viz. that plaintiff's intestate did not anticipate that the injuries he received would cause the development of spinal meningitis, and his death follow as a result; that defendant, through its claim agent, did not anticipate that such injuries would produce spinal meningitis and cause the death of Mr. Miles. It would seem that this is the broadest scope that can be given to the expression "mutual mistake of fact," when viewed in the light of the evidence in this case. I think it may be fairly held that neither party to the release anticipated or considered the fatal termination which followed the injury and the settlement made, as shown by the release.

Is this sufficient ground to set aside the release? If that was the only element to be considered, it would be a troublesome proposition, in view of some of the decisions that have been made. However, in this case the facts and circumstances, as shown by the record, must be taken into consideration. It appears that the defendant, through its claim agent, did not have any knowledge, except what he obtained from Mr. Miles and what he could see of him on the morning he was there

for the release. The only facts existing at that time the plaintiff's intestate knew, and told them to defendant's agent, viz. that he was thrown to the floor of the car, and was bruised and shocked, no bones broken, no laceration of flesh or muscle; what subsequently developed was not in existence at that time, and not for some weeks or months later; and what did subsequently develop was not the natural or usual result of such an injury. Thus we are brought to the question: What was considered by either or both of the parties to the release? Mr. Bavis says he was there to get a release that would foreclose any further claim against defendant on the part of Mr. Miles. He admits that he might have said he thought that Mr. Miles would be out in a few days, but that must have been based upon the extent of injuries then known and disclosed to him by the injured person; that was a mere expression of opinion, and does not sustain the claim that there was a mutual mistake of fact on his part.

Houghton v. Houghton, 34 Hun, 212, cited by plaintiff, has many features not found in this case: No consideration. The grantor "was induced and persuaded," and the subsequent acts of grantee colored the reasoning of the eminent jurist who wrote the decision. This appears from the following found in the opinion:

"It is also * * * inferable, from the allegations of the complaint, that the plaintiff did not intend to make his deed irrevocable, except in case of his death, and that would furnish a basis for the action. * * *"

In Kircher v. New Home Sewing Machine Co., 135 N. Y. 182, 31 N. E. 1104, also cited by plaintiff, the question of actual concealment, on the part of releasee, of conditions of which the releasor did not have knowledge, and further that the restrictions in the release were not destroyed by the general clause contained at the foot of the release. In other words, it was held that there was a cause of action not intended to be included. The same authority lays down this general rule:

"It is competent for a party by his own act to forego recovery for unknown as well as known causes of action."

[2] Distinct from what the evidence in that case led the court to conclude, the justice makes this observation at page 189 of 135 N. Y., at page 1106 of 31 N. E., of the opinion:

"If the plaintiff can show that by a mutual mistake of the parties, or by what is its equivalent, a mistake on his part and fraud on the part of his adversary, the present cause of action is embraced in the release, contrary to the intent of the parties, or contrary to his intent in case fraud is proven, he is entitled to an instruction to the jury to the effect that the release does not bar his right to recover."

This is a general rule laid down, which may have to give way or submit to modification, according to the facts of the case being considered. In the case at bar the element of fraud or misrepresentation is absent. The defendant knew the facts only as stated by the releasor, and he stated them as they were at that time. What was the position of plaintiff's intestate as disclosed by the evidence? His physician had seen him before the call of the claim agent of defend-

ant. He knew he was bruised and had suffered a severe shaking up; no other conditions were present at that time. The vital question for plaintiff comes in here: Did her intestate consider the possibility of something developing in the future from this injury which he did not and could not know at that time? Did he speculate on the chance that some unforeseen result might follow? According to what took place at the time of the execution of the release, as detailed by plaintiff who was present, he bargained for a higher sum than was first offered, and after the sum finally accepted by him was reached, he still hesitated, and appealed to his wife, this plaintiff, as to whether he had better take the chance. Her advice, twice given, was to wait until time would disclose further impairment, symptoms, results, or developments, and, notwithstanding this advice, he concluded to, and did, take the chance.

It would seem that the opinion in *Chicago & N. W. Ry. Co. v. Wilcox*, 116 Fed. 913, 54 C. C. A. 147, more nearly covers the circumstances in this case than any other cited or examined. The plaintiff in that action was a woman upwards of 60 years of age; she was injured on defendant's road and through the negligence of defendant; the injury was the breaking of her hip; her physician and the railroad physician were the same person. She claimed she was advised by the physician that she would be out or well in a year. She accepted \$600 in settlement and executed a release. Upon what constituted or did not constitute "a mutual mistake," the court wrote in part as follows:

"A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, cannot have this effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and every one who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so. Hence, where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very differently from the expectation, opinion, or belief of one or both of the parties. * * * Conceding, for the moment, that the doctor and the agent told the complainant that there was no doubt that she would be well in a year, that she believed this statement, that she relied upon it, and that she has never recovered, still these facts do not establish a fact which will warrant the avoidance of a solemn agreement of settlement. The mistake which they established was a mistake in prophecy, in opinion regarding the happening of a future event on the part of the doctor and of the agent, and a mistake in belief as to what the future had in store for her on the part of the complainant. The future duration of the disability, the future effects of the injury, were not matters of fact, but matters of conjecture, of opinion, of belief. The only material facts which conditioned the contract of compromise were the injury which the complainant had received and the acts of the railway company which caused it. These the complainant knew as well on the day she signed the release as she has ever known them. The future duration and the ultimate effects of the injury were unknown and unknowable future events, a mistake concerning which was a mere mistake of opinion or of belief, and not a mistake of fact. * * * The physical and mental condition of the sufferer, the state of his vital organs, his age, his habits of life, the character and temperament of his nervous system, and many other conditions that it is im-

possible to enumerate, or even to conceive, inevitably affect the duration and the character of his disability and the amount of his suffering."

In *Lumley v. Wabash Railroad Company*, 76 Fed. 70, 22 C. C. A. 64, the following statement appears in the opinion of the court:

"If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered, or enumerated. The subsequent discovery by one giving such a release that he was worse hurt than he had supposed would not, in and of itself, be ground for setting aside the settlement or limiting the release."

Again, in *Great Northern Railway Co. v. Fowler*, 136 Fed. 121, 69 C. C. A. 109, the court discusses the subject of "mutual mistake" as follows:

"The appellant's surgeon made an apparently cursory examination of the appellee's injuries, and found that they consisted of a wound of the scalp, a contusion of the shoulder, and nothing more, and expressed his opinion that the appellee would be ready to go to work again in two weeks. The appellee consulted no other physician as to the extent or probable duration of his injury. He was a sick man at the time when he made the settlement. He accepted the statement and opinion of the appellant's surgeon, and, on the basis of it, received \$195, and signed the discharge. We entertain no doubt that such a release, executed under a mutual mistake of facts so induced by the appellant, should be set aside. It is true that, where there is no misrepresentation or fraud on the part of the releasee, a releasor cannot subsequently avoid his release on the ground that his injuries were more serious than he thought them to be, even though his opinion at the time of making the settlement may have been based upon that of a physician employed by the releasee to examine and report on the extent of his injuries. Such was the case of *Nelson v. Minneapolis Street Ry. Co.*, 61 Minn. 168, 63 N. W. 486."

[3] In the present case the defendant was negligent, its negligence caused the injuries for which plaintiff brings this action, and, if she is correct as to the cause of her husband's death, that negligence subjected and subjects plaintiff and her family to hardship and deprivation. The decision reached is reluctantly reached, and because there seems no legal escape from it. The decision of the jury, if upheld, would make, not only contracts of this kind insecure, but the same principle would apply to all contracts when the party losing by such contract could avoid the same by claiming there was a mutual mistake on the part of each party to the contract, or a mistake on his part and fraud on the part of the other party. As to some contracts the remedy and relief is proper, but should not be extended to contracts executed under the circumstances surrounding the execution of this contract. It will be noted that there was no fraud alleged or proved—no misrepresentation, either active or passive; all parties were competent. The injuries and the extent thereof, so far as known, were discussed and considered, and after such discussion and consideration \$250 was paid for the release by the defendant. Such a contract should not be set aside.

Motion is granted, verdict is set aside, and new trial granted, with costs to abide the event.

(189 App. Div. 483)

BARDWELL v. BLACK.

(Supreme Court, Appellate Division, Third Department. November 21, 1919.)

1. PLEADING $\S$ 350(3)—DEMURRER TO COMPLAINT; PLAINTIFF'S MOTION FOR JUDGMENT.

Under Code Civ. Proc. §§ 547, 976, where defendant demurred to complaint as insufficient on September 26th, and on September 27th served notice of argument on demurrer, and on October 4th plaintiff's attorney served notice of motion that on the pleadings and papers referred to in the complaint plaintiff would move at the next Special Term, beginning October 12th, for an order for judgment prayed for, and that the issue of law be disposed of on the motion, the court properly took action on plaintiff's motion for judgment on the pleadings, despite defendant's objection that he himself had already duly noticed the argument of the demurrer.

2. PLEADING $\S$ 205(1)—GENERAL DEMURRER TO COMPLAINT.

A general demurrer on the ground the complaint fails to state the facts necessary to a cause of action cannot be sustained, unless, admitting all the facts alleged, no cause of action whatever is stated.

3. LANDLORD AND TENANT $\S$ 331(1)—RENTING ON SHARES; RIGHT TO ACCOUNTING.

Where plaintiff contracted to farm defendant's land on shares, and later, after he had raised crops, was drafted into military service, and the contract was terminated under agreement that the produce should be sold and the proceeds divided, which agreement defendant carried out to the extent of selling the produce, realizing a considerable sum, but failed to disclose or pay to plaintiff his share, in spite of demand, plaintiff is entitled to an accounting.

Appeal from Special Term, Washington County.

Action by Merritt W. Bardwell against Robert Black. From an order overruling the preliminary objections raised by defendant, and an order overruling a demurrer to the amended complaint, and granting judgment for plaintiff on the pleadings, defendant appeals. Orders affirmed, with leave to defendant to withdraw demurrer and answer.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Wemple & Peters, of Schenectady (Roy W. Peters, of Schenectady, of counsel), for appellant.

J. B. McCormick, of Granville, for respondent.

WOODWARD, J. The complaint alleges that the parties, on or about the 25th day of October, 1916, entered into a contract in writing by the terms of which the defendant let and demised certain premises, comprising a farm of about 100 acres, to the plaintiff; that it was agreed that each of the parties should furnish one-half of the necessary seed, fertilizer, etc., and that the plaintiff should furnish team, tools, machinery, etc., necessary to the proper tillage of the farm, and that the produce of said farm should be equally divided between them. The contract was to run for a period of one year. The complaint further alleges some modifications of such written contract, but it does not appear whether these were in writing or

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

not. It is alleged that, acting under the contract so modified, the plaintiff fulfilled the conditions thereof, and produced goods to the value of approximately \$1,000, which became the joint property of the parties. The complaint then sets up that the plaintiff was called upon, under the Selective Service Law to serve the United States government in the recent war, which necessitated his leaving the farm on the 5th day of October, 1917, which necessitated a further modification of the contract, involving a provision for the sale of the produce of the farm up to that time and a virtual termination of the contract and a division of the sums realized. This is followed by an allegation to the effect that the defendant sold various groups of farm products for sums unknown to the plaintiff, but believed to exceed certain named amounts, which sums belonged to the parties jointly, and that the defendant has received the moneys resulting from the sale for the joint use of the parties hereto, and that the defendant has refused to state the amount which he has received, or to pay over to the plaintiff his just portion of the same; that the plaintiff has no knowledge or information as to these amounts. The prayer for judgment is for an accounting, and for judgment in favor of the plaintiff for such amount as may be found due upon such accounting.

The defendant demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, on the 26th day of September, 1918, and on the following day the defendant served notice of argument on the demurrer, to be heard in the city of Schenectady on the 11th day of November. On the 4th day of October, 1918, the plaintiff's attorney served a notice of motion that—

"upon the pleadings in this case and the papers referred to in the amended complaint the undersigned will move this court, and a motion will be made at the next Special Term of this court, appointed to be held at the courthouse in the village of Hudson Falls, N. Y., in and for the county of Washington, on the 12th day of October, 1918, at the opening of the court," etc., "for a rule or order in this action directing that the plaintiff have the judgment as prayed for in the amended complaint in this action, and that the issue of law raised thereby be disposed of on this motion," etc.

On the 11th day of November, 1918, the attorneys for the parties entered into a stipulation that—

"the hearing on the motion for demurrer in the above-entitled action before Justice Salisbury, to be held at Schenectady Trial Term on November 11, 1918, at 10 o'clock a. m., be held open until Justice Van Kirk's decision on the motion for judgment on the pleadings held at Greenwich, N. Y., on October 26, 1918, is received," and that "if either party determine the hearing on the motion for demurrer be necessary following such decision of justice Van Kirk, that either party may bring such demurrer on," etc.

Upon the argument of the motion for judgment on the pleadings, defendant's attorney objected to the court taking action on the ground that the defendant had already duly noticed the argument of the demurrer. This objection was overruled, and the court at Special Term appears to have practically disregarded the motion of the plaintiff for judgment on the pleadings, and to have overruled the defend-

ant's demurrer, with permission to plead over on the payment of costs, and, on default in answering, directing "final judgment herein against the defendant for the relief demanded in the amended complaint, with costs."

The defendant appeals from the order overruling his preliminary objection and from the order overruling the demurrer and directing judgment.

[1] Under the rule laid down in *National Park Bank v. Billings*, 144 App. Div. 536, 539, 129 N. Y. Supp. 846, and *Keyes v. Lester-shire Heights Realty Co.*, 173 App. Div. 336, 158 N. Y. Supp. 617, the practice pursued seems to have been the proper one, though it must be admitted that there is some conflict in the proceedings. Section 976 of the Code of Civil Procedure provides that the "issue of law may be brought on and tried at any term of court as a contested motion," and this would naturally suggest that the demurring party had a right to give the notice and to bring on the argument at such time as should be convenient to him, in the absence of action by the opposite party. But section 547 declares that, "if either party is entitled to judgment upon the pleadings, the court may upon motion at any time after issue joined give judgment accordingly," and this right is specifically given to "either party," while in the former section there is merely the general right to bring the matter up as a contested motion, with no language to indicate that the mere giving of a notice of argument of the demurrer operates to nullify the provisions of section 547. "Whether an issue of law arising upon the pleadings is brought on under section 547 or section 976," say the court in *National Park Bank v. Billings*, supra, "the order should contain the appropriate provisions to work substantial justice which have heretofore been contained in an interlocutory decree on demurrer, such as extending leave to amend or plead over upon proper terms." This was done in the case under consideration, and while it might have been better form to have permitted the argument to come on under the defendant's notice, we are of the opinion that there is no such substantial invasion of the defendant's rights as to justify interference with the order on account of the alleged irregularity.

[2, 3] Upon the merits we find little difficulty in reaching the conclusion that, as against a demurrer, the plaintiff has stated facts entitling him to relief. Upon a general demurrer based upon the ground that the complaint fails to state the facts necessary to a cause of action, it has been said that in such a case—

"a demurrer cannot be sustained unless it appears, admitting all the facts alleged, that no cause of action whatever is stated. The demurrer cannot be sustained simply by showing that facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that material facts are only argumentatively averred. The pleading may be deficient in technical language or in logical statement, but, as against a demurrer, or a motion of this character at the trial, the pleading will be deemed to allege whatever can be implied from its statements by fair and reasonable intendment." *Kain v. Larkin*, 141 N. Y. 144, 151, 36 N. E. 9, and authorities there cited.

Tried by this test, the plaintiff shows that he entered into a contract to conduct the defendant's farm on shares, under a detailed

contract; that this contract was subsequently modified by mutual agreement; that still later, by reason of the operation of the Selective Service Law of the United States (Act Cong. May 18, 1917, c. 15, 40 Stat. 76), the plaintiff was obliged to forego the advantages of the contract for the full term, and the contract was terminated under an agreement that the produce of the farm should be sold and the avails thereof divided upon the agreed basis; that the agreement was carried out to the extent of selling the produce, resulting in a considerable sum, the amount of which is unknown to the plaintiff, and which the defendant refuses to disclose, or to pay over to the plaintiff his portion thereof, although demand has been made. Can there be any doubt that the plaintiff has stated facts which disclose a wrong toward him? If there is a wrong, then equity, if not law, gives him a right to relief. He asks for an accounting, with a decree directing the payment to him of the amount which shall be found to be due.

Is there any good reason why he is not entitled to this in substance, either in equity or law? It is doubtful, under the modifications in the contract and the conditions growing out of the plaintiff's service to the United States government, if the remedy at law is as complete and adequate as that which is afforded by equity. He has not had the same opportunities of knowing the facts as the defendant; the transaction between them was essentially that of a joint adventure, and the circumstances which made it the duty of the defendant to close up the affair were such as to impose upon the latter very much the same duties and obligations of a copartner. The action was apparently framed upon this theory, and as against a demurrer there would seem to be no good reason why the plaintiff should not be given the relief which he asks.

The order appealed from should be affirmed, with costs, with leave to the defendant, within 20 days, upon the payment of such costs, to withdraw his demurrer, and answer. All concur.

(108 Misc. Rep. 559)

PEOPLE ex rel. BAST v. VOORHIS et al.

(Supreme Court, Special Term for Motions, Kings County. September, 1919.)

1. SHERIFFS AND CONSTABLES ⇐5—TERM OF SHERIFF ELECTED TO FILL VACANCY.

The term of one elected sheriff of Queens county at a special election held on January 23, 1917, to fill a vacancy in the office caused by the death of a former incumbent, did not expire until January 23, 1920, so that there was no vacancy in such office which could be filled at the general election to be held on November 4, 1919.

2. SHERIFFS AND CONSTABLES ⇐2—EXPIRATION OF TERM OF SHERIFF ELECTED TO FILL VACANCY; SPECIAL ELECTION.

Public Officers Law, § 4, and County Law, § 180, substantially providing that the term of a sheriff elected at a general term shall commence on January 1st next after the election, prevent the election of a sheriff for Queens county at the general election of November 4, 1919, where term of a sheriff specially elected on January 23, 1917, to fill a vacancy did not

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

expire until January 23, 1920, and a special election will be necessary at that time, and every three years thereafter.

Application by the People, on the relation of Charles Bast, against John R. Voorhis and others, for a peremptory writ of mandamus. Writ granted.

Order reversed 189 App. Div. 909, 178 N. Y. Supp. 910, and affirmed 227 N. Y. 167, 125 N. E. 86. See, also, 178 N. Y. Supp. 516.

George F. Alexander, of Brooklyn, for relator.

Charles W. Froessel, of Brooklyn, for sheriff.

William P. Burr, Corp. Counsel, of New York City (George P. Nicholson, William E. C. Mayer, and Russell L. Tarbox, all of New York City, of counsel), for board of elections.

Pressinger, Newcombe, Cunningham & Wigg, of New York City (Richard S. Newcombe and Elmer E. Wigg, both of New York City, of counsel), for William N. George.

FABER, J. This is an application for a peremptory writ of mandamus directing and requiring the board of elections of the city of New York, in the making and preparation of the notice of, and the ballots, stationery, and other paraphernalia to be used at, the general election to be held within the county of Queens on November 4, 1919, to disregard all the names of purported candidates for the office of sheriff, and to prepare said notice, ballots, stationery, and other paraphernalia in such manner that the title of the office of sheriff for the county of Queens and the names of William N. George as a candidate of the Democratic party, Fred C. Pearson as a candidate of the Republican party, and any other persons as candidates, shall not appear thereon. All the parties seem to agree in treating the questions involved as questions of law, as no point is made that certain allegations of fact contained in the petition are denied; there is, therefore, no obstacle to a decision upon the merits.

The relator, a taxpayer in Queens county, bases his application for the writ of mandamus on the ground that there is no vacancy in the office of sheriff of Queens county which can be filled at the ensuing general election, and consequently an election for that office will involve needless expense. Counsel for the respondent William N. George, the Democratic candidate, contends that the term of Samuel Mitchell, who was elected sheriff at a special election held on January 23, 1917, to fill a vacancy caused by the death of Paul Stier, a former incumbent, should be adjudged to terminate on December 31, 1919, and accordingly this application should be dismissed. The corporation counsel, appearing on behalf of the board of elections, while not expressing any definite opinion as to the date when the term of the present incumbent expires, agrees with the contention of counsel for the respondent George that the application should be denied, and that a sheriff should be elected at the ensuing general election, even though the successful candidate at such election may not be entitled to take office until January 23, 1920. Counsel for the present incumbent of the office concurs in the claim of the relator and asks that the writ issue.

• Different phases of the general question involved have been considered by the courts in *Matter of Mitchell v. Boyle*, 219 N. Y. 242, 114 N. E. 382; *People ex rel. Conklin v. Boyle*, 98 Misc. Rep. 364, 163 N. Y. Supp. 72; *Id.*, 178 App. Div. 908, 164 N. Y. Supp. 1107; *Matter of Mitchell v. Prendergast*, 178 App. Div. 690, 165 N. Y. Supp. 972; *Id.*, 222 N. Y. 543, 118 N. E. 1068; *People ex rel. Lempp v. Voorhis*, 185 App. Div. 939, 172 N. Y. Supp. 913; *Id.*, 224 N. Y. 633, 121 N. E. 884.

In *Mitchell v. Boyle*, *supra*, the only question actually decided was that the vacancy caused by the death of Sheriff Stier could not be filled at the general election of 1916. In *People ex rel. Conklin v. Boyle*, *supra*, the Special Term upheld the validity of a special election which was ordered by the Governor to fill the vacancy caused by Sheriff Stier's death, and denied an application for a writ of mandamus to direct the board of elections to cease and refrain from taking any proceeding to hold such special election, and such decision was affirmed by the Appellate Division on the grounds (1) that the writ sought by the relator would be inoperative; (2) that the Court of Appeals had decided that the special election should be held and that it was the duty of the Governor to order it.

[1] In *Matter of Mitchell v. Prendergast*, *supra*, the Appellate Division held that the term of Sheriff Mitchell commenced to run from the date of his election, viz. January 23, 1917, and not on January 1, 1918, and this decision was affirmed, without opinion, by the Court of Appeals. In *People ex rel. Lempp v. Voorhis*, *supra*, the Special Term granted a writ of mandamus compelling the board of elections to print the ballots for the general election of 1918 so that they should not contain the names of any candidates for the office of sheriff of Queens county; the ground of the decision apparently being that there was no vacancy in the office of the sheriff to be filled at such election, although the learned justice in his opinion stated that when the successor to the present sheriff is to be elected was not involved and had not been considered. This decision granting the writ was affirmed without opinion by the Appellate Division and the Court of Appeals.

Counsel for the respondent George, in the instant case, argues that the early cases of *People ex rel. Gallup v. Green*, 2 Wend. 266, and *Coutant v. People*, 11 Wend. 511, holding that a person elected to fill a vacancy in the office of sheriff does not hold merely for the unexpired portion of the term, but that his election is for a full term of three years, were based entirely upon the peculiar wording of article 4 of section 8 of the Constitution of 1821. He further argues that the amendment of this portion of the Constitution in 1846, carried into the Constitution of 1894, was adopted with the sole view of obviating the practical difficulties caused by those decisions, and that by reason of such amendment those decisions are no longer controlling. In support of this argument he refers to the notes of *Croswell & Dutton* on the proceedings of the constitutional convention of 1846.

In the *Conklin* Case, *supra*, the learned justice at Special Term cited with approval the *Gallup* and *Coutant* Cases, *supra*, and also the case of *People ex rel. Weller v. Townsend*, 102 N. Y. 430, 7 N. E.

360, upon the point of the duration of the term of a sheriff elected to fill a vacancy. It does not, however, seem to me that this point was properly involved in the Conklin Case, and in view of the grounds for affirmance stated by the Appellate Division in that case (178 App. Div. 908, 164 N. Y. Supp. 1107). I do not think that the latter court necessarily approved that part of the opinion of the Special Term.

If the Conklin Case were the only case in which the duration of the term of the present incumbent had been considered, I would have no difficulty in agreeing with the contention of counsel for the respondent George, which has been set forth above, and denying the writ. The action of the Court of Appeals in affirming the decision in *People ex rel. Lempp v. Voorhis*, supra, however, seems to me to present an insuperable obstacle to any holding in this case that there is a vacancy in the office of sheriff which can be filled at the coming general election.

No argument can be adduced in favor of electing at the general election in the year 1919 which could not have been brought forward with equal or greater force in favor of electing a sheriff at the general election of 1918, and the Court of Appeals, in affirming the order granting the writ of mandamus in the Lempp Case, necessarily held that such an election could not take place in 1918. I cannot see any escape from the conclusion that under the decision in the Lempp Case a special election for sheriff of Queens county must be held in January, 1920, and every three years thereafter. It may be that, if the argument now so ably made by counsel for the respondent George, distinguishing the Gallup and Coutant Cases, had been presented to the courts in the Lempp Case, the decision in that case would have been different.

[2] The corporation counsel suggests in his brief that, even though the term of the present incumbent of the office be held to continue until January 23, 1920, there is no legal obstacle to electing his successor at the coming general election. It seems to me, however, that such obstacle exists in the provisions of section 4 of the Public Officers Law (Consol. Laws, c. 47) and section 180 of the County Law (Consol. Laws, c. 11), both of which provides in substance that the term of a sheriff elected at a general election shall commence on the 1st day of January next after his election. Obviously, if a sheriff were elected at the coming general election, his term could not commence on January 1, 1920, assuming, as seems to be the law according to the Lempp Case, that the term of the present incumbent does not expire until January 23, 1920.

The removal of this obstacle, if it is to be removed, rests with the Legislature. A special law could be enacted providing that in the county of Queens the term of office of a sheriff elected at a general election shall commence on the 23d day of January next after his election.

For the foregoing reasons, I am constrained to grant the writ applied for, without costs.

Ordered accordingly.

(109 Misc. Rep. 323)

SIEMERS v. HEUCHEL et al.

(Supreme Court, Trial Term, Kings County. November 28, 1919.)

1. **FRAUDS, STATUTE OF** $\S$ 116(5)—**WRITTEN AUTHORITY OF AGENT TO LEASE.**
Under Real Property Law, $\S$ 242, a lease for more than a year, executed by an agent for the lessor without written authority, is void, though under section 259 a contract for the letting or sale of property may be made by an agent without written authority.
2. **FRAUDS, STATUTE OF** $\S$ 123(2)—**TENANCY FROM YEAR TO YEAR UNDER INVALID LEASE.**
A lease for five years, executed by the agent for the lessors without written authority, being void under Real Property Law, $\S$ 242, was not good for one year, where the lessee never had possession; and even if possession had been obtained, such possession alone would have created merely a tenancy at will, without any fixed term.
3. **PRINCIPAL AND AGENT** $\S$ 152(3)—**INVALIDITY OF LEASE BY AGENT WITHOUT AUTHORITY.**
A lease for less than a year, executed by an agent without authority, verbal or written, is void.
4. **LANDLORD AND TENANT** $\S$ 114(1)—**TENANT AT WILL; HOLDING FOR FIXED TERM.**
The holding of a tenant at will may become one for a year, if it may be inferred that such is the parties' intention, and payment of an aliquot part of the yearly rent, without contrary explanation, is sufficient evidence of such intention.
5. **FRAUDS, STATUTE OF** $\S$ 116(10)—**RATIFICATION IN WRITING OF VOID LEASE BY AGENT.**
Where there was never any possession of the property by a lessee for five years from an agent for the lessors not authorized in writing, and no rent was ever paid by him, and there were no other acts that might constitute a ratification by the lessors of the lease, void under Real Property Law, $\S$ 242, the lease could be ratified only by a writing; verbal approval or acceptance not being sufficient.

Action by August F. Siemers against Katharine Heuchel and others, resulting in dismissal of the complaint. On plaintiff's motion for new trial. Motion denied.

David Blitzter, of New York City (David L. Podell and Jacob Podell, both of New York City, of counsel), for plaintiff.

Fred L. Gross, of Brooklyn, for defendants.

CROPSEY, J. A motion for a new trial was taken under advisement after the complaint had been dismissed. The action is for damages caused by plaintiff not getting possession of property under a lease for five years. The lease was in writing, but was not signed by the defendants, who own the property. It was signed by their brother.

[1] The plaintiff claims the brother was the agent of the defendants, authorized to make the lease; but the proof of this is very meager, if in fact there is any. It is conceded, however, he had no authority in writing; and this is essential. Without written authority, a lease for more than a year, executed by an agent, is void. Real Property Law (Consol. Laws, c. 50) $\S$ 242; *Larkin v. Radosta*, 119

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App. Div. 515, 104 N. Y. Supp. 165; *Finkelstein v. Fabyik* (Sup.) 107 N. Y. Supp. 67. A lease or other conveyance of real property must not be confused with a contract for its leasing or sale, which may be made by an agent without written authority. Real Property Law, § 259; *Newton v. Bronson*, 13 N. Y. 587, 593, 67 Am. Dec. 89; *Moody v. Smith*, 70 N. Y. 598.

[2-4] On the trial the plaintiff claimed that, even though his lease for five years was void, it was good for one year. This claim seems to have been withdrawn, as no mention of it is made in his brief. There is no basis for such a holding. A lease for more than a year, executed by an agent who did not have written authority, is void. It is in the same class with a lease for less than a year executed by an agent who had no authority, either verbal or written. Such a lease gives no rights and is unenforceable. *McAdam on Landlord and Tenant* (4th Ed.) pp. 71-73; *Dung v. Parker*, 52 N. Y. 494. If possession is taken under such a lease, the situation is different, and there may then arise rights and corresponding liabilities. But here the tenant never had possession. Even where such possession is obtained, the tenant at the time of taking possession becomes a tenant at will merely, and does not have any fixed term. The holding may become one for a year, if it may be inferred that is the intention of the parties, and the payment of an aliquot part of the yearly rent, without explanation to the contrary, is sufficient evidence for that purpose. *Talamo v. Spitzmiller*, 120 N. Y. 37, 42, 43, 23 N. E. 980, 8 L. R. A. 221, 17 Am. St. Rep. 607; *Coudert v. Cohn*, 118 N. Y. 309, 23 N. E. 298, 7 L. R. A. 69, 16 Am. St. Rep. 761.

[5] The further claim is that, though the lease was void, it was ratified. But there never was any possession of the property by the tenant, and no rent was ever paid by him. In the absence of these facts, or other acts that might constitute a ratification, such a lease can be ratified only by a writing. Where the original authority had to be written to make the agent's act binding, a ratification of the act of an agent not so authorized must be in writing. A verbal approval or acceptance is not sufficient. *Newton v. Bronson*, 13 N. Y. 587, 595, 67 Am. Dec. 89; *Long v. Poth*, 16 Misc. Rep. 85, 87, 37 N. Y. Supp. 670; *Carman v. Fox*, 86 Misc. Rep. 197, 199, 149 N. Y. Supp. 213. The cases cited by the plaintiff (*Appelbaum v. Galewski*, 34 Misc. Rep. 281, 69 N. Y. Supp. 636; *Anderson v. Conner*, 43 Misc. Rep. 384, 87 N. Y. Supp. 449; *In re Di Marti*, 72 Misc. Rep. 148, 129 N. Y. Supp. 81; *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. 891; *Shimer v. Ronk*, 139 App. Div. 137, 123 N. Y. Supp. 479) are not in point. In each the tenant was in possession and the landlord had collected rent, and in the last case named had based a prior summary proceeding upon the existence of the lease later sought to be declared void; and in most of the cases the owner had recognized the lease by making or taking a conveyance subject to it. In the case at bar the claimed ratification was made merely by verbal statements. They do not suffice.

The complaint was properly dismissed, and the motion for a new trial is denied.

(189 App. Div. 396)

WILSON v. BIRDSALL et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

1. PLEADING §350(3)—DISPOSAL OF DEFENDANT'S DEMURRER ON DENIAL OF PLAINTIFF'S MOTION FOR JUDGMENT ON PLEADINGS.

Upon plaintiff's motion for judgment on the pleadings, with no counter-motion, the court, on determining that defendant's demurrer is well taken, has no power, except to deny the motion, leaving the defendant to take such action in reference to his demurrer as would be proper, if the motion for judgment had not been made.

2. PLEADING §218(3)—DISPOSAL OF DEMURRER ON DENIAL OF MOTION FOR JUDGMENT ON PLEADINGS.

Where plaintiff, after defendants interposed separate demurrers to complaint, moved for judgment on the pleadings, denial of motion did not affirmatively dispose of demurrers, and where defendants thereafter served notice of trial on the demurrers, court properly rendered interlocutory judgment for defendants, sustaining demurrers.

Appeal from Special Term, Broome County.

Action by Albert F. Wilson against Grant Birdsall and others. From a judgment dismissing the complaint, and from an order and an interlocutory judgment sustaining demurrers to complaint, plaintiff appeals. Affirmed.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

Fremont F. Williams, of Binghamton (Moe Goldstein, of Binghamton, of counsel), for appellant.

George M. LePine, of Binghamton, for respondents Birdsall.

John Marcy, Jr., of Binghamton, for respondent City of Binghamton.

WOODWARD, J. This action was brought to set aside the redemption from a tax sale by the defendants Birdsall; the plaintiff being the holder of the tax certificate from which redemption was made. The defendants interpose separate demurrers on various grounds, relying principally upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. The plaintiff served a notice of motion for judgment on the pleadings, which motion was denied. The defendants then served notice of trial on the demurrers, and interlocutory judgment was rendered in favor of the defendants; the plaintiff being given permission to amend his complaint upon the payment of costs. The plaintiff has failed to avail himself of this privilege, and appeals from the judgment, on the theory that, when his motion for judgment on the pleadings was denied, the case was finally disposed of, and there remained no issue to be tried. There does not appear to be any contention that the complaint states facts sufficient to constitute a cause of action.

[1, 2] We are unable to discover any reason for disturbing the judgment in this case. The practice is well established that, upon a motion for judgment on the pleadings, with no counter motion, the court, on determining that the demurrer is well taken, has no power, except to

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

deny the motion, leaving the defendant to take such action in reference to his demurrer as would be proper, if the motion for judgment had not been made. *Kober v. Lyle*, 177 App. Div. 903, 163 N. Y. Supp. 614; *Ventriniglia v. Eichner*, 138 App. Div. 274, 122 N. Y. Supp. 966; *Wayte v. Bowker Chemical Co.*, 180 App. Div. 568, 168 N. Y. Supp. 122. The denial of the motion for judgment on the pleadings does not affirmatively dispose of the demurrer, and we are of the opinion that the practice followed by the court is the correct one.

The judgment appealed from should be affirmed, with costs. All concur.

SCHIEFFELIN v. HYLAN.

(Supreme Court, Special Term, New York County. October 30, 1919.)

1. PLEADING §90—AFFIRMATIVE DEFENSE SHOULD NOT CONTAIN DENIALS OF ALLEGATIONS OF COMPLAINT.

An affirmative defense should not contain a denial of any allegation of the complaint which plaintiff must allege and prove before he can recover.

2. PLEADING §90—DENIALS IMPROPER IN AFFIRMATIVE DEFENSE.

Any denials which may be contained in an affirmative defense must form essential parts of the defense pleaded in avoidance of a cause of action otherwise confessed, and the denial of any essential allegation of the complaint which plaintiff must prove in the first instance cannot be essential to an affirmative defense, for, if the denial is sustained, the cause of action itself falls.

3. LIBEL AND SLANDER §86(1), 100(7)—PROOF OF INNUENDO UNNECESSARY.

In an action for libel, plaintiff need not prove the innuendo, which was denied by the answer, for the letter, set out in the complaint, speaks for itself, and its meaning cannot be enlarged or changed by means of the innuendo, and he need not prove that the charges were wholly false or malicious, or that there was actual ill will towards him, or that defendant furnished copies of the letter to newspapers.

4. PLEADING §362(2)—DENIAL IN AFFIRMATIVE DEFENSE TO BE STRICKEN.

In an action for libel, a denial in the affirmative defenses that defendant published "of and concerning the plaintiff a letter, of which the following is a copy," will be stricken on plaintiff's motion, either as a denial of an essential part of plaintiff's cause of action, without place in the affirmative defense, or else as entirely meaningless, irrelevant, and redundant.

5. PLEADING §90—AFFIRMATIVE DEFENSES; INCLUSION OF DENIALS.

The mere fact that the inclusion of certain denials in the affirmative defenses will not prevent plaintiff from testing the sufficiency of such defenses by demurrer does not in itself show such denials are properly pleaded, for they may be irrelevant.

6. PLEADING §362(2)—STRIKING DENIAL PLEADED WITH AFFIRMATIVE DEFENSES.

In an action for libel, inclusion of the denial of the innuendo in the affirmative defenses does not to aggrieve plaintiff, and will not be stricken on motion.

7. LIBEL AND SLANDER §93, 94(1), 95—AFFIRMATIVE DEFENSES; DENIAL OF MALICE.

In an action for libel, denial by the affirmative defenses of plaintiff's allegation of actual malice and the facts tending to prove such malice is proper in the defense of privilege, qualified privilege, and mitigation of damages, but without relevancy to a defense of justification.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

8. PLEADING §364(2)—STRIKING IRRELEVANT MATTER FROM AFFIRMATIVE DEFENSES; DENIAL OF FALSITY OF CHARGES.

In an action for libel, the denial in the affirmative defenses that the charges made against plaintiff were wholly false is irrelevant to the defenses of privilege and qualified privilege, and, since the defenses of justification and mitigation of damages must set forth the facts relied on, is also irrelevant and redundant as to such defenses, and therefore to be stricken on motion.

9. LIBEL AND SLANDER §100(1)—AFFIRMATIVE DEFENSES; DENIAL OF AMOUNT OF DAMAGES.

In an action for libel, denial in the affirmative defenses of the amount of damages ordinarily raises no issue.

10. PLEADING §365(3)—STRIKING IRRELEVANT MATTER FROM ANSWER; CONSIDERATION OF OBJECTIONS TO.

In considering objections to affirmative allegations in the answer which are claimed to be irrelevant, the court should apply the rule that, where defendant has pleaded facts which might possibly be admissible, the court should not strike them on motion, but should leave the question of relevancy to be determined on trial, unless such allegations may prejudice plaintiff by putting before the jury irrelevant matters, injecting an atmosphere which no rulings on trial could eliminate.

11. PLEADING §364(2)—STRIKING IRRELEVANT ALLEGATION.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, the allegation of each affirmative defense that defendant had at all times endeavored to perform his duty as mayor without fear or favor, and to the best of his ability, etc., should be stricken on plaintiff's motion as irrelevant.

12. PLEADING §364(2)—STRIKING IRRELEVANT ALLEGATION.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, allegation, in the mayor's affirmative defenses of privilege and qualified privilege, as to appointment of the Rainey Commission by the Secretary of the Treasury of the United States to investigate the drug addict problem, *held* irrelevant, and to be stricken on motion.

13. PLEADING §362(2)—STRIKING CONCLUSIONS OF LAW.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, the allegations of the affirmative defenses of privilege and qualified privilege that the mayor's letter was written on an occasion of "at least one of absolute [qualified] privilege," etc., will be stricken as merely conclusions of law.

14. PLEADING §364(2)—STRIKING IRRELEVANT MATTER.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, allegations of the third affirmative defense of justification, reiterating practically all the allegations of fact contained in the affirmative defenses of privilege and qualified privilege, are irrelevant to the defense of justification, and will be stricken, despite the mayor's argument that he should be permitted to plead and prove the "story" of the case.

15. PLEADING §364(2)—STRIKING IRRELEVANT ALLEGATIONS.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, allegations of the affirmative defense of justification that the company of which plaintiff was president had pleaded guilty to indictments in the federal courts for violation of the Insecticide Law will be stricken as irrelevant.

16. PLEADING $\S$ 364(2)—STRIKING IRRELEVANT ALLEGATIONS.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, the allegation of the affirmative defense of mitigation of damages that the company of which plaintiff was president had pleaded guilty to indictments in the federal courts for violation of the Insecticide Law will be stricken as irrelevant to impeach plaintiff's character, or to show freedom from malice on the part of defendant mayor.

17. LIBEL AND SLANDER $\S$ 61.—BAD CHARACTER OF LIBELED PERSON.

Isolated incidents, which tend to show the bad character of the libeled person, cannot be alleged nor proved in an action for the libel.

18. PLEADING $\S$ 365(3)—STRIKING DOCUMENTARY EXHIBITS.

Plaintiff's motion to strike all the allegations contained in the separate affirmative defenses referring to annexed documents, including the fact of annexation, effected, when granted, the striking of the documents themselves; but if reference to such documents is stricken from one affirmative defense, if any reference remains to them in any other defense, the document itself cannot be stricken out.

19. PLEADING $\S$ 364(2)—STRIKING IRRELEVANT EXHIBIT.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, acknowledgment of receipt of the alleged libelous letter from the person to whom it was addressed, made an exhibit by defendant's affirmative defenses, held irrelevant and to be stricken.

20. PLEADING $\S$ 364(2)—STRIKING IRRELEVANT EXHIBIT.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, exhibit to the mayor's affirmative defenses, listing sales of narcotics made by plaintiff's company to various drug store proprietors, etc., held not so irrelevant to the plea of justification as to be stricken on motion.

21. PLEADING $\S$ 364(2)—STRIKING IRRELEVANT EXHIBITS.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, creating criminals, copy of a report of the police department in relation to drug-using criminals, and copy of a report of a city physician in charge of a narcotic clinic, made exhibits to the mayor's affirmative defense of justification, will be stricken on motion as irrelevant.

22. PLEADING $\S$ 362(2)—STRIKING IRRELEVANT EXHIBIT.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, copy of report made by the Rainey Commission to the Secretary of the Treasury of the United States will be stricken as an exhibit, on account of its dating and time of publication, from the mayor's affirmative defenses of privilege and qualified privilege.

23. PLEADING $\S$ 364(2)—STRIKING IRRELEVANT EXHIBIT.

An exhibit to an affirmative defense, consisting of copies of certain informations against plaintiff's company for violation of a statute, which violations have been stricken from the affirmative defense as irrelevant, must itself be stricken.

24. EVIDENCE $\S$ 29—JUDICIAL NOTICE OF STATUTE.

If a penal statute is applicable to a civil suit for libel, the court must take judicial notice of the statute and its terms.

25. PLEADING $\S$ 352—MOTION TO STRIKE ENTIRE DEFENSE AS IRRELEVANT.

The sufficiency of an entire defense cannot be tested on a motion to strike out as irrelevant and redundant, because the defendant is entitled to have the sufficiency of his entire defense tested in an ordinary way by demurrer or motion for judgment.

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

26. PLEADING $\Rightarrow$ 364(3)—STRIKING AFFIRMATIVE DEFENSE AS IRRELEVANT AND REDUNDANT.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, defendant's fifth affirmative defense of privilege, under Penal Law, § 1350, substantially in the same form as the previous plea of privilege, except in its conclusion that it is under such act, will be stricken on plaintiff's motion as irrelevant and redundant.

Action by William J. Schieffelin against John F. Hylan. On motion to strike parts of the answer. Motion granted in part.

Order affirmed — App. Div. — 179 N. Y. Supp. 949.

Seligberg, Lewis & Strouse, of New York City (Clarence M. Lewis, Walter H. Pollak, and Jay Leo Rothschild, all of New York City, of counsel), for the motion.

William P. Burr, of New York City (William P. Burr and William B. Crowell, both of New York City, of counsel), opposed.

LEHMAN, J. The plaintiff herein has brought an action for libel against the defendant. The answer contains denials of the specific allegations contained in the complaint, and also five separate defenses. The defendant seeks to set up absolute privilege in his first defense, qualified privilege in his second defense, justification in the third defense, mitigation in the fourth defense, and privilege under a penal statute in his fifth defense. The answer is somewhat voluminous in itself, and in addition the defendant has appended to the answer a number of documents to which he refers in the complaint. The plaintiff has now moved to strike out a large part of this answer as irrelevant and redundant.

The objections of the plaintiff are very numerous, but, on the whole, they may be grouped under three headings, and essentially the same rules of pleading and practice apply to all the objections in each heading. The first class of objections concerns the inclusion in the affirmative defense of specific denials. The second class of objections concerns the inclusion in the affirmative defense of matters which, it is claimed, are not relevant to the attempted defense. The third class of objections concerns the inclusion in the answer of the documents the existence of which is not an independent fact germane to the issues raised by the separate defenses, though perhaps the documents might be introduced to prove relevant facts.

[1] Each affirmative defense contains a repetition of all the denials of the answer, and the plaintiff has moved to strike out all of these denials in the defenses, but upon the argument and in his brief states that he makes no criticism of the denials of malice in the defense of privilege, and in the defense in mitigation of damages. He contends, however, that he is injured by the inclusion in the answer of the other denials, which prevent him from testing the sufficiency of the affirmative defenses by demurrer. There can, of course, be no question but that an affirmative defense should not contain a denial of any allegation of the complaint which the plaintiff must allege and prove before he can recover in the action.

[2] Any denials which may be contained in an affirmative defense must form essential parts of the defense pleaded in avoidance of a cause of action which is otherwise confessed, and it would seem plain that the denial of any essential allegation of the complaint, which the plaintiff must in the first instance prove, cannot be essential to an affirmative defense, for, if the denial is sustained, the cause of action itself fails. A careful analysis of the denials contained in the affirmative defenses in this case shows, however, that the defendant has not transgressed this rule or denied any essential allegation of the complaint, with one possible and unimportant exception. Even with the denials it would seem that the affirmative defenses are still defenses in confession and avoidance. The answer admits, either expressly or by failure to deny, that the defendant wrote the letter which is the basis of the alleged libel, and caused it to be delivered to the person to whom it is addressed. It would seem that in admitting those facts the defendant confesses that the cause of action pleaded by the plaintiff exists, unless overcome by the defense pleaded, provided, of course, that the letter is itself libelous.

[3] The answer denies the innuendo, but the plaintiff need not prove the innuendo, for the letter speaks for itself, and its meaning cannot be enlarged or changed by means of the innuendo. He need not prove that the charges were wholly false or made with malice, because, unless the defendant justifies the charges by affirmatively showing that they were true, their truth will be conclusively presumed, and if they are libelous malice will be implied in law. Obviously he need not prove that there was actual ill will towards the plaintiff, or that the defendant furnished copies of the letter to newspapers of general circulation, because these are matters which go only in aggravation of damages, and are not necessary to constitute any cause of action or the cause of action alleged. The only possible exception is a denial that the defendant published "of and concerning the plaintiff a letter of which the following is a copy"; but this denial is qualified by the exception that the defendant admits that "he wrote and caused to be delivered" the letter referred to in the complaint. Technically construed, this denial must be regarded as a denial that the letter was published of and concerning the plaintiff, for, in view of the express admission that the letter was written and delivered, the defendant can hardly be presumed to have intended to deny that the letter was "published."

[4] Other admissions contained in the answer, however, show very plainly that the defendant did not intend to deny that the letter refers to the plaintiff. Probably this denial was inserted merely from excess of caution, in order to sustain subsequent denials that the alleged libel was "published" by the defendant in the newspapers. The inclusion of this denial, in whatever way it may be construed, can in no possible way help any of the affirmative defenses. If the denial is to be construed as a denial either of the publication of the alleged libel, or of its publication "of and concerning the plaintiff," it is a denial of an essential part of the plaintiff's cause of action, and has no place in the de-

fense, while, if it does not receive such construction, it is entirely meaningless, and should be stricken out as irrelevant and redundant.

[5, 6] The mere fact that the inclusion of the other denials will not prevent the plaintiff from testing the sufficiency of the affirmative defenses by demurrer does not in itself show that they are properly pleaded, for they may still be entirely irrelevant. There is authority that a denial of an innuendo raises no issue and should be stricken out from affirmative defenses. It would seem, however, that where the innuendo pleaded is as broad as the innuendo in this case, it is at least debatable whether it is not proper practice to deny it. If the defendant admits the entire meaning and intent, as charged, a question of law might well arise as to whether he could possibly claim either that the letter was privileged or that the publication was justified by the facts pleaded to establish the truth. In no event can I find that the plaintiff is aggrieved by the inclusion of this denial, and it should therefore not be stricken out.

[7-9] The denial of the allegation of actual malice and the facts which would tend to prove such malice are evidently proper in the defense of privilege, qualified privilege and mitigation of damages, but have no relevancy to a defense of justification. The denial that the charges are wholly false is clearly irrelevant to the defense of privilege and qualified privilege, and inasmuch as the defense of justification and mitigation of damages must set forth the facts relied upon, it would seem equally irrelevant and redundant in those defenses. The denial of the amount of damages ordinarily raises no issue, but it was held in the case of *Haffen v. Tribune Ass'n*, 126 App. Div. 675, 111 N. Y. Supp. 225, that such denial should not be stricken from the defense of mitigation of damages.

[10] In considering the objections to affirmative allegations in the answer which are claimed to be irrelevant, the court should apply the rule that, where the defendant has pleaded facts which might possibly be admissible, the court should not strike them out upon motion, but should rather leave the question of relevancy to be determined at the trial, unless these allegations are of such a nature as to prejudice the plaintiff by bringing before the jury irrelevant matters which might tend to introduce into the case an atmosphere which no rulings at the trial could eliminate. Even though tested by this rule, practically all the objections of the plaintiff seem to me valid.

[11] The defendant alleges in each defense that—

"Such duty the defendant as mayor has at all times endeavored to perform without fear or favor and to the utmost of his ability, for the best interests of all the people of the city, and for the protection of the public health, safety, and welfare."

The inclusion of this allegation does not perhaps seriously prejudice the plaintiff, for every public officer is presumed at all times to perform his duties without fear or favor and to the utmost of his ability; but it seems to me so clearly irrelevant that it should be stricken out. The question in the defense of privilege and qualified privilege is whether this particular letter was written by the defendant in pursuance of his public duties, and it is quite immaterial whether or not

the defendant has at other times performed his duties. If the defendant has libeled the plaintiff, the plaintiff is injured, and entitled to damages, just as much if the defendant is ordinarily a faithful officer as if ordinarily he were faithless; and, on the other hand, the defendant is entitled to the benefit of any privilege he may have in this case, even if it were claimed that he was ordinarily unfaithful to his trust. Certainly neither party will be permitted upon the trial to go into the entire record of the defendant's administration, and this allegation should therefore be stricken out. Obviously this allegation has nothing to do with the defense of justification or the defense of mitigation of damages.

[12] The defendant has pleaded properly in his defense of privilege and qualified privilege:

"That the alarming increase in the number of drug addicts and the necessity for the control of the manufacture, sale, and use of habit-forming drugs and in the interest of public health, morals, and safety had become a subject of national importance prior to said April 15, 1919."

And the plaintiff does not object to this allegation, but he does object to the succeeding words:

"As appears by the appointment of the Rainey Commission by the Secretary of the Treasury of the United States, which commission has conducted an investigation and has had presented to it such evidence and data that new laws may be presented for submission to the Congress, having for their subject and purpose to check this serious and growing evil throughout the country, particularly in large cities such as the city of New York."

These additional words contain no allegation of any independent fact relevant to the issues, but even in form are pleaded merely as evidence of a fact which the defendant may desire to prove at the trial. The courts have frequently refused to strike out allegations of evidentiary facts. The matter complained of here, however, is not strictly even an evidentiary fact, but is merely evidence to prove such a fact, which in turn would be evidence from which an inference might be drawn as to the existence of an ultimate fact. It would seem clear that such pleading is improper, if it brings before the jury matters which the court at the trial may exclude, and the defendant cannot be injured by striking out a part of the pleading which must be useless for any legitimate purpose.

[13] The same defenses contain allegations to the effect that the letter was and is a privileged communication, and conclude with allegations to the effect that defendant alleges that—

"the occasion was at least one of absolute (qualified) privilege and claims such absolute (qualified) privilege therefor."

It is urged that even if these allegations are simply conclusions of law, which add nothing to the legal effect of the defense, they do not aggravate the plaintiff, and may perhaps serve a useful end as a designation of the purpose of the defense, and should be regarded as in the nature of a prayer for relief. A prayer for relief, even implied, has no place in a defense, and the other allegations in the defenses clearly designate their purpose. The plaintiff should, upon this motion, obtain a decision as to which allegations of the answer are allegations of

fact, and as such proper in a pleading, and which allegations are merely conclusions of law, and, since these allegations are clearly only conclusions, they should be stricken out.

[14] The third defense, which pleads facts in justification, commences with a repetition of practically all the allegations of fact contained in the defenses of privilege and qualified privilege. It is plain that these allegations are entirely irrelevant to the defense of justification, and the plaintiff is seriously aggrieved thereby. The only argument which the defendant urges for the inclusion of these statements is that he should be permitted to plead and prove the "story" of the case. The "story" of the case, in so far as concerns the court on this application, consists of those facts which are pertinent to the cause of action or to the defense attempted to be pleaded. All other allegations must therefore be stricken out.

[15] This defense further contains an allegation that the corporation of which the plaintiff is president pleaded guilty to certain indictments in the federal courts for violations of the Insecticide Law (Act April 26, 1910, c. 191, 36 Stat. 331 [U. S. Comp. St. §§ 8765-8777]). The charges made by the defendant in the letter in no wise refer to any infraction of the Insecticide Law, and even if the plaintiff, or the corporation of which he is president, was guilty of a violation of that law, such fact would not in any way justify the alleged libel. The defense also contains the contents of certain documents which are annexed to the complaint, and to which the plaintiff objects, and these objections will be considered hereafter in connection with objections raised to documents incorporated by reference in other defenses.

[16, 17] The defendant has pleaded in his fourth defense of mitigation of damages the same alleged infraction of the federal Insecticide Law which was alleged in the defense of justification. This allegation is irrelevant to impeach the character of the plaintiff or to show freedom from malice on the part of the defendant. Even if it can be regarded as an allegation of a moral dereliction that dereliction would not be connected in any way with the charge, and would not tend to prove the truth of the charge, or of any part of it, and though possibly it might constitute some evidence of bad character, yet, under the authorities, isolated incidents which tend to show bad character can neither be alleged nor proved. The plaintiff is undoubtedly aggrieved by the allegation, because the allegation brings before the jury charges which cannot be litigated herein, and which would tend to confuse and perhaps to prejudice the jury.

[18] The plaintiff has not moved specifically to strike out the documents annexed to the answer, but wherever the court strikes out all allegations contained in the separate defenses which refer to these documents, including the fact that they are annexed to the complaint, the intent of the motion is doubtless to strike out, also, the documents themselves. On the other hand, even though reference to these documents may be stricken out from one affirmative defense, if any reference remains to such document in any other defense, the document itself cannot be stricken out. The plaintiff states in his brief that Exhibits B to N, inclusive, should be stricken out; but Exhibit B is re-

ferred to in parts of the answer to which the plaintiff has not taken any objection. The same is true in regard to Exhibits C, D, E, F, and J. The court, therefore, can, upon this motion, consider only the objection to the other documents.

[19] Exhibit G is an acknowledgment of receipt of the letter containing the alleged libel from the person to whom it was addressed. I cannot see that it contains any statements which could injure the plaintiff's case, but it is so clearly irrelevant that the court should strike it out. Exhibits H and I are rather tabulations of records than independent documents.

[20] Exhibit H is alleged to be a "list of the sales made by Schieffelin & Co. to various drug store proprietors in the city of New York, said list showing specifically the ones who had been arrested for the illegal handling of the narcotics," and Exhibit I is described as a "list of drug addicts who have been arrested and convicted for using narcotics, and who purchased the drugs from the drug store proprietors who were supplied with the habit-forming drugs by Schieffelin & Co." Both of these lists are made part of the defense of justification. It is urged that they are both irrelevant, because it is not claimed in the answer that the plaintiff conspired with the drug store proprietors that the drugs sold to them should be used for any illegal purpose, and, unless such claim is made, such sale to the drug store proprietors must be regarded as innocent, and would not tend to prove the truth of any libel.

The defendant must justify the charges contained in the letter itself rather than the charges contained in the innuendo, as alleged in the complaint. The letter charges in part that the plaintiff, or his corporation or firm, is manufacturing certain habit-forming drugs for financial gain, and hundreds of young men are using such drugs, and becoming addicts, and committing crimes, and further that the sale of narcotics makes criminals by the wholesale. The facts pleaded in justification would show, first, that the plaintiff's corporation sells narcotics to drug stores; second, that young men are purchasing the drugs sold by the corporation, and that the police are apprehending them; third, that the sale of narcotics makes criminals of a number of retail druggists and of young men who purchase from such druggists. It may well be that none of these allegations, nor all of them together, would justify any of the charges contained in the letter, if interpreted as set forth in the innuendo, or even if interpreted in any manner which the courts could regard as libelous; but they seem to tend to justify at least part of the literal language of the letter, and are therefore, in my opinion, not so irrelevant that they may be stricken out on motion.

[21] Exhibit K is described in the complaint as "a copy of a report of the police department in relation to certain criminals therein named, who have obtained drugs from drug stores therein named, which purchased narcotics from Schieffelin & Co." It is evident that, even if the report of the police department should contain statements of fact which might possibly be relevant to the defense of justification, it is entirely irrelevant that the police department has made any such report. The report itself is not binding upon the plaintiff, and

would not be competent evidence against him in any court of justice, and the courts cannot permit the plaintiff to be prejudiced by permitting such report, or any reference to it, to remain in the pleadings.

Exhibit L is described in the answer as "a copy of a report made by Dr. S. Dana Hubbard, city physician, in charge of the narcotic clinic conducted by the department of health of the city of New York, at Worth street, borough of Manhattan." The same objection that applies to a report of the police department necessarily applies to a report of the city physician in charge of the narcotic clinic. If that physician has personal knowledge of facts which are relevant to the issues in this case, he can be produced as a witness on the stand; but the fact that a report has been made by him is certainly entirely irrelevant, and the report itself incompetent. Moreover, while it is alleged that it appears from his records and from the records of the police department that there have been gross violations of the narcotic laws by certain retail druggists, there is no allegation of any kind which connects this plaintiff with such violation, except possibly to the extent that the plaintiff, or the corporation of which he is president sold drugs to these druggists. It follows that all references to this report, or to such violations, should be stricken from the answer.

[22] Exhibit M is described as "a copy of a report made by the Ramey Commission to the Secretary of the Treasury of the United States, the same being dated April 15, 1919, with the same force and effect as is more specifically set forth herein." Inasmuch as this report is dated April 15, and appears to have been printed in June, while the letter of the defendant was written on April 15, 1919, it can hardly be claimed that this defendant had any knowledge of this report when he wrote the letter, and the report is therefore irrelevant to the defenses of privilege and qualified privilege, and, since the defendant is not bound by this report, it would not constitute evidence of the facts alleged therein. It must therefore be stricken out.

[23] Exhibit N consists of certified copies of the "three informations hereinbefore referred to for violations of the Insecticide Act." Inasmuch as I have already held that the violations themselves are irrelevant, the informations must be stricken from the pleading.

[24-26] The only remaining objection is the objection to the entire fifth defense of privilege under the Penal Law (Consol. Laws, c. 40). It is substantially in the same form as the previous plea of privilege, except in its conclusion. In its conclusion it sets forth that upon the foregoing recited facts the said letter of April 15, 1919, "was and is, and defendant claims it to be, a privileged communication within the meaning of the statute known as section 1350 of the Penal Law, which reads as follows," etc. There can be no doubt but that this is an allegation of a conclusion of law, and as such has no place in the answer, and the only serious argument made by the defendant for its retention is that it is harmless, and should be regarded only as a prayer for relief. It is, of course, not a prayer for relief, but is rather a designation of the legal effect of the defense, and is therefore a conclusion which the court must draw for itself.

The court should not upon this application consider whether the

penal statute is applicable to a civil suit; but there can be no doubt that, if it is applicable, the court must take judicial notice of the statute and its terms. Except, therefore, for the legal conclusion, this defense differs in no respect from the previous plea of justification, and the court would be bound to give the penal statute its due force under the earlier defense, even if the fifth defense were not pleaded. The case, therefore, presents the anomalous situation of an answer which contains two defenses, which are not only exactly the same in their legal effect, but which contain exactly the same allegations of fact. For this reason the plaintiff has moved to strike out the entire defense. From the practical standpoint it is clear that a verbatim repetition of an entire defense is entirely redundant; but the defendant maintains that under repeated decisions of the courts of this state an entire defense can never be stricken out for irrelevancy or redundancy. Those decisions are of course binding upon this court, but in my opinion they have no application in this case. The sufficiency of an entire defense cannot be tested upon a motion to strike out as irrelevant and redundant, because, where a defendant has pleaded facts which he deems sufficient to constitute a defense to the cause of action, he is entitled to have the sufficiency of such defense tested in an orderly way by demurrer or motion for judgment on the pleadings.

The basis of the rule seems to be that the defendant may raise by answer any issues which he desires. The question of whether the facts pleaded are sufficient to constitute a defense is in effect an issue of law. The courts will strike out from a pleading as irrelevant and redundant those allegations of fact which can have no possible bearing upon the issue of law, but they cannot strike out the entire defense by which the issue of law is sought to be raised. In other words, the court must pass upon every issue, either of fact or law, which a pleader has raised, and no separate defense which raises any question of law can logically be considered as irrelevant. If in the present case the court orders the entire fifth defense to be stricken out, it still leaves in the answer every allegation of fact which may be considered by the court upon the issue of justification, because all such facts have been pleaded in the earlier defenses.

The opinions of the cases upon which the defendant relies were never, in my opinion, intended to apply to such a condition, or to authorize a repetition verbatim of previous defenses. If the plaintiff wishes to test the sufficiency of the facts pleaded for the purpose of showing justification, he should not be required to interpose a demurrer to each repetition of the same facts. No possible advantage can accrue to the defendant from such a repetition, and the entire fifth defense should therefore be stricken out.

Motion is therefore granted to the extent that the parts of the complaint denominated in the moving papers under the following headings are stricken from the answer: 1a (except denials of allegations contained in paragraphs 3, 4, 6, 7, 8, 11, and 12 of the complaint) 1b, 1c, 1d, 1e, 1f, 2a (except denials of allegations contained in paragraphs 3, 4, 6, 7, 8, 11, and 12 of the complaint), 2b, 2c, 2d, 2e, 2f, 3a (except denials of allegations contained in paragraphs 3 and 4 of the

complaint), 3b, 3c, 3d, 3e, 3f, 3g, 3h, 3i, 3l, 3m, 3n, 3o, 3p, 4a (except denials of allegations contained in paragraphs 3, 4, 6, 7, 8, 10, 11, 12, and 15 of the complaint), 4b, 4c, 4d, and 5.

(189 App. Div. 286)

WEST VIRGINIA PULP & PAPER CO. OF DELAWARE v. PECK,
Superintendent of Public Works, et al.

(Supreme Court, Appellate Division, Third Department. November 12, 21, 1919.)

1. NAVIGABLE WATERS ⇨3—REVOCATION OF CONSENT TO CONSTRUCTION OF DAM.

Barge Canal Act, § 3, canalizing Hudson river, *held* to revoke any consent given to construction of dam on river by Laws 1882, c. 406, and Laws 1900, c. 683.

2. NAVIGABLE WATERS ⇨22(3), 26(2)—INTERFERENCE WITH NAVIGATION BY DAM.

Where state gave its consent under Laws 1882, c. 406, and Laws 1900, c. 683, to location of dam in Hudson river, and thereafter canalized the river under Barge Canal Act, and with consent and acquiescence of dam owner adapted the canal to the dam, any change in the dam detrimental to the canal was unauthorized, and the removal by state of flashboards placed on dam after construction of dam, and which impeded navigation, was not trespass.

3. NAVIGABLE WATERS ⇨37(4)—TITLE TO THREAD OF STREAM; NAVIGABILITY.

Question whether patents carried title to the thread of river, in absence of language indicating such a purpose, depends on the navigability of the river at place in question, the criterion as to navigability being the adaptability of river in its entirety for the purpose of transportation in about the locality of the place in question; it being unnecessary that it be deep enough to permit passage of boats at all portions of the stream.

4. PUBLIC LANDS ⇨193—COLONIAL PATENTS.

Colonial patent passed nothing by implication or not expressed in unequivocal language.

5. NAVIGABLE WATERS ⇨37(4)—CONSTRUCTION OF PATENT; TITLE TO BED OF STREAM.

Patentee does not by implication take the bed of the river to exclusion of state; every intentment being made in favor of state.

6. NAVIGABLE WATERS ⇨37(7)—TITLE TO BED OF RIVER; COLONIAL PATENT.

Colonial patent granting land "on both sides" of river, the description of which begins west of certain river and does not mention the river independently of one or both of its "sides," *held* to give patentee no title to bed of river.

7. EVIDENCE ⇨23(1)—JUDICIAL NOTICE.

It is a well-known fact that the colonial government as a matter of policy studiously avoided granting the river bed.

8. BOUNDARIES ⇨8—CLOSING OF DESCRIPTION IN COLONIAL PATENTS.

Where only purpose of colonial patent, the description of which did not close, was to make certain the boundaries of patent previously given, the omitted boundary will not be supplied; the straight line rule being one of necessity, applied for purpose of giving effect to grantor's intention, when that intention is obvious, and to prevent a nullification of the grant.

Appeal from Special Term, Saratoga County.

Action by the West Virginia Pulp & Paper Company of Delaware against Duncan W. Peck, individually and as Superintendent of Pub-

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

lic Works, State of New York, and others. From judgment of Supreme Court for defendants, after a trial before the court without a jury (104 Misc. Rep. 172, 171 N. Y. Supp. 1065), plaintiff appeals. Affirmed.

Robert Frazier, of Mechanicville (George M. Mackellar and Robert Gerbracht, Jr., both of New York City, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (Edward J. Mone and John D. Monroe, Deputies Atty. Gen., of counsel), for respondents.

COCHRANE, J. Plaintiff is the owner of a dam 796 feet long across the Hudson river at Mechanicville. It also owns the land on both sides of the river at the termini of the dam. As originally constructed in the year 1882, the dam was 16 feet high. In the year 1903 the Barge Canal Act was passed, being chapter 147 of the Laws of that year, which canalized (section 3) the river from Waterford to Ft. Edward. Notwithstanding that legislation, the plaintiff in 1904 increased the height of its dam 3 feet. Subsequently the state, in the construction of the Barge Canal, built lock No. 3 through the easterly end of the dam, and dredged the bed of the river above and below the dam for the purposes of the canal. In doing so the state officers adopted the height of the dam at that time as the basis of construction, and built the canal and lock to conform to the dam as it then existed. At about the time the canal and lock were completed, and in 1913 the plaintiff put flashboards on the dam, raising it to a still greater height of $2\frac{1}{2}$ feet. These flashboards were removed by the defendants, acting for and representing the state, for the protection of the canal. The plaintiff thereupon instituted this action to restrain the defendants from interfering with its dam. It is found by the trial justice that by reason of the flashboards the Barge Canal could not be safely navigated, nor could the locks or canal structures withstand the water pressure, and that they were jeopardized and their usefulness impaired. This finding is not criticized. From a judgment dismissing the complaint, the plaintiff appeals.

The dam was built pursuant to chapter 406 of the Laws of 1882, which purported to authorize its construction. Chapter 683 of the Laws of 1900 was passed to legalize the erection of the dam, and purports to give the plaintiff's predecessor certain rights in respect thereto. It has been found by the trial justice that neither of these acts operated to confer title to the plaintiff or its predecessor in respect to the river or its bed. It is unnecessary to consider the effect of either of those legislative enactments, because the plaintiff expressly disclaims any rights thereunder, except as they may have constituted a license or permission for the construction of the dam. The position of the plaintiff is stated in its brief as follows:

"The act of 1900 did not, any more than the act of 1882, confer upon the plaintiff's predecessor the right to maintain a dam. The plaintiff's predecessor in title had a right to erect and maintain the dam, irrespective of any legislative permission by virtue of its ownership of the uplands and the bed of

a nontidal, nonnavigable stream. * * * The plaintiff does not and has not at any time claimed the ownership of the bed of the river by virtue of either of these acts."

[1] The plaintiff does contend, however, that, even assuming the ownership of the state in the bed of the river, the state could not interfere with the dam without legislative authority, because it had granted its consent to the location of the dam in the river by the acts of 1882 and 1900, and that such consent has not been revoked. The Barge Canal Act (chapter 147 of the Laws of 1903) in section 3 specifically states:

"The route of the Champlain Canal as improved shall be as follows: Beginning in the Hudson river at Waterford, thence up the Hudson river canalized to near Ft. Edward," etc.

Here is a distinct declaration of legislative authority to use the river for canal purposes, and constitutes a revocation of any license or consent theretofore granted. The act of 1903 provides in what manner property may be appropriated for the construction of the canal, and the plaintiff claims that, because the state did not make its survey and map and file the same, and otherwise comply with the methods and procedure specified by the statute, therefore there has been no appropriation, and the state is a trespasser. Compliance with those statutory requirements was necessary only when the state appropriated the property of others. It was unnecessary for the state to make an appropriation of land or water which it already owned. If it owned the bed of the river, and had the right to navigate the waters of the river, no appropriation of the same was necessary, and the declaration by the Legislature of its intention to canalize the river was a sufficient revocation of any previous consent to the location of the dam in the river.

[2] Furthermore, I think the plaintiff entirely misses the point. The defendants have not interfered with the dam as it existed when the canal was constructed, but only with changes made to the dam since the construction of the canal. In the construction of the canal and the lock through the dam, and in conforming such construction to the dam as it then existed, the state seems to have had the consent and acquiescence of the plaintiff. There is certainly no evidence of any protest or objection. We must here assume that the method of construction and the utilization of the dam for the purposes of the canal, and the adaptability of the latter to the former, were mutually agreeable to the plaintiff and the state. The canal, therefore, was properly built with reference to the plaintiff's dam, and, assuming the canal to be on the property of the state, any change in the dam detrimental to the canal was unauthorized. The question is not as to the right of the state to interfere with the dam as it existed when the canal was built, but the question is as to the right of the plaintiff to so change its dam after the canal was built as to destroy it or impair its usefulness. Any question as to the liability of the state for utilizing the dam is not presented on this appeal, and we refrain from expressing any opinion in reference thereto. On the record here presented, we are required to assume that the plaintiff acquiesced in the use of its dam by the state,

and liability of the state for so doing is not now an issue. But, assuming that the bed of the river was owned by the state, and assuming, as we must from this record, that there was an acquiescence by the plaintiff in the utilization of its dam by the state for the purposes of the canal, no trespass was committed by the defendants in removing the flashboards placed on the dam after the construction of the canal.

[3] The plaintiff further contends that the state never had title to the bed of the river at the site of the dam, because of the effect of two colonial patents before New York became a state. Before considering those patents, it is appropriate to consider the question of the navigability of the Hudson river at the locus in quo, because on this question depends largely the effect of those patents, as to whether or not they carried the title of the adjoining uplands to the thread of the stream, in the absence of language indicating such a purpose. *Fulton Light, Heat & Power Co. v. State of New York*, 200 N. Y. 400, 413, 94 N. E. 199, 37 L. R. A. (N. S.) 307; *Danes v. State of New York*, 219 N. Y. 67, 113 N. E. 786; *People v. Page*, 39 App. Div. 110, 56 N. Y. Supp. 834, 58 N. Y. Supp. 239. The plaintiff strenuously urges that the river at Mechanicville is not navigable. There is much judicial literature on the navigability of the Hudson above tidal influence and the Mohawk, and the question I think is settled, and justifies little discussion from an original standpoint. I shall therefore merely refer to a few cases which seem to bear with special pertinency on the situation at Mechanicville.

Stillwater is less than three miles above the plaintiff's dam. Between the two places are Fonda's Rapids, mentioned in the evidence. If the river is navigable at one end of the rapids, it would seem to follow that it is also navigable at the other end. More than a century ago, in the case of *Palmer v. Mulligan*, 3 Caines, 307, 2 Am. Dec. 270, Chief Justice Kent said:

"The Hudson at Stillwater is capable of being held and enjoyed as private property, but it is, notwithstanding, to be deemed a public highway for public uses, such as that of rafting lumber, to which purpose it has heretofore been, and still is, beneficially subservient. To obstruct this and other public uses of the river, by dams, etc., would be a nuisance."

In the same case it was said by Spencer, J.:

"I cannot, however, but consider it as a common highway; independent of its being navigable with small craft and rafts above the place in dispute, the Legislature have constantly considered this river as public, and common to all the citizens of the state above tide water, and above Stillwater. They have granted islands in this river at Glens Falls, and in the town of Greenwich, in Washington county."

A few years later it was even held that the Batten Kill, a tributary of the Hudson about 20 miles above Mechanicville, and which figures prominently in the said patents, was a public highway. *Shaw v. Crawford*, 10 Johns. 236. In *Harris v. Thompson*, 9 Barb. 350, it was said of the river at Ft. Miller, many miles above the plaintiff's dam:

"The Hudson River at the location of the dam in question is a public river for the purposes of navigation; or as it is termed a public highway."

The navigability of the river above the plaintiff's dam has been judicially recognized for too long a time to be now questioned. The plaintiff, however, goes further in its contention, and urges that, even though the river be navigable above and below the site of its dam, it is not navigable at that particular place. That is much too narrow a view of the situation. A stream may be navigable in some of its stretches and not navigable in others; but that is not the condition at Mechanicville. The criterion is the adaptability of the river in its entirety for the purposes of transportation in about the locality of the place in question.

"In order to be navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream. *St. Anthony Falls Water Power Company v. St. Paul Water Commissioners*, 168 U. S. 349 [18 Sup. Ct. 157, 42 L. Ed. 497]; *Morgan v. King*, 35 N. Y. 454 [91 Am. Dec. 58]."
Danes v. State of New York, 219 N. Y. 67, 71, 113 N. E. 786, 787.

It has been held that the falls of Niagara do not qualify or distinguish in that locality the river in respect to its general character as a navigable river. *Matter of Commissioners of State Reservation at Niagara*, 37 Hun, 537. Of the Mohawk it has been said:

"That the Mohawk, at the particular place in controversy, is not in fact navigable, does not change or affect its general legal character as a navigable river, and take it out of this doctrine. A river navigable in law does not change its legal character because at particular localities it is, in fact, nonnavigable." *People v. Page*, 89 App. Div. 110, 117, 56 N. Y. Supp. 834, 58 N. Y. Supp. 239.

And in *Canal Appraisers v. State*, 17 Wend. 571, it is stated in the headnote:

"If, in the improvement of the navigation of a public river, the waters of a tributary stream are so much raised as to destroy a valuable mill site situate thereon, and the stream be generally navigable, although not so at the particular locality of the mill site, the owner is not entitled to damages within the provisions of the canal laws directing compensation to be made for private property taken for public use."

I think it should be held and found as a fact without any qualification that the river at the locus in quo is a navigable stream, and the patents should be construed accordingly.

We turn, now, to a consideration of the said patents. The first was granted by Colonial Gov. Dongan in the year 1684 to private individuals, and conveyed land by the following description:

"A Certaine Tract or Parcell of Land scituate lyeing and being to the North of Albany on both sides of Hudsons River beginning at the uppermost limitts of the land bought formerly by Goose Garretsen and Phillip Peterse Schuyler being a Creeke called Tioneen de houwe which is the Southermost Bounds of the said Lands and from thence up both sides of the River Northerly to a Creeke or Kill on the East side of the River called Tionoon de houwe the Land on said Creeke Included keeping the same Length on the West side of the River and soe Runnes East and West into the woods as farr as the Indians Right and Title to the within menconed Land afore recited as by a Certaine writeing or Indian Deed bearing Date the 26th Day of July in the thirty fifth Yeare of his Maties Reigne 1683 Relacon being thereunto had doth more fully and at Large appeare."

The "Tioneen de houwe" is Anthony's Kill, a tributary of the Hudson on the westerly side at Mechanicville, about 3,650 feet below the plaintiff's dam. The "Tionoon de houwe" is the Batten Kill, a tributary of the Hudson on the easterly side and about 22 miles above Anthony's Kill.

[4, 5] The rule is well established that nothing passes in such grants as the above by implication, or except such as is expressed in unequivocal language. The patentee does not by implication take the bed of the river to the exclusion of the state. Every intendment is to be made in favor of the state. *Canal Commissioners v. People ex rel. Tibbits*, 5 Wend. 423, 463; *People v. Page*, 39 App. Div. 110, 118, 56 N. Y. Supp. 834, 58 N. Y. Supp. 239; *Langdon v. Mayor*, 93 N. Y. 129, 145; *People v. New York & Staten Island Ferry Co.*, 68 N. Y. 71, 77; *Sage v. Mayor*, 154 N. Y. 61, 81, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592; *Dermott v. State of New York*, 99 N. Y. 101, 1 N. E. 242.

[6, 7] In the light of such rule we must construe the above description, and, thus construed, it does not in terms or by implication convey the bed of the river. Nothing appears from the grant indicating such an intent. It is a well-known fact that the colonial government as a matter of policy studiously avoided granting the river bed (*Canal Commissioners v. People ex rel. Tibbits*, 5 Wend. 423, 460), and it is extremely improbable that Gov. Dongan in this instance departed from that policy to the extent of conveying 22 miles of river bed in a single grant to private individuals; there being nothing to indicate any reason therefor.

The plaintiff presses on our consideration the recent case decided by us of *Haselo v. State of New York*, 187 App. Div. 804, 175 N. Y. Supp. 850. There is no similarity between the two cases. In the first place it was pointed out by us that, the patentee in that case being a political subdivision of the colony, the rule of presumption in favor of the state does not apply. But the crucial point in that case was that the point of beginning of the description as fixed by us was in the river, and it was said: "From this point all the measurements proceed." The entire argument rested on that feature of the case. In the instant case the description clearly begins west of the river; and the river is never mentioned in the description independently of one or both of its "sides."

The other patent is known as the Queen Anne or Lord Cornbury patent, and was granted in the year 1708 to the Dongan patentees or their successors, and is confirmatory of the Dongan patent. The description begins "att the South side of the Mouth of a Certain Creek on the West side of Hudsons River Comonly called by the Indians Tionoondehowe & by the Christians Anthonys Kill," and extends westerly into the woods 6 miles from the river thence northerly parallel with the river to a point opposite the north side of the Batten Kill, and then by a straight line east to the north side of the mouth of the Batten Kill, and thence still further east 6 miles into the woods on the east side of the river, thence southerly parallel with the river and 6 miles distant therefrom "untill it Come Opposite to and Bear East Six

Miles Distant from the North side of the Mouth of Schaackook Kill which is the Bounds of Schaackook Patent Late belonging to Henry Van Renslaer." The Schaackook Kill is the Hoosick river, a tributary of the Hudson on the easterly side, about 9,000 feet above the plaintiff's dam, and considerably more than 2 miles above the mouth of Anthony's Kill. The northerly boundary of this patent crosses the river. Not so the southerly boundary. There is no southerly boundary east of the river. Mr. Justice Whitmyer, before whom the case was tried, reasons with much plausibility that the purpose of this patent was to define the easterly and westerly boundaries, which in the Dongan patent were vaguely and indefinitely located, and that the omission of the southerly boundary east of the river was intentional. 104 Misc. Rep. 172, 171 N. Y. Supp. 1065. I am in accord with his conclusion in that respect, and deem it unnecessary to repeat the argument here.

I will, however, consider the question from another standpoint. The plaintiff urges that the omission was unintentional, and that the omitted boundary line should be supplied. If we yield to this argument, and attempt to supply the missing boundary, we nevertheless meet with insuperable obstacles. In the patent the description terminates six miles easterly of "the North side of the Mouth of Schaackook Kill which is the Bounds of Schaackook Patent Late belonging to Henry Van Renslaer." This Schaackook or Van Rensselaer patent was granted by Gov. Fletcher in the year 1698, after the Dongan patent. It encroached upon the southerly part of the property on the east side of the river previously granted by the Dongan patent to the extent of more than two miles. I quote from the plaintiff's brief:

"The question of encroachment was settled between the patentees under the two patents or their assigns, by a conveyance from the Saratoga patentees to the Schaackook patentees of a part of the southerly portion of the Saratoga patents"

—the Saratoga patentees manifestly referring to the Dongan patentees or their successors. The Queen Anne patent recognizes that the title south of the Schaackook Kill (Hoosick river) is in Van Rensselaer, because it recites the same as "belonging to Henry Van Renslaer." It is obvious, therefore, that a straight line connecting the termini of the description in the Queen Anne patent would cross land therein referred to as "belonging to Henry Van Renslaer."

[8] But the plaintiff urges further that we should connect the termini by extending a broken line around the land of the Van Rensselaer patent. The straight line rule, or in this case the broken line rule, is a rule of necessity, applied for the purpose of giving effect to the grantor's intention, when that intention is obvious, and to prevent a nullification of the grant. Such rule, therefore, has no applicability here, because without it the Queen Anne patent is not a nullity, but is effective to make certain the easterly and westerly boundaries of the Dongan patent, and no other intent is obvious.

But if we attempt to apply the rule, it by no means follows that the

supplied boundary should cross the river. It certainly should not do so, unless we can discover that such was the intention, and, as we have already seen, a contrary intent must be presumed. Every reason against such an intention in respect to the Dongan patent exists likewise in respect to the Queen Anne patent. If we supply the omitted boundary as extending along the northerly boundary of the Van Rensselaer patent to the easterly side of the river, and stop there, we have a complete grant and a valid and effectual conveyance. Furthermore, it is impossible to determine whether this supplied broken line should cross the river at the Hoosick, about 9,000 feet north of the plaintiff's dam, and then follow down the westerly side of the river to the point of beginning, or whether it should follow the easterly side of the river to a point opposite Anthony's Kill and make its crossing there. In the former case the bed of the river at plaintiff's dam would be effectually excluded. I know of no rule which will assist the plaintiff out of its dilemma. The Queen Anne patent undoubtedly was an effective instrument for certain purposes, but it clearly did not have the effect of conveying the bed of the river at the location of the plaintiff's dam.

It follows that the trial justice properly denied injunctive relief to the plaintiff, and that the judgment should be affirmed, with costs. This court disapproves of any finding to the effect that the river at the location of the plaintiff's dam is not navigable in fact, and finds as a fact that the river at that place is and was navigable in fact and in law. All concur.

(108 Misc. Rep. 621)

LEVETT v. DRAPER.

(City Court of New York, Trial Term. September 16, 1919.)

CARRIERS §151—POSTING OF SCHEDULE AT "OFFICE"; LIMITATION OF LIABILITY.

Under Public Service Commissions Law, § 28, requiring posting of schedules of rates by carrier in every station or office, a transfer or express company, sued for loss of trunk, could invoke schedule limitation of liability to \$150 for each piece of baggage, where such schedule was duly posted in each of its two offices on main floor of terminal, although not posted at small movable desk on mezzanine floor of terminal, used by defendant's agent in writing out baggage receipts, including plaintiff's receipt; such desk not being an "office," within the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Office.]

Action by Mary W. Levett against Samuel W. F. Draper, as President of the New York Transfer Company, Dodd's Express, a joint-stock association. Judgment for plaintiff.

See, also, 106 Misc. Rep. 497, 174 N. Y. Supp. 721; 174 N. Y. Supp. 725.

Lee & Wadsworth, of New York City (Joseph Day Lee, of New York City, of counsel), for plaintiff.

Hill, Lockwood & Redfield, of New York City (R. L. Redfield, of New York City, of counsel), for defendant.

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VALENTE, J. This case was tried before me without a jury. As the parties have agreed by stipulation upon the material facts, it is unnecessary to review these in detail. The complaint sets forth a cause of action by a traveler for the loss of her trunk and contents thereof, which defendant undertook to carry from the Pennsylvania Terminal to plaintiff's residence, at No. 1 West Seventy-Second street, New York City. The defense relied upon at the trial was that defendant had duly filed and posted its schedule of rates as required by Public Service Commissions Law (Laws 1910, c. 480; Consol. Laws, c. 48) § 28; that by said schedule defendant had limited its liability to the sum of \$150 for each piece of baggage; that plaintiff must be presumed to have knowledge thereof; and that her recovery should therefore be limited to said sum. At the first trial in this court judgment was rendered in favor of the plaintiff in the sum of \$1,000. After the court's decision in plaintiff's favor, but prior to the entry of judgment thereon, plaintiff made a motion to reopen the case, in order that testimony might be taken upon the issue whether the place where plaintiff received her baggage receipt was an "office" of the defendant, within the purview of section 28, so as to require the posting of a notice of the schedule of rates thereat.

Section 28 of the Public Service Commissions Law reads in part as follows:

"Such schedules shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for convenient inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of an agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor car or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from such schedules any transportation rates or fares or rules or regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in every such station or office." (*Italics mine.*)

This section formerly required the posting of such schedules "in every depot, station *and* office of every common carrier where passengers or property are received for transportation." Laws 1907, c. 429, § 28. But in 1910 the statute was modified by the Legislature so as to read in the manner above quoted.

On the motion to reopen the case plaintiff urged that the notice was not posted at the place where she received from the defendant her baggage receipt, which was a small movable desk situated in the mezzanine floor of the Pennsylvania Terminal, and which was used by defendant's agent for the purpose of writing out baggage receipts. It was and is conceded, however, that the schedule of rates was duly posted in large type in each of the two offices of the defendant on the main floor of the Pennsylvania Railroad station. The learned trial judge who presided at the first trial in this court denied plaintiff's motion to reopen the case. Plaintiff appealed to the Appellate Term from

the order denying her motion. Defendant also appealed from the judgment entered in plaintiff's favor. Both appeals were heard by the Appellate Term of the Supreme Court in February, 1919. The learned Appellate Term reversed the judgment entered in plaintiff's favor, but, instead of modifying the judgment, so as to limit it to the sum of \$150, and affirming it as modified, the Appellate Term ordered a new trial, saying:

"It may be that the place where the defendant gave a receipt for the baggage does not constitute an office within the meaning of the statute, and that the defendant has actually posted the tariffs wherever required to do so. This point, however, can be decided better at the trial when all the evidence bearing upon this point is properly presented." 106 Misc. Rep. 497, 174 N. Y. Supp. 721.

The trial held before me was for the purpose, I understand, of passing upon the single issue, therefore, whether or not the place where plaintiff received her baggage check from the defendant was an "office" of the defendant within the purview of section 28 of the Public Service Commissions Law, *supra*, so as to require a notice of the filing of the schedule of rates to be posted there. I have reached the conclusion that the place where plaintiff received her baggage check was not an office within the fair meaning of section 28. It appears from the conceded facts that when plaintiff arrived at the Pennsylvania Terminal she ascended from the platform where the trains arrive to the mezzanine floor, where a small desk 2 feet wide and 30 inches long is located. This desk has the name of the defendant company painted upon it, and is furnished by the company to its agent, in order to facilitate his writing out baggage receipts for the accommodation of incoming passengers. The said desk is not fixed to the floor, nor is it permanently located at any one point, but, on the contrary, is moved about freely from place to place whenever necessary. It is conceded that no notice of the filing of rates was posted at or on said desk, but it is conceded that notice of the filing of rates was duly posted by defendant in each of its two offices on the main floor of the said Pennsylvania Terminal Depot.

As I understand the plaintiff's contention, she urges that this little movable desk was an "office" within the meaning of section 28, and that the failure to post the schedule thereat rendered the limitation of liability to the sum of \$150, contained in defendant's schedule of rates, ineffectual and inoperative. I do not think that it can fairly be claimed that the desk is itself an "office" within the meaning of this section. Every place where receipts for property are issued is surely not an office. Suppose defendant's baggage agent walked through the train as it arrived at the depot and issued receipts in exchange for baggage. Could it fairly be argued that the agent, by reason of issuing said receipts, would be constituted an office so as to require the posting of the schedule of rates in two conspicuous places upon his person? It is equally true that defendant's little movable desk cannot fairly be regarded as an office. Defendant's office was its regular place of business in the Pennsylvania Depot—the place where its business was regularly conducted. At said office, the notice was duly posted, as required by statute. A place where receipts for baggage are issued from time

to time, which is also a place where some of the business of the common carrier is conducted, is not, in my judgment, an office where the notices required by statute are to be posted, and I think that the defendant has sufficiently posted the tariffs in such places as it is required to do. I am satisfied, in view also of the changed wording of the statute, that the defendant has sufficiently complied with the intention of the law, since its schedules were kept posted by it "in two public and conspicuous places in the station or office maintained by it in the Pennsylvania Railroad Terminal."

The learned counsel for the plaintiff contends that section 28 of the Public Service Commissions Law quoted, *supra*, was enacted by the Legislature for the purpose of affording to the public actual notice of the contents of the schedule of rates. I do not agree with this contention. In fact the Supreme Court of the United States has held that a schedule of rates is binding even though no notice thereof is posted at all. *Kansas City S. R. R. v. Carl*, 227 U. S. 639, 652, 33 Sup. Ct. 391, 57 L. Ed. 683; *Am. Exp. Co. v. U. S. Horseshoe Co.*, 244 U. S. 57, 65, 37 Sup. Ct. 595, 61 L. Ed. 990; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593. Thus in the *Hooker Case*, *supra*, the court specifically held that the schedule had the force of law and was binding upon all shippers, irrespective of actual knowledge. This point has never been decided by the Court of Appeals of this state, but, to my mind, the decisions of the United States Supreme Court in construing similar legislation are not to be lightly passed over.

For these reasons I hold that judgment should be awarded to the plaintiff in the sum of \$150, but, in view of defendant's offer of judgment, dated June 7, 1918, the defendant is entitled to costs as from said date. Submit decision and findings.

(108 Misc. Rep. 626)

KLINGENSCHMIDT v. MARTOCCHI.

(City Court of New York, Special Term. August 14, 1919.)

1. CORPORATIONS §181(7)—RIGHT OF STOCKHOLDER TO VERIFIED STATEMENT OF CORPORATE ASSETS AND LIABILITIES.

Under Stock Corporation Law, § 69, the owner of 5 per cent. of capital stock of a domestic corporation, whether a director or not, upon written request to its treasurer or chief fiscal officer, has absolute right to a verified statement of corporate assets and liabilities, and, irrespective of his motive, may maintain an action against the treasurer for the statutory penalty for his failure to comply with such request.

2. CORPORATIONS §323—OFFICER'S LIABILITY FOR PENALTY; REFUSAL OF VERIFIED STATEMENT OF ASSETS AND LIABILITIES.

In action under Stock Corporation Law, § 69, by stockholder owning 5 per cent. of capital stock of domestic corporation for penalty for treasurer's refusal to comply with a written request for a verified statement of assets and liabilities, a separate defense alleging that stockholder, who was a director, was engaged in a competing business, and had daily access to books, and was suing in bad faith, in view of his pending suit for salary, contrary to an agreement, was insufficient as a matter of law.

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Action by Louis Klingenschmidt against Michael Martocci. On motion to strike out separate defense in an answer. Granted.

Nathan H. Stone, of New York City, for plaintiff.

Frederic C. Leubuscher, of New York City, for defendant.

VALENTE, J. This is a motion to strike out the separate defense in the answer on the ground that it is insufficient as matter of law. The action is brought under section 69 of the Stock Corporation Law of New York (Consol. Laws, c. 59), against the defendant, as treasurer of a domestic corporation, to recover the statutory penalty because of defendant's failure to deliver to plaintiff a verified statement of the corporate assets and liabilities pursuant to a written demand duly served upon the defendant on October 31, 1918. The answer contains a general denial of the material allegations of the complaint, and also contains a separate defense, in which it is set up that plaintiff brings this suit in bad faith. This separate defense, briefly summarized, sets forth that plaintiff is himself a director; that, although a director, he has been engaged in another business, which competes with the business of the corporation; that he is bringing an action against the corporation for arrears of salary, although it had been agreed not to press the corporation for money; that plaintiff has daily access to the books of the corporation and is bringing this suit in bad faith.

[1] Section 69 of the Stock Corporation Law reads as follows:

"Financial Statement to Stockholders.—Stockholders owning five per centum of the capital stock of any corporation other than a moneyed corporation, not exceeding one hundred thousand dollars, or three per centum where it exceeds one hundred thousand dollars, may make a written request to the treasurer or chief fiscal officer thereof, for a statement of its affairs, under oath, embracing a particular account of all its assets and liabilities, and the treasurer *shall* make such statement and deliver it to the person presenting the request within thirty days thereafter, and keep on file for twelve months thereafter a copy of such statement, which shall at all times during business hours be exhibited to any stockholder demanding an examination thereof; but the treasurer or such chief fiscal officer shall not be required to deliver more than one such statement in any one year. The supreme court, or any justice thereof, may upon application, for good cause shown, extend the time for making and delivering such certificate. For every neglect or refusal of the treasurer or other chief fiscal officer thereof to comply with the provisions of this section he shall forfeit and pay to the person making such request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter until such statement shall be furnished." (Italics mine.)

It will be noted that the treasurer is given no discretion as to whether he shall furnish the statement or not. The language of the statute is unmistakably mandatory. The statute apparently contemplates an absolute right on the part of a stockholder owning more than 5 per cent. of the capital stock to such statement, and contemplates a stockholder's right to recover the statutory penalty in the event the treasurer fails to furnish it. Where the right is conferred by statute in absolute terms, the purpose or motive of the stockholder is not material in an action to recover the statutory penalty. A clear legal right given by statute to the stockholder cannot be defeated by

showing an improper motive. If the rule were otherwise the stockholder would be driven from a definite, positive right given him by the statute to a realm of speculation, indefiniteness, and uncertainty.

There is no authority in this state, so far as I am aware, upon the point raised by the present motion, but there are several analogous cases. In *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302, 89 N. E. 942, 134 Am. St. Rep. 835, a stockholder requested permission to inspect the stockbook of the corporation. The treasurer feared that the stockholder had an improper or ulterior motive, and requested him to state his purpose. The stockholder refused so to do, and sued for the statutory penalty provided for in Stock Corporation Law, § 33, formerly section 53. The Court of Appeals held that the stockholder was entitled to recover the penalty, irrespective of his motive, and Willard Bartlett, J., said at page 304 of 196 N. Y., at page 942 of 89 N. E. (134 Am. St. Rep. 835):

"Section 53 of the Stock Corporation Law, as in force at the time of this transaction (now section 33 of chapter 59 of the Consolidated Laws), provided that every foreign corporation having an office for the transaction of business in this state should keep a stockbook containing a list of its stockholders, showing their places of residence, the number of shares of stock held by them respectively, etc. It further provided as follows: 'Such stockbook shall be open daily, during business hours, for the inspection of its stockholders. * * * For any refusal to allow such book to be inspected, such corporation and the officer or agent so refusing shall each forfeit the sum of two hundred and fifty dollars (\$250), to be recovered by the person to whom such refusal was made.' Laws 1892, c. 688, § 53, as amended by Laws 1897, c. 884."

And at page 305 of 196 N. Y., at page 943 of 89 N. E. (134 Am. St. Rep. 835), the learned judge also said:

"No doubt the Legislature could make the stockholder's privilege of inspection dependent upon the motive or purpose with which it is sought; but it has not seen fit to do so. The language of the statute is plain and mandatory. It recognizes an absolute right in the stockholder and imposes an absolute duty upon the corporation and the custodian of the stockbook. The law requires no statement or proof of any particular intent upon the part of the person demanding the inspection. He must be a stockholder and must prefer his request during business hours; that is all."

The case of *People ex rel. Britton v. American Press Ass'n*, 148 App. Div. 652, 133 N. Y. Supp. 216, is perfectly consistent with the decision of the Court of Appeals in the *Henry Case*. In the *Britton Case*, the application was for a writ of mandamus to compel the treasurer of a corporation to permit an inspection by the stockholder of the stockbook. The Appellate Division, First Department, by a divided court, distinguished the application for a writ of mandamus from an action to recover the statutory penalty, holding that upon an application for a writ of mandamus the court retained its discretion to grant or refuse the writ, whereas the right to the statutory penalty is absolute. In making this distinction, former Justice Scott, writing for the majority of the court, said:

"It is definitely settled that the motives of a stockholder, however sinister, constitute no answer to an action by him to recover the penalty prescribed by statute for the refusal of a corporation to exhibit its stock book upon a proper demand. The statute recognizes an absolute right in the stockholder,

and imposes an absolute duty upon the corporation and the custodian of the stock book. *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302 [89 N. E. 942, 134 Am. St. Rep. 835]. The case just cited establishes the absolute right of the stockholder either to be allowed an inspection, or, if that be denied him, to a recovery of the penalty prescribed by statute."

[2] Since Stock Corporation Law, § 69, like Stock Corporation Law, § 33, confers on the stockholder an absolute right to recover the penalty, the defendant's contention herein that plaintiff, in seeking to enforce his absolute right, is proceeding from an improper motive constitutes no defense to the action for the recovery of the penalty. Nor is it a defense that plaintiff is a director of the corporation and had daily access to its books and records. In *Townsend v. Davis*, 153 App. Div. 599, 138 N. Y. Supp. 758, it was held that section 69 applies to a stockholder who is a director as well as to a stockholder who is not a director. The undoubted intention of the Legislature was to place no obstacle in the way of a stockholder seeking to obtain such a statement, and the only condition attached is that the applicant should own 5 per cent. of the capital stock of the company and make his demand, as it concededly has been made herein, in due and proper manner. For these reasons I feel constrained to grant the motion. No costs.

Motion granted.

(108 Misc. Rep. 408)

BUCK v. KELLY.

(Onondaga County Court, August, 1919.)

1. EXECUTORS AND ADMINISTRATORS §291—VESTING OF LEGACY ON ASSENT OF EXECUTOR.

With the assent of the executor, an asset specifically bequeathed becomes the property of the legatee.

2. WILLS §733(10)—VESTING OF RESIDUARY ESTATE DEPENDENT ON PAYMENT OF DEBTS, ETC.

Until the payment of debts and other legacies and charges, the residuary estate does not vest in the residuary devisee.

3. WILLS §733(10)—ACCRUAL OF RIGHT TO RESIDUE.

Where defendant accepted a bill of exchange payable to M., and there was evidence that he owned bill at his death, and by will he gave his residuary estate to his wife, who was named as executrix, and there was no evidence of value of estate, of amount of debts, that debts and specific legacies had been paid, or of any administration, she was not owner of bill at time of her alleged assignment thereof to plaintiff, but it was a part of estate, which she could dispose of only as executrix.

Appeal from Municipal Court of Syracuse.

Action by George E. Buck against Thomas B. Kelly. From a judgment of the Municipal Court of the City of Syracuse in favor of plaintiff, rendered March 7, 1919, for the sum of \$199.67 damages and costs, defendant appeals. Reversed, and a new trial granted.

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R. J. Shanahan, of Syracuse, for appellant.
P. Sidney Hand, of Syracuse, for respondent.

COBB, J. The plaintiff alleged the drawing of a bill of exchange by one David Cleary, whereby he directed the payment by defendant to C. H. Merrick of the sum of \$315.27. The complaint also alleged the acceptance of such bill by defendant in writing and the assignment thereof by said C. H. Merrick to plaintiff, who brings this action as owner and holder thereof.

There was proof of the drawing and acceptance of the bill as alleged, but not of the assignment by the payee thereof to plaintiff; the evidence in that regard showing that C. H. Merrick was the owner of the bill at the time of his death in 1915; that he left a will whereby, after the payment of his debts and certain specific bequests, he gave his residuary estate to his wife, Lavinia Merrick, who was also named as executrix. It was claimed that the bill in suit constituted a part of such residuary estate, which, having become vested in Lavinia Merrick by operation of law, passed to plaintiff through an assignment thereof authorized to be made by Lavinia Merrick in the assumed name "C. H. Merrick," under which she was carrying on the brick business formerly conducted by her husband, C. H. Merrick.

At the conclusion of the trial the defendant moved for a nonsuit, while the plaintiff asked for the direction of a verdict. The latter motion was granted. A reversal of the judgment is asked on the ground that Lavinia Merrick was not the owner of the bill in her own right at the time of the assignment to plaintiff, but that same constituted a part of the estate held by her as executrix of the will of C. H. Merrick, deceased, to be administered in accordance with its terms.

[1, 2] There was no evidence of the value of the estate left by Merrick or the amount of his debts. There was no evidence that the debts and specific legacies had been paid, or that any steps had been taken by the executrix in the administration of the estate. This being the case, I am compelled to hold that Lavinia Merrick was not the owner of the bill at the time of its alleged assignment to plaintiff, and had no authority, except in her capacity as executrix, to dispose of the same.

With the assent of the executor an asset specifically bequeathed becomes the property of the legatee. *Onondaga Trust & Deposit Co. v. Price*, 87 N. Y. 542-548. Upon the payment of the debts of the estate a sole devisee or legatee becomes the owner of the residue. *Blood v. Kane*, 130 N. Y. 517, 29 N. E. 994, 15 L. R. A. 490. On payment of the debts and other legacies and charges, the residuary estate vests in the residuary legatee. *Blood v. Kane*, *supra*; *Matter of Mullon*, 145 N. Y. 98-104, 39 N. E. 821.

But there is no authority for holding that before the payment of debts and legacies any part of the estate is so vested. In *Delabarre v. McAlpin*, 71 App. Div. 591-593, 76 N. Y. Supp. 301, 302, Justice Ingraham said:

"It is a general rule which, I supposed, was of universal application, that the personal estate of a deceased person vests in his personal representatives, and the next of kin have no standing in a court of law or equity to recover possession of the personal estate of a decedent."

The subject was discussed by Presiding Justice Van Brunt in *Wetmore v. St. Luke's Hospital*, 56 Hun, 313-318, 9 N. Y. Supp. 753, 756, where, in the course of the opinion, he said:

"In order that there should be a residuary estate, the provisions of the law must be fulfilled, and something must be left over. Debts and legacies must be paid, and then the residuum goes to the residuary legatees. But until the debts and legacies are paid it is difficult to see how, under the residuary clause, residuary legatees are entitled to receive anything."

In *Matter of Mullon*, 145 N. Y. 98-104, 39 N. E. 821, 823, Chief Judge Andrews, referring to the case of administrators with the will annexed, who were also residuary legatees, said:

"Upon payment of all debts, legacies, and charges against the estate, the title to the remaining assets would at once vest in the residuary legatees under the will, without any formal transfer from themselves as administrators."

In *Blood v. Kane*, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490, the defendant, who was executrix and sole legatee under the will of her husband, was permitted to avail herself of a counterclaim against plaintiff which was a part of the assets of her husband's estate; but the decision was placed squarely on the ground that all other debts and charges had been paid, Chief Judge Follett, in the prevailing opinion of the court, saying:

"The trust estate of a sole executor, who is also the sole devisee and legatee, is solely for the benefit of the testator's creditors, and when they are paid the trust estate sinks into and is merged with the beneficial interest, and the sole devisee and legatee becomes vested with the legal title of all the testator's estate. * * *" 130 N. Y. 519, 29 N. E. 995, 15 L. R. A. 490. "It follows from these views that the defendant was entitled to show by common law evidence that all of the debts of the testator had been paid, and that fact being established, the defendant was entitled to have the sum due her testator allowed as a counterclaim." Two judges of the court voted to disallow the counterclaim upon the ground that the evidence did not warrant the conclusion that all debts had been paid. 130 N. Y. 522, 29 N. E. 995, 15 L. R. A. 490.

But all members of the court were agreed that the payment of the debts was a prerequisite to the vesting of title to the asset in the legatee.

Blood v. Kane was followed by the Court of Appeals in the case of *Ketcham v. Deutsch*, 211 N. Y. 85, 105 N. E. 85, where plaintiff, who was sole heir and next of kin of his father, brought an action in his own name to foreclose certain mortgages, two of which were held to be assets of the estate of his father of which he was the administrator. Judgment was reversed upon the ground, among others, that the administrator was not the party plaintiff; Judge Miller, who wrote the opinion of the court, saying (211 N. Y. 89, 105 N. E. 85, 86):

"But it does not appear that those bonds and mortgages were assigned to the plaintiff and as administrator he is not a party to this action. Payment to him individually would not protect the appellant from a claim in behalf of the estate of his intestate. The fact that the plaintiff is sole next of kin does not suffice, as it does not appear that the debts of his intestate have all been paid. See *Blood v. Kane*, 130 N. Y. 514 [29 N. E. 994, 15 L. R. A. 490]."

See Code Civ. Proc. §§ 449, 1814; Huyler v. Dolson, 101 App. Div. 83, 86, 91 N. Y. Supp. 794; Hart v. Goadby, 138 App. Div. 160, 164, 123 N. Y. Supp. 166; Matter of Nash, 159 App. Div. 46, 50, 144 N. Y. Supp. 403.

[3] At the time of the assignment to plaintiff Mrs. Merrick could not have maintained an action against defendant in her individual name and capacity. As an individual and for the benefit of her individual estate she could not assign the chose in action. There is no pretense that in making the assignment in question she was acting in a representative capacity or that the estate received the consideration for the transfer. The claim is that by the terms of the will title to the bill of exchange vested in her as her sole and separate property. As this claim has no legal support, the judgment should be reversed, and since additional evidence may exist which would validate plaintiff's claim of title to the cause of action in suit, a new trial should be granted, with costs to appellant to abide the event.

Judgment reversed, and new trial granted, with costs to appellant to abide event.

(109 Misc. Rep. 297)

In re MATTHIESSEN'S ESTATE.

(Surrogate's Court, New York County. November 13, 1919.)

TAXATION ¶867(1)—TRANSFER OF REAL ESTATE OF NONRESIDENT DECEDENT SUBJECT TO TAX.

Under Tax Law, § 220, subd. 2, as it existed prior to its amendment by Laws 1919, c. 626, imposing tax upon transfers of nonresident decedent's "tangible property within the state or of any intangible property, if evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in" certain classes of corporations, transfers of real estate within the state of nonresident decedent *held* subject to transfer tax; real estate being tangible property under section 248, and qualification, "if evidenced by," etc., applying solely to intangible property.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Tangible Property.]

In the matter of the estate of Frederick Matthiessen. From report of transfer tax appraiser, and order fixing the tax, the executors appeal. Order fixing tax affirmed.

Curtis, Mallet-Provost & Colt, of New York City (Thomas A. S. Beattie and Joseph F. McCloy, both of New York City, of counsel), for appellants.

Lafayette B. Gleason, of New York City (Schuyler C. Carlton, of New York City, of counsel), for state comptroller.

FOWLER, S. This appeal is taken by the executors from the report of the transfer tax appraiser and the order fixing the tax, on the ground that the real estate within the state of New York owned by decedent, who was a nonresident, was improperly included among the taxable assets of his estate. It is contended by the appellants that

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subdivision 2, section 220, of the Tax Law (Consol. Laws, c. 60), as it existed prior to its amendment by chapter 626 of the Laws of 1919, must be so construed as to exclude from its operation transfers of real property within the state of New York of a nonresident decedent.

The section referred to provides that in case the decedent is a nonresident a tax shall be imposed "when the transfer is by will or intestate law, of tangible property within the state or of any intangible property, if evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in" certain classes of corporations or companies described in the section. The appellants contend that the words "if evidenced by or consisting of," et seq., qualify or limit the words "tangible property within the state" as well as the words "of any intangible property," and that in consequence New York real estate is taxable only if or as represented by stocks or bonds in corporations or companies.

Section 243 of the Tax Law defines "tangible property" as used in the transfer tax article as "corporeal property, such as real estate and goods, wares and merchandise," and states that it "shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt." In the same section intangible property is defined as "incorporeal property, including money, deposits in bank, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt." The words "consisting of," used in subdivision 2 of section 220, are, in my opinion, intended to be synonymous with or explanatory of the preceding words "evidenced by" in the same section. Tangible property could not, under the definition in section 243, consist of shares of stock, bonds, notes, etc., which are expressly excluded from the classification of tangible property, so that the qualification in section 220 must apply solely to intangible property.

The real estate of the decedent was properly included by the appraiser among the taxable assets. The order fixing tax is affirmed.

(109 Misc. Rep. 845)

In re BROOKFIELD'S ESTATE.

(Surrogate's Court, New York County. November 18, 1919.)

WILLS §587(4)—RESIDUARY LEGATEES; DISTRIBUTION OF INCOME.

Under a will giving testatrix's furniture and personal chattels to her two sons, H. and F., equally, and \$10,000 to her other son, J., and directing that the residue of her estate be divided into three equal portions, and giving one portion to H., one to F., and one in trust for J., *held*, that one-third of the residue, as of date of testatrix's death, and also one-third of the total income of the residuary estate, should be set apart for the trust created for J., and that all income accrued on the remaining two-thirds of the residuary, together with interest within one year from the granting of letters testamentary upon the \$10,000 legacy, should be further divided into three parts, and one of them paid to the trustee.

Accounting proceeding by the executors of the estate of Kate M. Brookfield, deceased. Decree for distribution ordered submitted.

Platt & Field, of New York City, for executors.

Geller, Rolston & Horan, of New York City, for trustee.

COHALAN, S. Upon the settlement of the decree in the accounting proceeding instituted by the executors, question has arisen as to the proper distribution of the income among the residuary legatees. The two accounting executors and the Farmers' Loan & Trust Company as trustee for James Hanford Brookfield are the residuary legatees.

It is claimed by the executors that all of the income which has accrued since the death of the testatrix should be divided, together with the principal, into three equal parts, and one of said parts paid over to each of the three residuary legatees. On the other hand, it is the contention of the trustee that one-third of the residue of testator's estate, as of the date of her death, should be set apart for the trust created for James Hanford Brookfield, and one-third of the total income of the residuary estate paid over to the trustee for his benefit. The trustee further claims that all the income accrued on the remaining two-thirds of the residuary, together with interest within one year from the grant of letters testamentary upon the legacy of \$10,000 given in paragraph 3 of the will to James Hanford Brookfield, should be further divided into three parts, and that one of these three parts should be paid to the trustee for the benefit of James Hanford Brookfield.

By paragraph 1 of the will the testatrix gave all her household furniture and all personal chattels to her sons, Henry Morgan Brookfield and Frank Brookfield, equally. By paragraph 2 is given to Frank Brookfield a share in the Adirondack League Club. By paragraph 3 \$10,000 is bequeathed to James Hanford Brookfield. Paragraph 4 of the will reads as follows:

"Fourth. I direct that all the rest, residue and remainder of my estate, whether real, personal or mixed, and wheresoever situated, shall be divided as hereafter directed by my executors hereinafter named into three equal shares or portions.

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"I give, devise and bequeath one of said portions to my said son Henry Morgan Brookfield, to be his absolutely; to my said son Frank Brookfield another of such portions to be his absolutely; and the third and remaining share or portion I give, devise and bequeath to the Farmers' Loan & Trust Company of the City of New York, in trust nevertheless, upon the following express trust, viz.: Said trust company is to hold, manage, invest and reinvest such share or portion during the life of my son James Hanford Brookfield, and to pay over to him (said James Hanford Brookfield), semiannually during his life, the net income of such share or portion. * * *

While a consideration of the entire will seems to show an intention on the part of the testatrix to divide her estate, as nearly as possible, equally among her three children, it is only in respect to the residuary estate that this direction is given. The residuary estate, therefore, must be arrived at and divided in accordance with the rule laid down by the Court of Appeals in *Matter of Benson*, 96 N. Y. 499, 48 Am. Rep. 646, which, in my opinion, is controlling on the question now before me.

The position taken by the trustee is the correct one, and the decree should provide for distribution accordingly. Submit decree.

In re MOLLER'S ESTATE.

(Surrogate's Court, New York County. November 21, 1919.)

1. TRUSTS ¶21(2)—FOR POOR RELATIONS VOID FOR INDEFINITENESS OF BENEFICIARIES.

Unaided by Personal Property Law, § 12, as to charitable trusts, a trust to divide \$500 income among testator's poor relations selected by the executors and trustees, is void, because the beneficiaries are too indefinite and uncertain.

2. CHARITIES ¶11—BEQUEST FOR POOR RELATIONS A CHARITABLE USE.

At common law, dispositions in favor of poor relations are to be ranked among charitable uses, whenever they seem to have been treated as such by the testator.

3. CHARITIES ¶11—PERPETUITIES ¶4(15)—TRUST FOR POOR RELATIONS; VALIDITY.

There is no principle of public policy prohibiting the foundation of a public charity by way of trust to care for the poor relations of the founder, if the conveyance or limitation is drafted accurately in a technical way; such a trust not creating a perpetuity for a family or tending to a privileged class.

In the matter of the estate of George H. Moller. On an accounting. Decree directed in accordance with the opinion.

Miller & Bretzfelder, of New York City (Cyrus C. Miller, of New York City, of counsel), for petitioner.

Percival E. Jackson, of New York City, for general guardian.

FOWLER, S. In this accounting arises a question as to the validity of a trust. The pertinent language of the will is as follows:

"Sixth. I direct that a sum sufficient to produce an annual income of five hundred dollars shall be set apart by my executors and trustees during the

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term of twenty-five years after my death, should my two grandchildren live so long or until their death should it sooner occur, and the said income shall be divided among my poor relations. The beneficiaries of this fund shall be selected by O. Gerhard Moller while he acts as executor, otherwise by my executors and trustees. Should this trust for any reason be declared void, I give and bequeath the definite sum to produce five hundred dollars annually to my executors, requesting, though not commanding, them to carry out my wishes. At the termination of the time the principal shall go with and be part of the residuary estate. * * *

Such a trust has been held to be not within the definition of a charitable trust under section 12 of the Personal Property Law (Consol. Laws, c. 41). *Matter of MacDowell*, 217 N. Y. 454, 463, 112 N. E. 177, L. R. A. 1916E, 1246, Ann. Cas. 1917E, 853; *Matter of Shattuck*, 193 N. Y. 446, 452, 86 N. E. 455.

[1] Unaided by the statute, the trust is void because the beneficiaries are too indefinite and uncertain. *Fosdick v. Town of Hempstead*, 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715; *Rose v. Hatch*, 125 N. Y. 427, 433, 26 N. E. 467. The Lord Chancellor of Ireland held distinctly in *Mahon v. Savage*, 1 Sch. & Lef. 111, that poor relations could be the beneficiaries of a charitable use. It seems to me that Judge Seabury's language in *Matter of MacDowell*, 217 N. Y. page 463, 112 N. E. 180, L. R. A. 1916E, 1246, Ann. Cas. 1917E, 853, to the effect "that a trust for poor relatives does not come within the designation of a charitable trust," is more general than was necessary for the case then on before the court.

[2] At common law dispositions in favor of poor relations are to be ranked among charitable uses whenever they seem to have been treated as such by the testator (*Isaac v. De Freiz*, erroneously reported, Amb. 595, but corrected from the register's book 17 Ves. 373, in notice; *White v. White*, 7 Ves. 423; *Mahon v. Savage*, 1 Sch. & Lef. 111. And see *Atty. Gen. v. Hudson*, 1 P. Wms. 674; s. c. Eq. Ca. Abr. 192, pl. 9; *Atty. Gen. v. D'Oyley*, 2 Eq. Ca. Ab. 194, 4 Vin. 485, and 7 Ves. 78, note, and *Waldo v. Cayley*, 16 Ves. 206); also of poor kindred or poor kinsmen and kinswomen (*Goffe v. Webb*, Duke's Ch. Uses, by Bridgman, 361; *Atty. Gen. v. Price*, 17 Ves. 371).

[3] There is in this country no principle of public policy known to me which prohibits the foundation of a public charity to care for the poor relations of the founder, if the conveyance or limitation is drafted accurately in a technical way. The reason sometimes assigned that it would create a perpetuity for a family and tend to a privileged class is absurd. There does not seem to me to be any great danger to republican institutions in a gift relegating poor relations to the status of paupers to be supported on a charity foundation. Thus far an aristocracy of that kind has not arisen anywhere else in the world, and while our aristocratic classes may seem somewhat singular to the world, I do not apprehend the country would be endangered if a charitable foundation should be upheld for our poor relatives. But I shall follow the decisions cited and declare the trust void under the doctrine of *stare decisis*.

Submit decree accordingly.

In re DIEHL'S ESTATE.

(Surrogate's Court, New York County. November 25, 1919.)

1. WILLS §277—OBJECTIONS TO PROBATE.

Objections to probate of a will, which controvert none of the allegations of the petition, and which are insufficient to defeat probate, even if taken to be true, do not comply with Code Civ. Proc. § 2519, and should be stricken out.

2. WILLS §277—OBJECTION TO PROBATE.

Objections to the probate of a will are to be treated according to the rules governing other pleadings.

In the matter of the estate of Clara Diehl. On motion to strike out objections to probate of will. Motion granted, with leave to amend.

Arthur Mayer, of New York City, for proponent.

FWLER, S. The first four allegations of the objections to probate are in the common form. They allege, in substance, that the propounded paper is not the last will and testament of the testatrix; that it was not executed according to law; that it was not freely or voluntarily made by the testatrix; and that the said instrument was obtained by fraud and undue influence.

There seems to be no allegation that the testatrix lacked testamentary capacity at the time she executed the propounded paper. Such may have been the purpose of the sixth objection, which relates to a period almost four years after the execution of the paper propounded; but the allegations of the sixth objection are not sufficient to raise an issue as to the mental capacity of the testatrix. The allegations are prolix or irrelevant.

[1, 2] It is quite apparent that the allegations contained in the fifth and sixth objections, even if taken to be true, are not sufficient to defeat probate. Therefore the allegations are incompetent and irrelevant, and should be stricken out for that reason alone. They controvert none of the allegations of the petition for probate, and, being incompetent, they do not comply with the provisions of section 2519, C. C. P., which provides that objections shall contain a plain and concise statement of the facts constituting the objections. Objections are to be treated according to the rules governing other pleadings. The fifth and sixth objections are not well pleaded, and both should be stricken out.

The motion is therefore granted. But it seems to me that the contestants should have leave to amend within eight days. Ordered accordingly.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In re ROMANO'S ESTATE.

(Surrogate's Court, New York County. November 25, 1919.)

WILLS §261—LACHES BARRING VACATION OF PROBATE DECREE.

An unexplained failure of one who signed a waiver of citation to make application to vacate decree admitting will to probate until one year after date of decree, not only creates a presumption that he was not deceived when he signed the waiver, but shows laches necessitating denial of application.

In the matter of the estate of Pascal L. Romano, deceased. On application to vacate decree admitting will to probate. Application denied.

Pascal J. Fortinash, of New York City, for petitioner.
I. Balch Louis, of New York City, for executrix.

FOWLER, S. This is an application to vacate a decree of this court, which admitted to probate the will of the deceased. The petitioner is the brother of the deceased. On November 1, 1918, he signed and acknowledged a waiver of citation in the proceeding to probate the will of the deceased. Subsequently, and on November 8, 1918, a decree was entered admitting the will to probate. The petitioner now alleges that he was told at the time he executed the waiver that he would get all the estate of the deceased, and that he did not ascertain the real facts in relation to the will until after the decree was entered.

The petitioner can read and write the English language. He does not contend that he did not understand the effect of signing the waiver of citation in the probate proceeding. An application to open the decree, made promptly after he had acquired knowledge of the falsity of the representations alleged to have been made to him in relation to his interest under the will, might have justified an inference that there was some truth in the allegation that he was deceived at the time he signed the waiver; but an unexplained failure to make such application until one year after the date of the decree not only creates a presumption that no deception was practiced upon him when he signed the waiver, but shows such inexcusable laches as necessitates a denial of the application.

Application denied.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

(108 Misc. Rep. 495)

In re UPJOHN'S ESTATE.

(Surrogate's Court, Suffolk County. August, 1919.)

1. TAXATION $\S$ 886½.—TRANSFER TAX BASED ON PRESENT CONTINGENCIES.

The provision of Tax Law, § 230, that when property is transferred and the rights and interest of the transferees are dependent upon contingencies or conditions defeating or abridging them, a tax shall be imposed upon the transfer at the highest rate possible on the happening of any of the contingencies or conditions, has reference to present contingencies or conditions, and not to remotely possible contingencies.

2. TAXATION $\S$ 886½.—CONTINGENCIES TOO REMOTE TO BE BASIS OF TRANSFER TAX.

Where testator directed that the income of one-half of his residuary estate should be paid to his wife for life, and at her death to various named beneficiaries during the life of a certain grandnephew, and upon the death of the wife and grandnephew half of the residue to be given to certain institutions, which, under Tax Law, § 221, were exempt from the payment of a transfer tax, and in case of dissolution before the bequests became effective, or if any of the institutions should become legally incompetent to take, their bequests to go to others, the possibility that all of the charitable corporations would be unable to take at the time the bequest should become effective *held* too remote to become present contingencies or conditions, within section 230.

Proceeding to impose a transfer tax on the estate of Frederick Lawrence Upjohn, deceased. On appeal from an order fixing the tax. Decree modified.

Caldwell & Masslich, of New York City, for petitioners.
William H. Robbins, of Bay Shore, for state comptroller.

STRONG, S. This is an appeal from a decree of the Surrogate's Court of the County of Suffolk, entered on the 10th day of February, 1919, in transfer tax proceedings upon the estate of Frederick Lawrence Upjohn, deceased, in so far as said decree assesses and fixes a tax upon the value of certain remainder interests passing under the seventh and eighth paragraphs of decedent's will, to 17 separate charitable institutions.

By paragraph "seventh" of the will testator disposes of the remainder of the estate by giving it to the trustees thereafter named, directing that the income of one-half be paid to his wife for life, and upon her death to be paid to various beneficiaries named in subdivision B of said paragraph "seventh" during the life of a grandnephew, Robert Redpath, and upon the death of the wife and Robert Redpath he directs that the trust estate thereby created shall cease and determine, and the one-half of said residue from which the income was derived be given to the beneficiaries mentioned in paragraph "eighth" of the will.

The bequests provided for and the beneficiaries named in the "eighth" paragraph of the will are various charitable institutions coming within the provisions of section 221 of the Tax Law (Consol. Laws, c. 60),

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exempting charitable institutions from the transfer tax. The last paragraph of this provision "eighth" of the will provides:

"In case of the dissolution of any of the above named societies, hospitals and institutions, to whom bequests have been made by me, prior to the time such bequests shall take effect, or in case at the time such bequest shall become effective any of such societies, hospitals or institutions shall be legally incompetent to take such bequests, then, and in the event of either of such contingencies, it is my will that the amount of any such bequest so failing shall be distributed among the other societies, hospitals and institutions thereinbefore mentioned pro rata in proportion to their respective bequests."

The provisions of section 230 of the Tax Law, under which the transfer tax appraiser assessed a tax on a possible remainder on these charitable bequests, read as follows:

"When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision."

[1] The provision that when property is transferred, and the rights and interests of the transferees are dependent upon contingencies or conditions, refers to present contingencies or conditions, not to remotely possible contingencies, as the transfer tax appraiser has interpreted the provision. The word "possible," found later in the provision, refers to the tax payable on such present contingent or conditional estates. The estate taxable and the rate of taxation should not be confused, as they are entirely distinct.

The Court of Appeals, in affirming the Hutton Case, 220 N. Y. 770, 116 N. E. 1053, had a different situation, as in that case the testatrix went further than the direct heirs and next of kin, and the power of appointment to the last of the direct line, by distributing the property in default thereof to and among the surviving children of her sister.

As the Court of Appeals said in Matter of Terry, 218 N. Y. 218, 112 N. E. 931, decided directly before the Hutton Case, *supra*, which is to be distinguished:

"Contingencies do not reduce the valuation of the present interest, when they are nothing more than mere possibilities, and are neither future nor contingent estates or interests."

In the Terry Case, *supra*, the charitable bequest was to a foreign charitable corporation, to be retained by it so long and only so long as it should continue to exist under its present name and maintain under that name, in a certain village, a home for destitute aged men and women, and in case of failure to so carry on the home as there provided the fund was to revert to the heirs at law of testatrix. The court used the test of what reduces the value of the present estate. It held that it must be something more than a remote possibility. If

there be a remote possibility only, it was the duty of the appraiser to fix the tax as to amount, and the decree would provide for a deferred payment as required by section 222 of the Tax Law, while, if there be a present contingency or condition, the tax should be presently paid by the executors of the estate as provided in section 230 of the Tax Law.

The Court of Appeals in the Terry Case, where there was a charitable corporation transferee, and in the Hutton Case, where there were individual transferees, appears to have recognized a different rule as applying to charitable corporations than to that of individual transferees, and to have given the charitable corporation transferee a more permanent standing than the individual, where as the court below said in the Hutton Case "these children may all die by a single catastrophe."

The value of the present estate to the 17 charitable corporations who are benefited by paragraph "eighth" of the will is not reduced by the further provision that in case of the dissolution of any of them prior to the time, or that if any of them should be legally incompetent to take such payment at the time the bequest shall become effective, the amount so failing should be distributed among the others.

[2] The possibility that all 17 of the charitable corporations would be unable to take "at the time the bequests should become effective," is too remote to be considered present "contingencies or conditions" whereby the 17 charitable corporations may be defeated.

The amount of the possible tax has been ascertained; it can "accrue and become due and payable [only] when the persons beneficially entitled thereto shall come into actual possession or enjoyment thereof," under section 222 of the Tax Law. The decree fixing the tax will be modified in accordance with the ruling of the court, and there will be deducted from the total tax imposed the aggregate of the taxes imposed upon these exempt transfers.

Decree modified.

(109 Misc. Rep. 425)

TYLER v. JAHN et al.

(Supreme Court, Special Term, Kings County. December 3, 1919.)

1. JUDGMENT $\S$ 123(1)—NECESSITY OF FINDINGS ON DEFAULT IN EQUITABLE ACTION.

The practice of making a decision on default stating findings of fact and conclusions of law in actions of an equitable nature is of statutory origin, necessary only where required by statute, as where an issue of fact has been tried before the court without a jury, or in rendering judgments on default and on the pleadings in matrimonial actions; and if the allegations of the complaint, admitted by failure to answer, are insufficient to support the judgment, the findings would not aid them, under Code Civ. Proc. § 1022.

2. QUIETING TITLE $\S$ 19—STATUTORY ACTION EQUITABLE IN ITS NATURE.

The statutory action to determine claim to real property, under Code Civ. Proc. § 1638 et seq., is equitable in its nature, and although, under section 1642, it may assume the nature of an ejectment action, authorizing a jury trial, yet, whether a jury trial is required or not, the relief, such as the barring of claims under section 1645, is equitable in its nature, and the equity practice should be followed, except where the statute directs otherwise.

3. JUDGMENT $\S$ 130—RECITALS OF ESSENTIAL ALLEGATIONS OF COMPLAINT AND OF FAILURE TO ANSWER.

On entering a judgment on default, where defendants were personally served with summons, attorneys may insert recitals in the judgment setting forth the allegations of the complaint, which, with a recital that defendants had failed to answer, will constitute a judicial recognition of the facts on which the judgment is based, thus conforming to the former English chancery practice, although findings by the court are unnecessary.

4. JUDGMENT $\S$ 120—ORDER FOR JUDGMENT UNNECESSARY TO TAKE BILL PRO CONFESSO.

It was the practice in a court of chancery to enter an order to take a bill pro confesso; but under the present Code procedure no order for judgment is required, and it is sufficient for the court to sign the judgment, whereupon the clerk will enter it.

Action by May L. Tyler against Anna Mathilde Jahn and others. Judgment upon default, without findings, to be entered.

Wood, Cooke & Seitz, of New York City, for plaintiff.

BENEDICT, J. This is an application for judgment on default in an action to determine a claim to real property.

[1] All of the defendants have been personally served with the summons within the state, or have appeared generally in the action. The only question arises as to whether it is necessary for me to make a decision stating separately the findings of fact and conclusions of law in order to render judgment. No proof in support of the allegations of the complaint was offered on the application, and I think none was necessary. The action, although a statutory action, is equitable in its nature, and at the time of the adoption of the Constitution of 1846 it was not the practice in taking a bill pro confesso to require proof in support of its allegations, unless by reason of their indefiniteness or for other reasons proof was necessary to enable the court to

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render a decree. *Williams v. Corwin*, Hopk. Ch. 471; *Denison v. Bassford*, 7 Paige, Ch. 370; *Trust Co. v. Jenkins*, 8 Paige, Ch. 589, 593; *Rose v. Woodruff*, 4 Johns. Ch. 547; *Central R. R. Co. v. Central Trust Co.*, 133 U. S. 83, 90, 91, 10 Sup. Ct. 235, 33 L. Ed. 561. The practice, I think, should be the same upon an application to the court for judgment under sections 1214 and 1215 of the Code of Civil Procedure. See Code Civ. Proc. § 522; *Bullard v. Sherwood*, 85 N. Y. at page 256; *Charlton v. Ward*, 102 Misc. Rep. at page 240, 168 N. Y. Supp. 876.

It has been my practice not to make a decision embodying findings of fact, except in cases where evidence has been offered upon which the findings may be based; but I am urged to do so in this case upon the allegations of the complaint, which are, of course, admitted by failure to answer, on the ground that a certain title insurance corporation will not insure the title unless the judgment is based on findings. This leads me to inquire into the question whether findings are necessary or proper in such a case. So far as I can ascertain from consulting works on chancery or equity practice, it was not customary for the court to render a formal "decision" stating the facts found and the conclusions of law, even where there were issues of fact; and, if I am correct in that conclusion, a fortiori no such formal decision would have been necessary, where the bill was taken pro confesso. The English practice formerly was to recite in the decree the substance of the bill and answer, and also the facts on which the decree was founded (2 *Daniel's Chancery Pl. & Prac.* *1003; 2 *Beach's Mod. Eq. Prac.* § 806); but this rule does not appear to have been generally adopted in this country (5 *Encyc. of Pl. & Pr.* 1038; 8 *Encyc. of Pl. & Pr.* 938; 2 *Beach's Mod. Eq. Prac.* § 806 et seq.; *Whiting v. Bank of U. S.*, 13 Pet. 6, 14, 10 L. Ed. 33; *Clapp v. Thaxter*, 7 Gray [Mass.] 384, 387; *Mason v. Daly*, 117 Mass. 403, 406; *Campbell v. Ayres*, 6 Iowa, 339, 347), and I cannot find that it was customary in New York, under our chancery practice, at the time of the adoption of the Constitution of 1846 (see 1 *Barbour's Chancery Practice* [2d Rev. Ed.] *336, and 3 *Barbour's Chancery Practice* [2d Rev. Ed.] 115, 123, 382 [foot paging]).

The first requirement which I have found in the law of this state that the decision of the court upon an issue of fact tried by the court without a jury should embody findings of fact and conclusions of law was contained in section 222 of the Code of Procedure of 1848, which read as follows:

"Upon a trial of a question of fact by the court, its decision shall be given in writing, and filed with the clerk, within twenty days after the court at which the trial took place. In giving the decision, the facts found shall be first stated, and then the conclusions of law upon them. Judgment upon the decision shall be entered accordingly."

This requirement was speedily abandoned, however, for the section just quoted was revised as section 267 of the Code of 1849 as follows:

"Upon a trial of a question of fact by the court, its decision shall be given in writing, and filed with the clerk, within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly."

Under this section, it was held that findings of fact and conclusions of law, separately stated, were not necessary in the decision upon an issue of fact tried by the court without a jury, although they might be necessary in a case on appeal. *Johnson v. Whitlock*, 13 N. Y. 344, 348; *Otis v. Spencer*, 16 N. Y. 610. In 1860, however, section 267 of the Code of Procedure was amended so as to read as follows:

"Upon a trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately; and upon a trial of an issue of law the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly."

The requirement as to findings has been continued in section 1022 of the present Code of Civil Procedure.

From all this I conclude that the practice of making a decision stating findings of fact and conclusions of law is of statutory origin, and that such a decision is necessary only in those cases where the statute expressly requires it, namely, where an issue of fact has been tried before the court without a jury, and in rendering judgment on defendant's default in pleading in certain matrimonial actions.

There is no suggestion, in any of the provisions of the Code relating to judgment by default, that findings are required in actions of an equitable nature, even when it is necessary to take proof of certain facts in order to render judgment. The material allegations of the complaint are admitted by the failure to answer. If these are sufficient to support the judgment, that is all that is necessary. If not, then findings would not help.

[2] I come now to consider the Code provisions (section 1638 et seq.) relating especially to the action to determine a claim to real property. I have observed, above, that the action is equitable in its nature. Of course, I do not mean by this that it is an equitable action, for it has always been regarded as purely statutory, but that it is an action which is to be carried on according to the general rules of equitable procedure except as otherwise provided by the Code. Under section 1642, it may assume the nature of an action of ejectment in a certain contingency; that is, where the defendant claims an estate in the premises and demands affirmative relief, and then, of course, either party would be entitled to a jury trial, which, it has been held, may be had at Trial Term, without framing issues. *Ryan v. Murphy*, 116 App. Div. 242, 101 N. Y. Supp. 553. In another contingency, as, for example, if defendant should claim a lien by way of mortgage, it might be treated as an action of foreclosure, in which case the trial would be by the court. If, however, defendant makes no claim for affirmative relief, "the action proceeds precisely as any other action to quiet title, and is tried on the equity side of the court at Special Term without a jury." *King v. Ross*, 28 App. Div. 371, 51 N. Y. Supp. 138.

The case of *Pure Strains Farm Co. v. Smith*, 99 Misc. Rep. 108, 110, 163 N. Y. Supp. 615, proceeded upon the theory, I assume, that

the complaint contained a sufficient demand for affirmative relief; also in any case, even where a jury trial is required, the relief granted, if the plaintiff recovers judgment, is equitable in its nature, as it is provided in substance that by the judgment the defendant shall be barred of all claim to the premises. Code Civ. Proc. § 1645. Hence I think that equitable practice is to be followed, except where the statute directs otherwise. But, even if not, there is no provision in the several sections relating to this sort of action requiring findings in rendering judgment for the plaintiff on defendant's default in pleading.

[3] If the plaintiff's attorneys consider it advantageous, they may insert recitals in the judgment setting forth the essential allegations of the complaint, which, with a recital that the defendants have failed to answer, will constitute a judicial recognition of the facts on which the judgment is based. This, it appears, would be in conformity with the former English chancery practice.

[4] As to the order for judgment, it is unnecessary. It was the practice in the Court of Chancery to enter an order to take a bill pro confesso, but under our present Code procedure no order is required. It is sufficient for the court to sign the judgment, whereupon the clerk will enter it.

Submit judgment accordingly.

THORBURN v. MITCHELL et al.

(Supreme Court, Special Term, New York County. December 2, 1919.)

1. JUDGMENT § 12—ENTRY OF FINAL JUDGMENT AGAINST DECEASED PARTY.

Under Code Civ. Proc. § 763, providing that, if a party die after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment in the names of the original parties, and section 765, providing that the entry of a judgment against a party who dies before a verdict, report, or decision is actually rendered is not authorized, a motion for an order adjudging that the equitable relief to which a claimant against the estate of a deceased person is entitled be ascertained at Special Term, is not a request for final judgment, notwithstanding the motion in form asks therefor, so as to authorize entry of final judgment against a deceased executrix.

2. JUDGMENT § 12—ENTRY OF INTERLOCUTORY DECISION AS AUTHORIZING FINAL JUDGMENT AGAINST DECEASED PARTY.

Under Code Civ. Proc. § 763, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, but before final judgment is entered, an order denying the motion of a defendant executrix, since deceased, to set aside service of summons, is not such a decision or interlocutory judgment as is contemplated by the statute.

3. JUDGMENT § 12—ENTRY OF FINAL JUDGMENT AGAINST DECEASED PARTY ON DEFAULT.

Where a defendant executrix dies while an order extending her time to plead is in force, she is not in default, so as to authorize entry of final judgment against her in the names of the original parties, under Code Civ. Proc. § 763, even if such section be applicable to cases of default in appearance or pleading.

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4. JUDGMENT §12—DEFAULT AUTHORIZING ENTRY OF JUDGMENT AFTER DEATH OF ORIGINAL PARTIES.

Where an executrix dies while an order extending her time to plead as defendant in a suit against the estate is in force, the failure of her successors to appear and appeal from an affirmance of a denial of application by deceased executrix to set aside a service of summons does not constitute an election to be in default, so as to make applicable Code Civ. Proc. § 763.

5. JUDGMENT §12—ENTRY OF FINAL JUDGMENT AGAINST DECEASED PARTY UNDER STATUTE WHEN SUCCESSORS IN INTEREST NOT JOINED.

The entry of a judgment against a deceased executrix, under Code Civ. Proc. § 763, is not justified, where she is the sole residuary legatee under the will of decedent, against whose estate the action is brought, and where her personal executors, who are her successors in interest, have not been served with summons.

Motion by Robert Henry Thorburn against John J. Mitchell and others, as executors, etc., Dellora R. Gates, as executrix of and trustee under the last will and testament of John W. Gates, deceased, Dellora R. Gates, as executrix of and trustee under the last will and testament of Charles G. Gates, deceased, and others, for final judgment against defendant Dellora R. Gates, on her alleged failure to appear, answer, or demur. Motion denied.

Robert H. Thorburn, of New York City, for the motion.

Taylor, Humes & Begg, of New York City (Ben Leroy Stowell, of New York City, of counsel), opposed.

GIEGERICH, J. The plaintiff applies for final judgment against the defendant Dellora R. Gates, as executrix and trustee of and under the last will and testament of John W. Gates, deceased, and in her further capacity as executrix and trustee of and under the last will and testament of Charles G. Gates, deceased, on her alleged failure to appear, answer, or demur. The defendant above named was at the time of the service of the summons upon her the executrix and trustee in the two estates above named. The plaintiff, as a creditor of the estate of John W. Gates, brings the action on behalf of himself as well as all other creditors of that estate to reach certain real and personal property of the decedent alleged to be situated in this state and to have that property applied pro rata to the payment of the indebtedness due by said decedent and for general relief.

The respective wills of the two decedents were duly probated in the state of Texas. The said defendant Dellora R. Gates was appointed executrix of said wills by the appropriate tribunal of that state; no ancillary letters were issued to her in this state and service was made upon her in person while sojourning in this state. The defendant Dellora R. Gates died on November 28, 1918. On January 9, 1919, the county court of Jefferson county, Tex., wherein the wills of John W. Gates and Charles G. Gates were probated, appointed the First National Bank of Port Arthur, Tex., as administrator with the will annexed of the estate of John W. Gates, deceased, and also as administrator with the will annexed of the estate of Charles G. Gates, deceased, in the place

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and stead of Dellora R. Gates, and issued letters of administration to said bank on those estates.

At the time of the death of the defendant Dellora R. Gates she was contesting the jurisdiction of this court over her as a foreign executrix. Her motion to set aside the service of the summons was denied at Special Term (*Thorburn v. Gates*, 103 Misc. Rep. 292, 171 N. Y. Supp. 198), and such denial was affirmed by the Appellate Division (*Thorburn v. Gates*, 184 App. Div. 443, 171 N. Y. Supp. 568). On October 22, 1917, she obtained at Special Term, Part I, on notice to the plaintiff, an order extending her time to answer or demur to the complaint or otherwise move with respect thereto until 20 days after the final hearing and determination of such motion to vacate the issuance and service of the summons upon her. She subsequently obtained at Special Term, Part I, another order extending her time to answer, demur, or otherwise plead until the expiration of 20 days after the entry of an order in the Appellate Division for leave to appeal to the Court of Appeals. In October, 1918, her motion for leave to appeal to the Court of Appeals was granted by the Appellate Division, which at the same time extended her time to answer or demur or otherwise move with respect to the complaint until 20 days after the entry in the office of the clerk of the Appellate Division of an order upon the remittitur of the Court of Appeals and the service of a copy of such order. Her time to appeal to the Court of Appeals commenced to run at the time of the entry of the Appellate Division's order granting leave to appeal. *Porter v. Internat. Bridge Co.*, 163 N. Y. 79, 57 N. E. 174. The order was entered on October 18, 1918, and she had 60 days after that date in which to perfect her appeal to the Court of Appeals. Code of Civil Procedure, § 1325.

As already stated, she died on November 28, 1918. This was while her time to appeal to the Court of Appeals was running, and also while her time to plead or move was running. Prior to her death other defendants in the action had demurred to the complaint, and, after her death, the demurrer was sustained on the ground that the complaint did not state facts sufficient to constitute a cause of action. Thereafter the plaintiff served an amended complaint. This has been demurred to by the defendants Humes and Herrmann, as her executors, on the ground that it does not state facts sufficient to constitute a cause of action, and the demurrer has been noticed for argument by such defendants. After her death the plaintiff moved to vacate the said order of October 22, 1917, which extended her time to answer or demur to the complaint, or, in the alternative, if the court should decide that the relief so asked for should not be granted until the action had been revived and continued against her successors that in that event the action be revived and continued against said bank as such administrator with the will annexed of the estates above named, and that the said bank in the capacities named be substituted as defendants in her place and stead, and that the title of the action be amended accordingly, and that such continuance or substitution be made without prejudice to any of the proceedings already had in the action and without prejudice to the right

of the plaintiff to apply for the entry of judgment by default against her as executrix of the wills of John W. Gates and Charles G. Gates. By an order entered on June 23, 1919, the motion just mentioned was granted to the extent of providing that the plaintiff have leave to issue a supplemental summons against the said bank as such administrator with the will annexed of the said estates, and that, upon the service of such supplemental summons within the state, the action be revived and continued as against the said bank in the capacities above named, in the place and stead of the said Dellora R. Gates as executor of the said estates, and that in all subsequent proceedings the said bank, in the capacities named, be substituted in the place and stead of said executrix and that the title of the action be amended accordingly, but in all other respects the motion was denied.

The plaintiff thereafter applied to the justice who made the said order of June 23, 1919: (1) To vacate the same; also (2) for leave to withdraw that part of his motion which asks for the revival of this action, and the substitution of the said bank in the place and stead of Dellora R. Gates; also (3) for leave to reargue that part of the said motion which asks that the order of October 22, 1917, be vacated and set aside; or (4) in the alternative, if paragraphs 2 and 3 should be denied, then for an order vacating and setting aside the order of June 23, 1919, and granting leave to the plaintiff to withdraw his motion on which such order was made. The motion was denied in all respects by a short form order dated October 28, 1919. An application for a resettlement of such order was denied on November 18, 1919, and the plaintiff has appealed from that order.

So far as I can gather from the papers submitted, the plaintiff has not availed himself of the leave given by the order of June 23, 1919, to serve a supplemental summons upon the said bank, nor sought to do so. It is stated in the plaintiff's supplemental memorandum that he makes application for final judgment in the name of the deceased executrix, because, as claimed, there is an obstacle in the way of reviving and continuing the action against her successor, the First National Bank of Port Arthur, Tex., and that the plaintiff has so far been unable to obtain an order of this court that will effect the revival and continuance of this action against that bank. The application for final judgment is opposed by the defendants Humes and Herrmann, as executors under the will of Dellora R. Gates, deceased, and by the said bank as such administrator with the will annexed of the said estates, which appears specially for the sole purpose of objecting to the jurisdiction of the court.

The plaintiff claims that the defendant executrix and her successors are in default, and that under the provisions of section 763 of the Code of Civil Procedure he is entitled to enter final judgment against and in the name of the deceased executrix. That section provides as follows:

"If either party to an action dies, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment, in the names of the original parties; unless the offer, verdict, report, or decision, or the interlocutory judgment, is set aside."

Section 765 of the Code provides:

"This title does not authorize the entry of a judgment against a party, who dies before a verdict, report, or decision is actually rendered against him. In that case, the verdict, report, or decision is absolutely void."

[1] In order to bring the case within section 763 of the Code, the application must be for final judgment. Although the notice of motion asks for final judgment by default against the defendant executrix, it appears from the proposed form of order annexed to the motion papers that what the plaintiff seeks is not, in fact, a final judgment, but an order adjudging and decreeing that the equitable relief to which the plaintiff may be entitled be ascertained and determined at Special Term, Part III. In other words, the application is merely a step preliminary, not only to obtaining a final judgment, but even to obtaining a hearing and a decision.

[2] It is insisted by the plaintiff that the order of this court denying the motion of the defendant executrix to set aside the service of the summons was a decision or an interlocutory judgment, within section 763 of the Code of Civil Procedure, and that the present motion must therefore be deemed to be an application for final judgment. The plaintiff, in support of such contention, advances the argument that the determination of the court that the service of the summons was valid and that the court had jurisdiction was a determination on the merits. There was no determination of the merits of the action, but merely a determination as to the validity of the service of the summons, which is an entirely different thing. The court in *Grant v. Griswold*, 21 Hun, 509, construing the above-quoted provisions of section 763 of the Code, at page 513, said:

"The words 'verdict, report or decision' cover trial by jury, by a referee, or by a single judge."

It was further held, in the same case that the section is not applicable to an ordinary default, which was said to be the result of mere inaction as distinguished from a confession of judgment, which is a distinct, affirmative act; the court further observing that a judgment cannot be entered, even upon confession, after the defendant's death.

[3] But even if section 763 were ever applicable to cases of default in appearance or pleading, I do not think the circumstances of the present case warrant its application. The defendant executrix was not in default in pleading at the time of her death; the said orders of the Special Term and the said order of the Appellate Division, extending her time to plead, being then in force. As above shown, the plaintiff attempted, but without success, to have the said order of October 22, 1917, extending the executrix's time to plead vacated.

[4] The plaintiff contends, however, that by the failure of the "successors" of the executrix to come into the action and take an appeal to the Court of Appeals from the determination of the Appellate Division affirming the denial of the motion of the defendant executrix to set aside the service of the summons they have elected to be in default. I do not think that the mere inaction of the said bank in the respects mentioned had the effect claimed; but, even if it had, such election to be

in default would not avail the plaintiff because it took place after the death of the defendant executrix, who, as already shown, was not at the time of her death in default in pleading, and therefore the entry of a judgment against her would not be warranted.

The plaintiff cites in support of his contention that the defendant executrix and her successors are in default a decision I made in *Muslusky v. Lehigh Valley Coal Co.*, 96 Misc. Rep. 68, 159 N. Y. Supp. 571, affirmed 225 N. Y. 584, 122 N. E. 461. In that case a demand and notice of special appearance substantially in the same form as that served by the defendant executrix was served on the plaintiff's attorney, who refused to recognize the demand and failed to serve a complaint. Thereupon the defendant applied for an order dismissing the complaint for the failure of the plaintiff to serve a copy thereof in response to the defendant's demand. The motion was denied on the ground that the defendant, having appeared specially, could attack only the jurisdiction of the court over its person, and that the defendant's right to move to dismiss the complaint was given only in cases where the defendant had entered a general appearance. These views were subsequently affirmed by the Court of Appeals, which reversed the judgment of the Appellate Division dismissing the complaint, and affirmed the order of the Special Term.

The plaintiff maintains that under the decision in the *Muslusky* Case the court was without power to grant to the defendant executrix any extension of time to plead to the merits on a mere special appearance. That question, however, did not arise in that case. The only questions considered and decided were whether a defendant who has appeared specially is entitled to a copy of the complaint and to a dismissal of the complaint in case of refusal to serve a copy of the same. In the case at bar the demand for a copy of the complaint was complied with, and a copy of the complaint was served upon the attorneys appearing specially for the purposes of the motion. Thereafter such attorneys so appearing specially made a motion challenging the jurisdiction of the court over the person of the executrix. Even if the court had no power to grant any extension of time to appear or plead on a mere special appearance, I do not think I would be warranted in disregarding the orders of the Special Term and the order of the Appellate Division extending the defendant executrix's time to plead. One of such orders, viz. the order of October 22, 1917, was granted upon notice to the plaintiff, who did not object to the granting thereof. As stated above, the plaintiff sought, but without success, to have such order vacated. As to the order of the Appellate Division extending the executrix's time to plead, that tribunal alone can afford any relief from its terms.

[5] There is another circumstance which may be mentioned. The defendant Dellora R. Gates is the sole residuary legatee under the will of her husband, John W. Gates, deceased, and it is alleged in the moving affidavit that her personal executors, Messrs. Mitchell, Humes, and Herrmann, are, or will be when, her estate is settled and wound up the successors in interest in and to the property which this action is brought to reach, and that all of such property is now in their possession. Two of such executors have appeared and demurred but the

supplemental summons has not as yet been served upon the third executor, Mitchell. Under these circumstances, a judgment simply against Dellora R. Gates, as executrix, would not be justified, since such a judgment would necessarily involve the interests of her personal executors, who since her death, have been made parties defendant, and who, as already shown, are alleged to have possession of the property which the action is brought to reach.

My conclusion is that the motion should in all respects be denied, with \$10 costs. Settle order on notice.

(189 App. Div. 462)

CLARK v. VARIETY, Inc.

(Supreme Court, Appellate Division, First Department. November 21, 1919.)

1. **LIBEL AND SLANDER** ¶16—**ARTICLE HOLDING UP TO CONTEMPT AND RIDICULE.**

An article holding one up to contempt and ridicule is libelous per se.

2. **NEW TRIAL** ¶21—**COMMENTS OF COURT IN LIBEL SUIT AS GROUND.**

A new trial was demanded in a libel case, where trial court in the presence of the jury suggested that defendant's president should shake hands with plaintiff and tell him he was sorry for the publication, and make a retraction in the next issue, and stated that plaintiff was not seeking mere damages, but vindication for his feelings, and that defendant had "kidded" in the same way as plaintiff had, etc.

3. **WITNESSES** ¶270(2)—**CROSS-EXAMINATION AS TO IRRELEVANT MATTERS.**

In a libel case, trial court erred in permitting plaintiff to be cross-examined at great length on his use of the names of his friends and associates as characters in a "crook" play; the sole purpose of the examination being to endeavor to show that he had but little regard for the feelings of his friends and acquaintances, such matter not being relevant to the issue.

4. **LIBEL AND SLANDER** ¶120(1)—**PUNITIVE DAMAGES RECOVERABLE WITHOUT ACTUAL DAMAGES.**

Punitive damages may be recovered for publication of an article libelous per se, although actual damages are not established.

5. **TRIAL** ¶251(2)—**PRIVILEGE IN ACTION FOR LIBEL MUST BE PLEADED TO AUTHORIZE INSTRUCTION.**

In action for damages for libel, court erred in submitting to the jury the question of privilege, where it had not been pleaded or raised on the trial in a proper way.

6. **LIBEL AND SLANDER** ¶104(3)—**OTHER ARTICLES AS EVIDENCE OF MALICE.**

In a libel action, plaintiff, to prove express malice, may show that defendant attacked the officials of an organization of which he was president, although not named in the articles, if he first shows that defendant knew that plaintiff was one of such officials; but such matter cannot be shown if the articles written concerning the organization were just general in character against the organization.

Appeal from Trial Term, New York County.

Action by Edward Clark against Variety, Incorporated. From a judgment for defendant, entered upon the verdict of a jury, and from an order denying a motion for a new trial, plaintiff appeals. Judgment and order reversed, and new trial ordered.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, PAGE, and MERRELL, JJ.

Harold Riegelman, of New York City, for appellant.

O'Brien, Malevinsky & Driscoll, of New York City (M. L. Malevinsky, of New York City, of counsel, and Dennis F. O'Brien, of New York City, on the brief), for respondent.

DOWLING, J. [1] This action was brought to recover damages claimed to have been sustained by plaintiff by reason of the publication of a libel concerning him in a paper published by defendant. The complaint herein was demurred to, and the demurrer overruled; the court holding that according to its reasonable import the article in suit holds the plaintiff up to contempt and ridicule, and is therefore libelous. On appeal to this court that judgment was affirmed. 181 App. Div. 927, 167 N. Y. Supp. 1093. Upon the face of the complaint, therefore, this article, with the innuendo laid in the complaint, was libelous per se. Upon the trial no effort was made to dispute the innuendo, nor to claim that the article was susceptible of any other meaning than that assigned to it by the innuendo. The defendant did claim that the article was a pleasantry, or a species of wit; but it did not controvert the meaning of the publication as averred by plaintiff.

[2] It seems to me that the verdict for the defendant in this case must have been due to the belief of the jury, after listening to the colloquy between the learned trial court and counsel for the parties, that the libel was unimportant and trivial, and should not furnish the basis for any substantial recovery. Not only did the learned trial court in the presence of the jury suggest that the defendant's president should shake hands with plaintiff, tell him he was sorry for the publication, and make a retraction in the next issue, but he indulged at some length in remarks about the liberality and good fellowship of the theatrical profession, and said plaintiff was not seeking mere damages, but vindication for his feelings. He further commented on the fact that the defendant had "kidded" in the same way as plaintiff had, and while the court's obvious purpose was to endeavor to effect a reconciliation of the parties and create good feeling between them, the failure to accomplish such a purpose left the plaintiff in a most unfortunate position, when the jury had heard from the court that he was only looking for vindication, and not for damages, and when the onus had been put upon him of refusing a suggestion of the court for what the latter suggested as a reasonable settlement of the case.

Furthermore, the defendant's counsel took advantage of the situation to interject into the case, still in the presence of the jury, the statement that plaintiff never would have brought this suit, except to recover his attorney's fees. Exception was duly taken to all that occurred before the jury, and a motion made to withdraw a juror because of the discussion, which motion was renewed at the end of the case. In my opinion this motion should have been granted, and the denial of it constituted reversible error. The plaintiff's cause of action was vitally prejudiced after the jury had heard the discussion between the court and trial counsel, and could only have gathered the

impression that his grievance was trivial, and he had sustained no damage whatever, if he had any cause of action at all.

[3] Furthermore, error was committed by the learned trial court in permitting plaintiff to be cross-examined at great length on his use of the names of his friends and associates as characters in his play "De Luxe Annie." The sole purpose of this was to endeavor to show that he had but little regard for the feelings of his friends and acquaintances, and, having used their names indiscriminately as those of characters in a play which is denominated a "crook" play, that therefore he was entitled to but scant consideration for his own feelings. This had no relevancy to the libel sued upon.

[4, 5] Error was also committed in charging the jury that there could be no recovery of punitive damages, unless actual damages had first been established. Error was further committed in submitting to the jury the question of privilege, which had not been pleaded, nor raised upon the trial in any proper way.

[6] In view of the fact that a new trial of this action will be required, it might be well to call attention to the exclusion of evidence which was sought to be introduced by plaintiff in order to prove express malice on the part of defendant against plaintiff by a general and continued course of attack upon an organization known as the "White Rats," whereof plaintiff was vice president. If the plaintiff had been prepared to show that defendant's president, who was responsible for the acceptance of the libelous article, knew of plaintiff's activities as an officer of the "White Rats," and that his hostility to that organization extended to the plaintiff personally, evidence might be received of articles published in defendant's paper which attacked the officers of the "White Rats" in a body, even if plaintiff's name was not specifically mentioned. If plaintiff had been able to show that defendant's president had announced a policy of destroying the reputation of officials of that organization, and that he knew that plaintiff was one of such officials, that evidence would be admissible as showing malice on his part in the publication of the article in question. But the excerpts from the defendant's paper which have been offered in evidence are too general in character and too indefinite in aim to justify their reception in evidence. The only person whose name is specifically mentioned therein is one Harry Mountford. A general abuse of the organization and of its spokesmen would not warrant the receipt of these articles as proof of malice on the part of defendant's president against the plaintiff.

The judgment and order appealed from are reversed, and a new trial ordered, with costs to the appellant to abide the event. Order filed. All concur.

In re THOMAS E. NOYES & CO. Appeal of NEBEL
BACKENSTOS v. NOYES et al.

(Supreme Court, Appellate Division, First Department. November 21, 1919.)

Appeal from Special Term New York County.

In the matter of the general assignment of Thomas E. Noyes & Co. to Richard E. Nebel, assignee; Fanny A. Noyes appearing specially. In the matter of supplementary proceedings by Edward J. Backenstos, judgment creditor, against Thomas E. Noyes and others, judgment debtors; Fanny A. Noyes appearing specially. From an order granting a motion to set aside service of subpoena in assignment proceedings, assignee appeals; and from an order granting a motion to set aside a third party order, a subpoena, and a subpoena duces tecum in supplementary proceedings, the judgment creditor appeals. Orders affirmed.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

See, also, 188 App. Div. 995, 177 N. Y. Supp. 921.

Knox & Dooling, of New York City (Joseph M. Gazzam, of New York City, of counsel), for appellant.

Foster & Newman, of New York City (Nathan Ballin, of New York City, of counsel), for respondents.

PER CURIAM. Orders affirmed, with \$10 costs and disbursements. Orders filed.

PAGE, J. (dissenting). These are appeals from an order vacating and setting aside the service of a third party order in supplementary proceedings, and a subpoena duces tecum and a subpoena for the attendance of Fannie A. Noyes, individually and as secretary and treasurer of a domestic corporation, upon the ground that she was a nonresident of this state and was in attendance at the County Courthouse in Kings county pursuant to an order for her examination as a party before trial in an action pending in the Supreme Court. I dissent from the affirmation of these orders on the grounds:

I. That she did not come into this state voluntarily as a witness. She came here under compulsion of an order of the Appellate Division of the Supreme Court, Second Department, which provided that if she failed to appear her answer would be stricken out.

II. The process was not against her individually, but against the domestic corporation of which she was secretary and treasurer. The examination of the corporation by her as an officer thereof was sought. Code of Civil Procedure, § 2444. The individual immunity of a nonresident does not extend to the nonresident officer of a domestic corporation. See Breon v. Miller Lumber Co., 83 S. C. 221, 65 S. E. 214, 24 L. R. A. (N. S.) 276, 137 Am. St. Rep. 803.

ANSIN v. KAUFMANN et al.

(Supreme Court, Appellate Division, First Department. November 21, 1919.)

TRIAL ⇨159—**DISMISSAL FOR FAILURE TO PROVE CONTRACT ALLEGED.**

Plaintiff's failure to prove a contract alleged as the basis of his cause of action should have entailed dismissal of his complaint on defendant's motion at the close of his case.

Appeal from Trial Term, New York County.

Action by David Ansin against Gerson Kaufmann, impleaded, etc. From a judgment for plaintiff, defendant named appeals. Reversed, and complaint dismissed.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, PAGE, and MERRELL, JJ.

Weissberger & Leichter, of New York City (M. N. Leichter, of New York City, of counsel), for appellant.

A. L. Geilich, of New York City, for respondent.

PER CURIAM. The plaintiff failed to prove a contract for the sale of the 18 cases of goods, which was alleged to be the basis of his cause of action. The complaint should have been dismissed upon defendant's motion at the close of the plaintiff's case, which was renewed at the end of the case.

Judgment reversed, with costs to appellant, and complaint dismissed, with costs. Order filed.

(108 Misc. Rep. 585)

PEOPLE ex rel. MOODY ENGINEERING CO., Inc., v. HAMILTON, County Treasurer.

(Supreme Court, Special Term, Rockland County. September, 1919.)

1. COUNTIES ⇨153, 171—**POWER OF SUPERVISORS TO BORROW MONEY OR ISSUE BONDS.**

A county board of supervisors has no inherent, implied, or incidental power to borrow money or to issue negotiable paper in any manner, except in strict compliance with the statute.

2. COUNTIES ⇨173(2)—**STATUTORY METHOD OF RAISING TEMPORARY LOAN.**

Where board of supervisors of Rockland county, in compliance with County Law, § 45, as amended by Laws 1915, c. 132, after adoption of proposition by voters to the amount of \$50,000, purchased real property and built and equipped a tuberculosis hospital at a greater expense, its issuance of bonds to amount of \$80,000, the proceeds of which had been expended, was legal, and it had power to raise an additional \$40,000, if necessary, but could only raise it by a bond issue as provided in section 45, subd. 3.

3. COUNTIES ⇨153—**TEMPORARY LOAN BY SUPERVISORS; VIOLATION OF STATUTE.**

Proposal by board of supervisors of Rockland county, after the construction and furnishing of a tuberculosis hospital at a cost exceeding the amount fixed by the vote authorizing such action, to raise \$40,000 by temporary loan not included in the tax budget, was in violation of General Municipal Law, § 5, so that county treasurer was justified in refusing to honor board's drafts, and an application by holder for a peremptory writ of mandamus to compel their payment must be denied.

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Application for a peremptory writ of mandamus by the People of the State of New York, on the relation of the Moody Engineering Company, Incorporated, against Walter G. Hamilton, as Treasurer of the County of Rockland. Application denied.

Edward Maxson, of New York City, for relator.

Thomas Gagan, of Haverstraw, for respondent.

SEEGER, J. The relator has applied for a peremptory writ of mandamus to compel the respondent, the county treasurer of the county of Rockland, to pay seven drafts, aggregating \$8,920.14, made by the board of supervisors of the county of Rockland, which drafts were drawn in payment of bills for work, labor, and services performed in the construction of a tuberculosis hospital in Rockland county. The respondent has refused to honor the drafts.

It appears that in the year 1915, pursuant to the provisions of section 45 of the County Law (Consol. Laws, c. 11), as then in effect, the board of supervisors caused to be submitted to the voters of the county the question of establishing a county hospital for tuberculosis, fixing the sum of money deemed necessary for the establishment of such hospital at the sum of \$50,000. The proposition was carried, and thereupon the board of supervisors, in compliance with said section 45 of the County Law, purchased real property and built, furnished, and equipped a tuberculosis hospital at an expense far exceeding the sum of \$50,000 originally deemed necessary. For the purpose of providing funds to pay the expense of such hospital they issued bonds to the amount of \$80,000, the proceeds of which have been entirely expended, and they now propose to make a temporary loan upon the credit of the county for the sum of \$40,000 additional. Such temporary loan is not applied for in anticipation of the taxes of the current fiscal year and is not included in the budget thereof.

The board of supervisors, claiming to have power to make such temporary loan, issued to the relator, Moody Engineering Company, Incorporated, the drafts in question, expecting the respondent to pay them from the proceeds of the proposed temporary loan. The respondent bases his refusal to honor the said drafts upon the contention that the board of supervisors has no right to expend more than the sum of \$50,000 appropriated by the referendum; also contending that said board of supervisors had no authority to make the said temporary loan of \$40,000, and that therefore he has no funds in his hands with which to pay the said drafts.

The Legislature first provided for the establishment of county hospitals for tuberculosis by the enactment of chapter 341 of the Laws of 1909, being section 45 of the County Law, and thereby the board of supervisors of any county was authorized to establish such hospital by a majority vote of such board, and to purchase and lease real property therefor, or acquire such real property by condemnation proceedings, and to erect all necessary buildings and make all necessary improvements and repairs; to cause to be assessed, levied, and collected such sums of money as they should deem necessary for such purchases; and as the statute was originally enacted the board of

supervisors had absolute power to expend any sums of money that they might deem necessary for the establishment of such hospital.

The statute was amended by the enactment of chapter 166 of the Laws of 1913, by the insertion of a provision providing that after the presentation of a petition in a proceeding for the condemnation of lands for the purposes of such hospital the said board of supervisors shall be and become seized of the real property described in said petition to be acquired, and containing other provisions relating to the method of procedure in such condemnation proceedings. Said section 45 was further amended by chapter 323 of the Laws of 1914 and chapter 132 of the Laws of 1915, by adding thereto a provision providing that such boards of supervisors shall have authority to submit the question of establishing such hospital to the voters of the county, but neither of such amendments in any way limited or abridged the authority of the board of supervisors granted in the original act. Therefore, if the authority of the board of supervisors of the county of Rockland was limited and defined by the terms of said section 45 of the County Law as in force in the year 1915, it is my opinion that they were authorized to expend such sums of money as they should deem necessary for suitable lands, buildings, and improvements for said hospital, and for the maintenance thereof, and for all other necessary expenditures therefor, and also to borrow money for the erection of such hospital and for the purchase of a site therefor on the credit of the county, and to issue county obligations therefor. County Law, § 45, as amended by Laws 1915, c. 132.

[1, 2] The action of the board of supervisors in issuing bonds in the sum of \$80,000 for the necessary expenses of purchasing the lands and the erection of buildings and other necessary expenses of said hospital was legal. I am also of the opinion that the board of supervisors has power and authority according to the provisions of section 45 of the County Law to raise the additional sum of \$40,000, or any other sum that may be necessary, for the establishment and completion of said hospital and the maintenance thereof; but the same must be raised in such manner as the board of supervisors might do for other county purposes. County Law, § 45, subd. 3.

[3] The board of supervisors has no inherent, implied or incidental power to borrow money or to issue negotiable paper in any manner, except in strict compliance with the statute. *Parker v. Board of Supervisors of Saratoga*, 106 N. Y. 394, 13 N. E. 308. And for the purpose of preventing the practice by boards of supervisors of borrowing money on temporary loans, and so involving the counties in debt, section 5 of the General Municipal Law (Consol. Laws, c. 24) was enacted, which provides as follows:

"Moneys shall not be borrowed by a municipal corporation on temporary loan, except in anticipation of the taxes of the current fiscal year, and for the purposes for which such taxes are levied, and shall not be in excess of the amount of such taxes. Such loans shall be payable out of the taxes on account of which such loans are made, and in no case shall interest run on any such loan after such taxes are paid into the treasury of the corporation."

It is evident in this case that when the matter was submitted to vote by the board of supervisors the expense of the erection of the

hospital was very much underestimated, due, perhaps, in part at least, to the fact that the cost of labor and materials was increased to an enormous extent by reason of the conditions created by the war. It is always difficult to accurately estimate the expenses of the erection of buildings of unusual character in advance of contracting, and the Legislature never intended to hamper boards of supervisors in the erection of hospitals of this kind by requiring them to remain within the limits of an original estimate of cost. There is an entire absence of any charges of fraud or corruption or bad faith in connection with this work. The questions presented are solely questions of the authority of the board of supervisors.

The county treasurer was justified in refusing to honor the drafts, for the reason that the board of supervisors had not raised the money for the payment thereof by a bond issue, and because they proposed to raise it by a temporary loan in violation of the provisions of section 5 of the General Municipal Law above quoted.

The application for writ of mandamus is therefore denied, with costs.

Application denied, with costs.

(189 App. Div. 534)

KOVARIK v. LONG ISLAND R. CO.

(Supreme Court, Appellate Division, Second Department. November 21, 1919.)

1. CARRIERS ⇐286(9)—PASSENGER STATION; WARNING AGAINST CATTLE GUARDS.

Defendant railroad, which placed cattle guards near its station, and between it and a village highway crossing, owed duty of warning prospective passengers against the danger of entering station grounds across the tracks, especially where guards were covered with snow.

2. CARRIERS ⇐317(4)—EVIDENCE OF INSTALLATION OF CATTLE GUARDS NEAR STATION.

In action by plaintiff, who in going to station to take train, instead of entering through passenger gate, started from street crossing diagonally across tracks, and was injured by falling on cattle guards, *held*, that plaintiff should have been permitted to show when the cattle guards were installed, and whether they were installed on both sides of the crossing.

3. CARRIERS ⇐317(9)—CATTLE GUARDS NEAR STATION; PRIOR INJURIES.

In an action by plaintiff, who in going to station to take train, instead of entering through passenger gate, started from street crossing diagonally across tracks and was injured by falling on cattle guards, *held*, that plaintiff should have been permitted to prove previous injuries to others.

4. CARRIERS ⇐286(1)—CATTLE GUARDS NEAR STATION UNAUTHORIZED.

Laws 1915, c. 281 (inserting words "cattle guards" in Railroad Law, § 52), *held* not to justify a railroad company in exposing passengers to injury by guards at street crossings alongside station grounds.

5. CARRIERS ⇐286(9)—TRESPASSER ON STATION GROUNDS.

Plaintiff, who in going to station to take train, instead of entering through passenger gate, started from street crossing diagonally over tracks, and was injured by falling on cattle guards, *held* at least an unintentional trespasser without criminal intent.

Jenks, P. J., and Blackmar, J., dissenting.

Appeal from Trial Term, Suffolk County.

Action by Alice Kovarik against the Long Island Railroad Company. From a judgment dismissing her complaint at the close of her case, plaintiff appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and RICH, PUTNAM, BLACKMAR, and JAYCOX, JJ.

Frank W. Shaw, of Patchogue, for appellant.

Dominic B. Griffin, of New York City, for respondent.

PUTNAM, J. Defendant maintains its passenger station in Patchogue in the block between Ocean avenue on the east and Railroad avenue on the west. Patchogue village by the 1915 census had 4,506 inhabitants. It was not proved how near the passenger station was to this Ocean avenue crossing, but the photographs and diagram in evidence indicate that east of the station was an express house with baggage platform in line with the station platform. The eastern end of this baggage platform had three steps, which came down to the ground about 100 feet from Ocean avenue. To the south, defendant's station grounds had a gate opening from Ocean avenue. The photographs also show at least two openings in the street fence, giving access therefrom toward the steps of the express house. A cattle guard covered the double tracks to an area of $81\frac{1}{2}$ feet by 24 feet, which came within $5\frac{1}{2}$ feet of the Ocean avenue building line. Strips of sheet steel were cut into raised triangles, with sharp edges forming upright teeth, 3 inches high and 3 inches apart. There was no sign or other warning to persons against entering the station grounds across these tracks. At the south side of the crossing was a small wing fence; but at the north there was no wing fence whatever, leaving an open space between the north rail and the side fence by the post of the drop gate.

On the day of the casualty plaintiff had come to Patchogue under a round trip ticket from Sayville, and had left the station by the passenger gateway south of the tracks. She had no previous acquaintance with the locality. After having been engaged in shopping in Patchogue, in the afternoon she came back along Ocean avenue, intending to take a return train to Sayville. At the crossing she saw this train standing alongside the station. It had been snowing, so that these guards were covered. Plaintiff did not see the projecting points, or know that such guards were there. In her haste she started from this crossing, intending to go diagonally over the tracks to the train. She struck these steel points beneath the snow, and fell, cutting her arm, also piercing her kneecap, and sustained other injuries.

At the trial, plaintiff sought to show that in 1912 these cattle guards were installed at the station side of this Ocean avenue crossing, but this evidence was excluded. Plaintiff also produced a witness to prove that others had been injured at this same cattle guard, but this was also disallowed. At the close of her proofs, she was nonsuited.

In 1851, Hand, J., said that "cattle guards in the streets of a city or village would be nuisances" (*Vanderkar v. Rensselaer & Saratoga Railroad Co.*, 13 Barb. 390, 393), which applied to the older and less

dangerous guards by openings covered by wooden strips. Where snow had gathered on a station sidewalk, so that passengers took to the railroad tracks to reach the highway, an alighting passenger fell into this snow-covered opening and was there struck by a passing train. Mr. Justice Talcott, writing the unanimous opinion of the court, declared:

"In this case the leaving of the plank sidewalk in such a condition as that passengers from the station to the highway were obliged to take the defendant's tracks, and then suffering the snow to accumulate in an open cattle guard, so that there was nothing discernible upon the surface to indicate the existence of a cattle guard, or any other hindrance to a safe and expeditious crossing, operated as a mere trap." *Hoffman v. N. Y. O. & H. R. R. Co.*, 13 Hun, 589, 593, affirmed 75 N. Y. 605.

[1-3] In placing these inherently dangerous guards so near the station, and between it and a village highway crossing, I think the defendant owed a duty of warning against such a danger, especially when they were hidden under the snow. Cattle guards are not to stop passengers, or to exclude persons from entering station precincts. The lawful use of them is to prevent the ingress of domestic animals. I think plaintiff should have been permitted to show fully if these guards were placed there in 1912; also whether they were installed on both sides of this crossing. If not, there might be an inference that the real purpose was to exclude pedestrians. The fact of previous injuries therefrom was also relevant to the question of warnings or notice.

[4] Laws 1915, c. 281, inserted the words "cattle guards" in section 52 of the Railroad Law (Consol. Laws, c. 49), so as to declare that, if cattle guards are not provided or maintained, a railroad would be liable for damage to animals on the tracks. However, such risk toward estrays in a populous village cannot justify a railroad company in exposing passengers to hurt by such guards at street crossings alongside station grounds, when allowed to present the deceptive appearances here shown. *Hulbert v. New York Central*, 40 N. Y. 145.

[5] The absence of any wing fence, so as to leave an open space by the north tracks, if not an invitation to enter the station grounds, at least made plaintiff an unintentional trespasser, without criminal intent. *People v. Stevens*, 109 N. Y. 159, 163, 16 N. E. 53.

I advise to reverse, and to grant a new trial, with costs to appellant to abide the event.

RICH and JAYCOX, JJ., concur.

JENKS, P. J. I dissent from the judgment about to be handed down. I think that there was no question for the jury raised by the plaintiff at the close of her case, and that she was dismissed properly. When she left the customary way of access to the station, to cut across the defendant's lands to its station, she admittedly did so to save time. There is no evidence of license or invitation, express or implied. She found no way, but made it. She entered the lands as a trespasser, and passed along between its rails as a trespasser misdemeanor.

Marra v. New York Central & H. R. R. Co., 139 App. Div. 707, 124 N. Y. Supp. 443, citing *Keller v. Erie Railroad Co.*, 183 N. Y. 67, 72, 75 N. E. 965. Such was her status when she stepped forward upon the cattle guard that was located entirely within those rails. As a trespasser she took the land as she found it (*Magar v. Hammond*, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. [N. S.] 1038; *Birch v. City of New York*, 190 N. Y. 397, 83 N. E. 51, 18 L. R. A. [N. S.] 595), and the sole obligation of the defendant was not to injure her willfully or recklessly (*Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718; *Keller v. Erie Railroad Co.*, 183 N. Y. 67, 71, 72, 75 N. E. 965; *McCaffrey v. Baltimore & Ohio R. Co.*, 201 N. Y. 115, 94 N. E. 624; *Petur v. Erie Railroad Co.*, 151 App. Div. 578, 136 N. Y. Supp. 79, affirmed 208 N. Y. 615, 102 N. E. 1111), for the reason that a trespasser is not *caput lupinum* (*Palmer v. Gordon*, 173 Mass. 410, 53 N. E. 909, 73 Am. St. Rep. 302). That the cattle guard was dangerous cast no liability on the defendant. Liability must be found in danger and deceit, as a spring gun or a snare. *Larmore v. Crown Point Iron Co.*, *supra*. The full danger of the cattle guard was obvious. It was not a trap. It was not a deceit, but a deterrent. It did not lure to injury, but halted by its threat of injury.

The defendant was not bound to fence its land against the plaintiff. *Burgess v. Great Western R. Co.*, C. B. (6 J. Scott N. S.) 923. It was not bound to set up a sign that there was no passageway at this point. *Stevens v. Nichols*, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459. It was not bound to warn against a danger that was obvious, and that could not be incurred save by a trespasser misdemeanor. The defendant was not liable for negligence, save for that shortcoming that is aptly described as "affirmative negligence" in *Larmore v. Crown Point Iron Co.*, *supra*. If negligence constituted liability, then there was contributory negligence on the part of the plaintiff, that barred her and justified her dismissal. *Parsons v. N. Y. Central & H. R. R. Co.*, 85 Hun, 23, 32 N. Y. Supp. 598; *Heiss v. C., R. I. & P. Ry. Co.*, 103 Iowa, 590, 72 N. W. 787; *Mason v. Mo. Pac. Ry. Co.*, 27 Kan. 87, 41 Am. Rep. 405; *Sturgis v. D., G. H. & M. R. R. Co.*, 72 Mich. 619, 40 N. W. 914; *Hutchinson on Carriers* (3d Ed.) p. 1062. See, too, *Frost v. Grand Trunk Railroad Co.*, 10 Allen [Mass.] 389, 87 Am. Dec. 668; *Bancroft v. Boston & Worcester Railroad Corporation*, 97 Mass. 275.

The proposition of the prevailing opinion embraces three features, namely: The inherent danger of the fabric, the location of it, and the snow that had fallen to cover it. I have to consider only the snow. There was evidently not a deep covering of snow, because the plaintiff saw the rails, recognized the two tracks and the right of way when she turned in upon the land, and the cattle guard with upright teeth was between the rails. All we learn of the time of the snowfall is the testimony that it had not fallen since morning. I think that there was no obligation to clear off the snow from the rails or the cattle guard. Even if there were, the omission was negligence, and not the affirmative negligence that could only avail a trespasser; and despite

the snow the plaintiff admittedly saw the rails as she walked between them, and hence was a willing trespasser misdemeanor.

Of the three cases cited in the prevailing opinion, the first declares a cattle guard in a street a nuisance, but this cattle guard was not in a street; the second presents the "very important" feature of snow piled up by the defendant in the usual way of access, so as to render it impassable, and the consequence that the passengers were forced to cross the rails; and the third presents the fact that the excavation of the former cattle guard was dangerously near the place where passengers were admitted to the trains.

I vote to affirm.

BLACKMAR, J., concurs.

(189 App. Div. 481)

LORD ELECTRIC CO. V. OAK REALTY CO. et al.

(Supreme Court, Appellate Division, First Department. November 21, 1919.)

1. APPEAL AND ERROR § 843(4)—NONDETERMINATIVE ISSUES WILL NOT BE CONSIDERED.

Where plaintiff replied, and appealed from order granting motion to frame issues raised by defendant's counterclaim, his contention that counterclaim does not state facts sufficient to constitute a cause of action will not be determined, as a determination in plaintiff's favor would merely deprive defendant of a jury trial of the issues raised, since the counterclaim cannot be dismissed, and must be tried, unless plaintiff challenges it either by motion for judgment on the pleadings or at the trial.

2. PLEADING § 404—WAIVER OF OBJECTION NOT TAKEN BY DEMURRER OR ANSWER.

While objection that pleading does not state facts sufficient to constitute a cause of action is not waived, though not taken by demurrer or answer, in view of Code Civ. Proc. § 499, yet the objection should be raised directly, so that a decision will effectually determine the issue at law presented, in view of section 547, furnishing a speedy and inexpensive method of determining the question.

3. TRIAL § 370(3)—ISSUES FOR JURY IN ACTION TO FORECLOSE MECHANIC'S LIEN.

The court, in granting defendant's motion to frame issues raised by counterclaim and reply, went too far in providing for the trial of issues that were not raised by the reply to the counterclaim, but by the denials of the defendant of the allegations of the complaint.

Appeal from Special Term, New York County.

Action by the Lord Electric Company against the Oak Realty Company and others, impleaded with the Sandringham Hotel Company. From an order framing issues to be tried by the jury, plaintiff appeals. Modified, and, as modified, affirmed.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, PAGE, and MERRELL, JJ.

Nugent & Nugent, of New York City (Daniel F. Nugent, of New York City, of counsel), for appellant.

Baldwin & Hutchins, of New York City (George C. Lay, of New York City, of counsel), for respondent.

PAGE, J. The action was brought for the foreclosure of a mechanic's lien. The defendant interposed an answer containing denials and a counterclaim to which the plaintiff replied. Defendant's motion to frame issues raised by the counterclaim and reply was granted. The plaintiff appeals therefrom.

[1] The plaintiff contends that the counterclaim does not state facts sufficient to constitute a cause of action. The plaintiff, however, replied, and accepted the issues of fact tendered by the defendant, and the motion was to frame those issues for trial by a jury. If we should determine upon this appeal that the plaintiff's contention was correct, and hence deny the motion, the effect would merely be to deprive the defendant of a jury trial of those issues. We could not dismiss the counterclaim. The issues would still remain in the pleadings, and unless the plaintiff challenged the legal sufficiency of the alleged counterclaim, either by motion for judgment on the pleadings or at the trial, those issues would have to be tried and determined.

[2] While it is true that, if such objection is not taken either by demurrer or answer, it is not waived (Code of Civil Procedure, § 499), nevertheless, the objection should be raised directly, so that the decision of the court will effectually determine the issue of law thus presented. Section 547 was added to the Code of Civil Procedure to furnish a convenient, speedy, and inexpensive method of determining this question. We feel that we are not called upon to pass on this question on this appeal, but will leave it to the determination of the court when directly raised.

[3] The order in this case goes too far; it provides, also, for the trial of issues that are not raised by the reply to the allegations of the counterclaim, but by the denials of the defendant of the allegations of the complaint, and also some that are immaterial. The order will therefore be modified, by striking therefrom paragraphs numbered 2, 3, 4, 5, 9, 10, and 11, and the following from paragraph 14:

"by overcharges for time of superintendents, foremen, laborers, and helpers, and for overcharges for materials furnished, and for charges for materials not furnished"

—and, as modified, affirmed, with \$10 costs and disbursements to the appellant. Order filed. All concur.

(189 App. Div. 477)

In re MARSHALL'S WILL.

(Supreme Court, Appellate Division, First Department. November 21, 1919.)

WILLS §405—COSTS OF ATTEMPTED PROBATE OF FRAUDULENT WILL NOT CHARGE ON ESTATE.

Where the executor, who was a party to the fraudulent execution of a will, presented it for probate, it was an abuse of discretion, under Code Civ. Proc. § 2746, for the surrogate to impose the costs upon the estate, though probate was denied.

Appeal from Surrogate's Court, New York County.

Proceeding by John A. Bullinger to probate the last will and testament of William Marshall, deceased. From so much of the decree as awarded costs and expenses to the unsuccessful proponent payable out of the estate, an appeal was taken by George B. Marshall, contestant. Reversed.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, PAGE, and PHILBIN, JJ.

Clarence B. Campbell, of Brooklyn (Bruce R. Duncan, of Brooklyn, of counsel), for appellant.

Louis B. Brodsky, of New York City (William S. Butler, of Brooklyn, of counsel), for respondent.

PAGE, J. Dr. John A. Bullinger propounded for probate an alleged last will and testament of William Marshall. Objections to the probate of the will were made by the widow, who demanded a trial by jury, and an order was duly made directing such a trial of the following issues of fact:

"I. Did William Marshall, the testator, subscribe the paper offered for probate at the end thereof in the presence of each of the attesting witnesses, or acknowledge to each of them that such subscription appearing on said paper had been made by him?

"II. At the time of making such subscription or acknowledgment, did the said William Marshall declare to each of the attesting witnesses that the paper offered for probate was his last will and testament?

"III. Were there at least two attesting witnesses, each of whom signed his or her name at the end of said paper at the request of said William Marshall?

"IV. At the time of the execution of the paper offered for probate, was the said William Marshall of sound and disposing mind and memory?

"V. Was said paper executed by the said William Marshall freely and voluntarily as his last will and testament?

"VI. Was the execution of the said paper by the said William Marshall caused or procured by fraud or undue influence?"

The evidence in the case developed the following facts:

Dr. Bullinger and Mr. Marshall had been acquainted with each other for a number of years and were on terms of intimacy. Marshall became very ill. Dr. Bullinger attended him in his professional capacity. A consultation was called, and Dr. Thompson was called in, and he advised Marshall that he was a very sick man and should put his affairs in order. Thereafter Marshall asked Bullinger to notify a Mr. Morrison, who had been his lawyer for a number of years past and was a distant relative, and a Mr. Graham, who was associated with him in

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business, to come to his house at 3 o'clock on Saturday afternoon. Bullinger testified that he notified Morrison and Graham of the appointment, and that Graham came, but that Morrison did not keep the appointment, and that after waiting more than an hour Marshall said that he did not care thereafter to be disturbed. Morrison denies that Bullinger ever made such an appointment with him. Some 10 days later Mrs. Bullinger prepared a will in her own handwriting. Dr. Bullinger had arranged with three persons, friends of his, who were also acquaintances of Marshall, to come to the house whenever he should summon them, for the purpose of executing a will, and at 10 o'clock at night he got these three persons together at his office, and he and his wife went around to the residence of Marshall with the three witnesses. Morrison had been in the house for two hours that evening, and nothing was said to him about the executing of a will. Dr. and Mrs. Bullinger went into the sick room, and Bullinger claims that his wife read the will to Marshall, and Marshall said, "Yes; that is correct." Thereupon the three witnesses were summoned, and all three testify that Marshall was propped up in bed with his eyes closed; two of them testify that Marshall opened his eyes, when Susskind, one of the witnesses to the will, asked him if he knew him, and that Marshall nodded his head, and said, "Ehm." Susskind, however, testified that he shook Marshall by the shoulders; that Marshall opened his eyes, but gave no sign of recognition, and neither nodded his head nor spoke, but merely groaned. Bullinger then informed him that his friends were there for the purpose of witnessing his will.

Marshall's name was signed to the will in this manner: Bullinger placed a pen within his hand and took hold of it in such a manner that Bullinger's hand clasped the fingers of Marshall's hand, thereby holding the pen within his grasp; that he then made a cross mark; when he released his hand, the pen fell from the hand; that Bullinger picked it up, placing it within Marshall's hand, and in the same manner made another cross mark. The three witnesses then subscribed the will and went away. Marshall died the next morning at 11 o'clock.

There is no doubt from the testimony that Marshall, at the time this will was executed, was in a moribund condition and had no knowledge of what was going on. It is not claimed that he gave directions to any one as to the disposition of his property; but by the will, after making some specific bequests, all the rest, residue, and remainder of his estate, both real and personal, was given to Mrs. Bullinger, and Bullinger was made the executor thereof. The electric business of Marshall was given to Graham, his business associate, and \$5,000 was given to Morrison.

It seems that, some two months before Marshall's death, Morrison had given to Mrs. Bullinger a blank form of will, and it was because of her possession of this blank form that she was enabled to prepare the will. The evidence of fraud in the execution of this will is overwhelming, and also that Bullinger was an active participant in the fraud, and had full knowledge thereof when he propounded this will for probate.

Notwithstanding the fact that the jury found that the propounded will was not the will of Marshall, the surrogate allowed Bullinger \$447.-80 as his costs and disbursements, and a further sum of \$2,500 as his allowance for counsel fees, both payable out of the estate. Bullinger's attorney claims that the question of allowing or refusing costs and disbursements rested within the discretion of the surrogate (citing section 2746 of the Code of Civil Procedure), and that, where the surrogate has exercised his discretion, an appellate court will not interfere merely because that court would have acted otherwise. Undoubtedly his position is sound, but the discretion vested in the surrogate is a judicial discretion, and ordinarily, where the proponent of a will is the executor named therein, the result of the proceeding for probate would not be determinative of the right of the executor to costs; it being his duty to bring forward the will and to assume the burden of its probate. But where it is shown, as it was in this case, that the executor was the party to the fraudulent execution of the will, and with full knowledge of the fraud he attempted to impose a false and fraudulent will upon the court, it is contrary to good morals and public policy that the estate should be mulcted in the costs and expenses of his unsuccessful effort to perpetuate the fraud.

The decree, in so far as appealed from, is reversed, with costs to the appellant payable by John A. Bullinger personally. Order filed. All concur.

(189 App. Div. 501)

P. REARDON, Inc., v. CATON et al.

(Supreme Court, Appellate Division, Second Department. November 21, 1919.)

INJUNCTION §=101(1)—**BOYCOTT; WHEN LAWFUL.**

Employés of common carriers, who refuse to accept freight hauled by nonunion truck drivers, will not be restrained from so doing in an action by a corporation owning trucks, there being no show of malice against the plaintiff and freight being received from plaintiff's trucks operated by union employés; the object of the boycott being to compel plaintiff to recognize the union and to limit the regular day to 8 hours and pay double time for overtime—it appearing that three-fourths of the truck owners have recognized the union and agreed to the hours of work and overtime pay; boycotting not being unlawful where the primary purpose is to better the condition of the boycotters as laborers, and not to do irreparable injury to the party boycotted.

Mills and Putnam, JJ., dissenting.

Appeal from Special Term, Kings County.

Action by P. Reardon, Incorporated, against Daniel Caton, individually and as president of the Steamship Clerks' Union, Brooklyn and Staten Island, Local No. 975, I. L. A., an unincorporated association, and others. From an order (107 Misc. Rep. 541, 177 N. Y. Supp. 803) granting a motion to continue an injunction *pendente lite*, which was originally granted *ex parte*, defendants appeal. Order reversed, and motion for preliminary injunction before trial denied.

See, also, 189 App. Div. 515, 178 N. Y. Supp. 722.

Defendants appeal from an order continuing an injunction *pendente lite*, which was originally granted *ex parte* on May 7, 1919, and which restrained

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the defendants from practicing any discrimination against the plaintiff in the receipt or delivery of freight and merchandise trucked by plaintiff. The controversy which is the subject of this litigation took place in the latter part of the year 1918 and first three months of the year 1919.

The plaintiff corporation conducts an extensive public trucking business in the city of New York. Its business consists mainly in trucking freight for its customers to and from the various railroad and steamship terminals and docks. The complaint alleges that plaintiff's investment exceeds \$500,000, and the gross annual income of the business is at least \$1,500,000. The defendants are unincorporated labor unions and individual officers and members thereof. The defendant Transportation Trades Council of the Port of New York is an organization of representatives of local unions affiliated with the American Federation of Labor in the transportation trades. The other defendant unions are composed of workmen engaged on the steamship piers and in driving trucks to and from the piers; each different department of the work having a separate union, as, for example, the steamship clerks, the checkers, the scalemen, the weighers, the pier employes, and the truck drivers and chauffeurs, organized into separate locals. It is alleged in the answers interposed, and the replying affidavits read on the motion, that in the year 1918 the local unions of longshoremen and teamsters in and about the port of New York comprised from 100,000 to 125,000 men, about 90 per cent. of all the men engaged in such work.

The plaintiff conducts its business on what is known as the "open shop" basis. It employs drivers, chauffeurs, and truckmen, some of whom belong to one or other of the various local unions, and some who are not members of the labor unions. In the early part of the year 1919 the various local unions voted upon and adopted certain resolutions looking to the unionizing of the entire body of men engaged in this class of work. It is alleged that as a result of earlier unionizing movements the wages of the men were steadily increased, and the standard of an 8-hour working day had been generally adopted, and that over 75 per cent. of the employers of labor had voluntarily adopted the union scale of wages and hours of work and employed only union men. It is alleged, in the pleadings and affidavits used upon the motion, that the plaintiff corporation and another trucking concern, known as Daniels & Kennedy, refuse to join with the other employers in unionizing their men, and, while paying the same weekly rate of wages, insist upon a 10-hour working day, instead of an 8-hour day, paying but 50 cents an hour for overtime, instead of \$1 per hour, as demanded by the defendants.

To bring about a uniform rate of wages and hours of work, by means of unionizing the entire laboring force, the various local unions and their members resolved that members of the unions should not continue to work with non-union men, and accordingly would refuse to handle merchandise brought to the piers, or called for at the piers, by drivers, chauffeurs, and truckmen who were not members of the union. Unsuccessful efforts were made to negotiate settlements with the plaintiff and the Daniels & Kennedy trucking concern; the plaintiff refusing to become a party to the agreement, with the result that in the latter part of April the union men, working as dock foremen, clerks, weighers, checkers, etc., refused to handle freight brought to the piers by plaintiff's trucks driven by nonunion men. There was no refusal to handle such freight when plaintiff's trucks were driven by employes who were members of the union. The defendants, disclaiming any malice towards the plaintiff, insist that the primary object of their refusal to deal with plaintiff's nonunion employes was to better the condition of the laborers generally as to wages and working hours, and the main grievance of the defendants, as alleged, is the refusal of plaintiff to conform to the 8-hour day condition and the payment of \$1 per hour for overtime.

The plaintiff alleges, however, that the demands of the laborers and their organization were arbitrary, onerous, unbearable, and ruinous, and that plaintiff declined and refused to sign the agreement, which it insists it had the right to do. The result of the refusal of the union men to work with the plaintiff's nonunion employes, maintained for some two weeks, seriously interfered with plaintiff's business. Plaintiff was obliged to take back freight

which the union men refused to handle, or transfer it to other trucks operated by union men. Shippers and receivers of freight formerly employing plaintiff's trucks threatened to, and in some cases did, transfer their business to other trucking concerns, and plaintiff alleges that it is unable to carry on its business, and that it has suffered and will suffer irreparable loss and damage.

This action was accordingly commenced on May 6, 1919, and a preliminary injunction obtained ex parte, restraining defendants from "practicing any discrimination against the plaintiff or its agents, servants, employes, or trucks, or against any through freight, local freight, incoming freight, outgoing freight or export freight, or merchandise, trucked by the plaintiff or its agents, servants, or employes, or tendered by them, or either of them, for shipment or carriage by any carrier by rail or water or intended for delivery to or carriage by the plaintiff or its agents, servants, employes or trucks." An order was directed to defendants to show cause why this injunction should not be continued during the pendency of the action, on the return of which, after hearing, the learned judge at Special Term granted the plaintiff's application. It is from this order that the appeal is taken.

Argued before JENKS, P. J., and MILLS, RICH, PUTNAM, and KELLY, JJ.

Clarence J. Shearn, of New York City, for appellants.
Paul Bonyne, of New York City, for respondent.

KELLY, J. We are concerned, on this appeal, solely with the question of the legality and propriety of the preliminary injunction issued in this action, originally without notice and continued after argument.

The wrongdoing charged by the plaintiff corporation against the defendant labor unions and the individual defendants, members thereof, is the formulating of a plan to compel the plaintiff to unionize its employes, and that in pursuance of such plan the defendants have declared a boycott against the plaintiff, by refusing to handle the freight or merchandise carried on or called for by the plaintiff's trucks. Stripped of adjectives and denunciatory characterization, this is the sum and substance of the defendants' alleged offense against the plaintiff. While the complaint characterizes the demands of the defendants as "arbitrary, unjust and ruinous," and avers that defendants have conspired "to crush such of plaintiff's employes as might refuse to accept unionization" and thereby deprive them of means of livelihood, and to injure and destroy plaintiff's business as the penalty for further resistance to their demand, and to "impede and stifle interstate and foreign commerce," and to generally disrupt and disorganize plaintiff's business, and while plaintiff alleges that defendants' unions have exercised compulsion upon their members, there is no allegation in the complaint of any fact indicating violence, or threats of violence, by the defendants, and the affidavits submitted by plaintiff in support of the motion for a preliminary injunction contain no evidence of violence, coercion or intimidation.

On the papers presented in the record it appears that this conflict between the plaintiff and the labor organizations and their members prior to the injunction was not characterized by the use of force or violence; the defendants seeking to accomplish their ends peaceably. We are brought, therefore, to the question whether the plans resolved

upon by the labor unions and their members with reference to the freight and merchandise handled by plaintiff's nonunion drivers, and the refusal of the union men to load or unload the plaintiff's trucks when in charge of nonunion men, were contrary to the law of the land, and whether the injunction issued was authorized. On the complaint and affidavits submitted it appears idle to argue that these defendants were actuated by any personal malice against the plaintiff corporation or its officers or nonunion employes. They handled plaintiff's freight and merchandise without objection, when it was in charge of drivers who were members of the union; that they had no personal objection or antagonism to the Messrs. Reardon is shown by their continued efforts to bring them into affiliation with the union, in the same way that 75 per cent. of the employers of labor in the port of New York were in voluntary affiliation with them.

So far as appears by the many affidavits there is but one other trucking concern, Daniels & Kennedy, besides the plaintiff, who refuses to recognize the labor unions, and 15 per cent. of the plaintiff's employes are already members of the union. It therefore appears that the primary object of the boycott complained of was to bring about recognition of the union by the plaintiff, to the end that plaintiff should recognize the 8-hour day, instead of the 10 hours of labor exacted by it from its employes, and pay its teamsters \$1 per hour for overwork, instead of 50 cents per hour. It is difficult to see how these demands can be characterized as onerous, unbearable, or ruinous, if they are acceded to voluntarily by 75 per cent. of the employers of labor. The courts are not called upon to decide questions of public policy with regard to the existence of labor unions; we are concerned solely with the enforcement of the law of the land. Labor unions have been and are recognized as lawful associations, and when their objects and designs are lawful, they and their individual members are entitled to the protection of the courts as well as the plaintiff corporation. The injunction granted by the order appealed from is, in effect, a mandatory injunction. These laborers refusing to work with nonunion men, the court by one of its most powerful and drastic writs has commanded them to cease this refusal and to work with these men opposed to their union organization.

If disputes of this kind are to be reviewed in courts of equity, the plaintiff must present a case in conformity with equitable principles, and upon the papers before the court on this appeal I think it fails to present such a case. The plaintiff does not make the employers, or common carriers, or shippers of freight, parties to this action. We are dealing here with the facts presented by the record, and with conditions prevailing in the months of January, February, and March, 1919. We have here no dispute between employer and employé. No common carrier or employer, or shipper or receiver of freight, is before the court complaining of the defendants. On the proof here one trucking concern, the plaintiff, is before the court, complaining that it cannot transact its business, although 75 per cent. of the truckowners in the port of New York have no difficulty with the defendants. There is but one other trucking concern mentioned in the affidavits as involved in

the same controversy, and that concern is not before the court as a plaintiff. Despite the agreement of its fellow truckowners, the plaintiff will not agree with the defendants; and, so far as the record discloses, the immediate cause of the break between plaintiff's concern and the defendants is its refusal to accede to the demand for an 8-hour day and \$1 an hour for overtime for its drivers. These are the so-called "union rates." They are the rates paid by 75 per cent. of the truck-owners. The plaintiff pays its men the same regular wages as other truckowners, but it insists upon a 10-hour day and pays but 50 cents an hour for overtime. Of course, this gives plaintiff a great advantage over its competitors; its profits are greater; but is the assertion of such a right sufficient to justify a court of equity in issuing a mandatory injunction without notice, since continued after argument, compelling the defendants, comprising the entire body of dock laborers in the port of New York, to work with the plaintiff's nonunion employés? Because this is the effect of the injunction.

There is no proof of any violence or intimidation in this record. The plaintiff's affidavits will be searched in vain for any evidence of unlawful overt acts by the defendants. There is no evidence of any appeal to the shippers or receivers of freight to refuse employment to plaintiff. There is no evidence of malice or animosity towards the plaintiff in particular, because the defendants have never refused to handle the merchandise brought to and from the docks by its union drivers. The sole object of the refusal to deal with plaintiff's nonunion employés is to bring about the same hours and the same pay for its drivers as prevail in 75 per cent. of the trucking concerns in New York. This does not appear to be unlawful or unreasonable. *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; *Nat. Protective Ass'n v. Cumming*, 170 N. Y. 315-320, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Paine Lumber Co. v. Neal*, 244 U. S. 459-471, 37 Sup. Ct. 718, 61 L. Ed. 1256; *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185.

In *Bossert v. Dhuy*, supra, Judge Chase, writing for the Court of Appeals, said:

"It is unnecessary in the case now under consideration to hold that in all cases and under all circumstances, whatever a man may do alone he may do in combination with others; but it was clearly established in the *National Protective Association Case* [*Nat. Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648] that workmen may organize for purposes deemed beneficial to themselves, and in that organized capacity may determine that their members shall not work with nonmembers or upon specified work or kinds of work. It was not illegal, therefore, for the defendants to refuse to allow members of the Brotherhood to work in the plaintiffs' mill with nonunion men. The same reasoning results in holding that the Brotherhood may by voluntary act refuse to allow its members to work in the erection of materials furnished by a nonunion shop. Such action has relation to work to be performed by its members and directly affects them. The voluntary adoption of a rule not to work upon nonunion made material, and its enforcement, differs only in degree from such voluntary rule and its enforcement in a particular case. Such a determination also differs entirely from a general boycott of a particular dealer or manufacturer, with a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer. An act, when done maliciously and for an illegal purpose,

may be restrained, and held to be within the bounds of reasonable business competition when done in good faith and for a legal purpose. See *Ruling Case Law*, vol. 16, pp. 431, 432 and 433. * * * When it is determined that a labor organization can control the body of its members for the purpose of securing to them higher wages, shorter hours of labor, and better relations with their employers, and as a part of such control may refuse to allow its members to work under conditions unfavorable to it, or with workmen not in accord with the sentiments of the labor union, the right to refuse to allow them to install nonunion made material follows as a matter of course, subject to there being no malice, fraud, violence, coercion, intimidation, or defamation in carrying out their resolutions and orders. * * * The same rule applies to a body of men who, having organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to stop." 221 N. Y. 353, 354, 117 N. E. 584, Ann. Cas. 1918D, 661.

The court said further:

"It was clearly established in the *National Protective Association Case* that workmen may organize for purposes deemed beneficial to themselves, and in that organized capacity may determine that their members shall not work with nonmembers or upon specified work or kinds of work. It was not illegal, therefore, for the defendants to refuse to allow members of the *Brotherhood* to work in the plaintiffs' mill with nonunion men. The same reasoning results in holding that the *Brotherhood* may by voluntary act refuse to allow its members to work in the erection of materials furnished by a nonunion shop." 221 N. Y. 355, 117 N. E. 584, Ann. Cas. 1918D, 661.

Also:

"An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith, for the purpose of bettering the condition of its members, and not through malice or otherwise to injure an employer, the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action." 221 N. Y. 359, 117 N. E. 585, Ann. Cas. 1918D, 661.

Judge Chase also approvingly cites the recent *Paine Lumber Co. Case*, supra, in the United States Supreme Court, in which Judge Holmes said, at page 471 of 244 U. S., at page 720 of 37 Sup. Ct. (61 L. Ed. 1256), dealing with a case of refusal to handle nonunion materials:

"As this court is not the final authority concerning the laws of New York, we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws, until we are so instructed by the New York Court of Appeals."

The alleged "boycott" in the *Bossert Case* went much further than in the case at bar. There is no evidence in the present case of circulars or appeals to plaintiff's patrons. Nor does the recent decision of the Court of Appeals in *Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 124 N. E. 97, in any way militate against the defendants here, because, as Judge Collin points out in that case, the defendants "inaugurated and carried on, affirmatively and aggressively, through the agencies of fear and coercion, a comprehensive exclusion of the plaintiff from the business of the community," and it is this fact, Judge Collin says,

which distinguishes the case from *Bossert v. Dhuy*. There is no similarity between the acts of the defendants in the Auburn Case and the acts of the defendants in the case at bar. On the contrary, the acts of defendants complained of in the case at bar come expressly within the legitimate procedure indicated in the opinion of the Court of Appeals in that case.

But it is said that this injunction, granted originally without notice, directed to this army of more than 100,000 laboring men, is not mandatory; that there is no obligation on the men to continue working, if they do not wish to work with plaintiff's nonunion drivers. This argument, it seems to me, is no answer in a court of equity. We know that longshoremen and dock laborers who are not regularly employed, and who are paid by the hour, cannot quit their work because of their necessities. A so-called "strike," even if it be lawful, is a serious matter, entailing loss and hardship on employer and employé; a last resort, to be avoided, if it be possible by united effort. It appears that in this case the defendants have continued to work because of these considerations and in obedience to the preliminary injunction of the court, which gives to the plaintiff the full relief to which it might be entitled after trial.

But is the suggestion that the men may quit their work, because of the individual plaintiff's grievance, one that should commend itself to a court of equity? Events move rapidly nowadays, and the disastrous results to the community of such action on the part of the men is apparent. Is this to be brought about by injunction of a court of equity, in advance of trial of the issue, because the plaintiff for its own profit will not grant the same working day and the same pay for overtime as practically all of its associates in the trucking business? I fail to see much in the plaintiff's position commending the case to a court of equity. Labor unions and laboring men, longshoremen and dock laborers, have at times resorted to violence and illegal methods to enforce their rights, or what they sometimes mistakenly asserted to be their rights, and in so doing have brought upon themselves just criticism; and they have at times been exploited by dishonest or incompetent so-called leaders, who used their cause for ulterior and unlawful purposes. With such men and with such motives the law should deal strictly. But when men attempt to assert what they claim to be their rights in good faith, in a decent, orderly way, without resort to violence and within the law, their interests are as sacred as those of the plaintiff, and a court of equity should see to it that they are not improperly interfered with by the writ of injunction.

But it is said that these men are employés of common carriers, and that they are in a different class from the defendants, whose right to refuse to handle nonunion material was sustained by the Court of Appeals in *Bossert v. Dhuy*, *supra*. It will be remembered that on the record here presented no governmental agency, no common carrier or shipper, or receiver of freight is before the court complaining of the defendants. The plaintiff is a trucking concern, employed to cart freight to and fro, under no public obligation. It may carry or refuse to carry

merchandise, as it sees fit. From the necessities of the case the common carrier steamship companies and the like in the port of New York cannot give regular employment to the dock laborers and employes, by the month, the week, or even by the day. The labor is uncertain, depending on the arrival and departure of vessels, and the character and quantity of freight to be moved. The men are hired and paid by the hour. They have no regular, steady employment or income. It seems to me that it may be argued that it is as unreasonable to deny them the right accorded to the defendants in the Bossert Case as it would be to insist that the common carriers should employ their laborers regularly by the day, the week, the month, or the year. I do not think these casual laborers are in the same class with regular employes of those serving the public. There are diverse contentions concerning strikes and boycotts which affect public service, but I think these are for the legislative branch of government, and no Legislature, state or national, has so far enacted that they are illegal.

I therefore vote to reverse the order and to deny the motion for preliminary injunction before trial.

JENKS, P. J. (concurring). I vote for reversal of this order. My Brother KELLY has stated the facts and has cited the cases.

In *Quinn v. Leatham*, [1901] A. C. 506, the Lord Chancellor says:

"Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code; whereas every lawyer must acknowledge that the law is not always logical at all."

The course complained of may be described accurately enough as a boycott. The sole question is whether the court was justified in granting this injunction against this boycott. The court was not justified, unless it appear that the boycott is a conspiracy to accomplish an unlawful end, or a lawful end by unlawful means, causing "irreparable damage." *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 437, 31 Sup. Ct. 496, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. If the primary purpose of the boycott is to better the condition of the boycotters as laborers, and not to do irreparable injury to the plaintiff, the boycott is not unlawful. And if to accomplish this primary purpose the means are lawful, and yet there is incidental irreparable injury to the plaintiff, such injury does not make the boycott unlawful. The sole injury stated is, to my mind, but incidental. The facts, as KELLY, J., shows, do not present the issue of a common carrier who refuses carriage of goods.

So far, the facts appear by affidavits only. The trial may reveal that the facts are different from the present appearance of them, and it may establish that this boycott is a conspiracy, or the consequences of this course of the defendants may be far-reaching and conditions may

follow that justify other legal remedies, either of the common law or of statutes, state or national. But that is not the concern of this court in the present litigation. The sole duty of this court is to declare the law as between the litigants now before it.

MILLS, J. I feel compelled to dissent, and to vote for affirmance, for the following reasons:

The plaintiff corporation conducts in the city of New York a large trucking business, owning and operating 340 horse trucks and 14 motor trucks. Its business consists mainly in trucking freight for its customers to and from the various railroad and steamship terminals in the city. The defendants are certain unincorporated labor unions and individual officers and members thereof, comprising various employes of certain common carriers, steamship companies, such as steamship clerks, checkers, scalemen, weighers, etc., engaged in handling such freight at the piers and docks of the city. The several unions involved have deliberately and formally resolved that their members shall not work with nonunion men, and therefore shall refuse to handle merchandise brought to piers or called for thereat by drivers, chauffeurs, or truckmen who are not members of the unions. Pursuant to such resolutions the defendants have refused to handle, in any way, freight with, to, or for those of the plaintiff's employes who are not members of the unions, or of one of them. Plaintiff conducts its business upon what is commonly known as the "open shop" basis or plan, employing men without regard to their membership in any union. Many of its employes are not such members, while others are. For several days prior to the making of the motion, defendants had persisted in such refusal, to the very great damage of the plaintiff, so much so that much of the freight tendered by it at the several piers was not received, and several of its customers, from fear of such condition, had withdrawn from plaintiff their patronage, and others threatened to do so. No question upon the argument was made by defendants' counsel but that the defendants intended to persist in such refusal, and in effect to compel plaintiff to reorganize its business and to conduct it upon the union basis. The action of the defendants is intentional and deliberate, and defended here by their counsel as entirely rightful.

The effect of the order appealed from is not to compel any of the defendants to continue working in his present position in the employment of any given carrier, but only to compel him, so long as he does continue in that position, to deal therein with the nonunion employes of the plaintiff the same as with the union employes of it; that is, to receive from them or deliver to them freight, without regard to their being union or nonunion men.

The question presented by this appeal is simply this: Can an employe of a common carrier, while acting as such, refuse to extend to any person accommodation—e. g., carriage of goods or persons—upon the same terms as are extended by the carrier to the public generally? It seems to me self-evident that he cannot so refuse. He may, if he so elect, decline to work for such an employer; but, if he does work

for him, he must give the same service to all. It seems to me likewise plain that he, as well as the employer, is subject to the injunctive process of the court. I quite agree with the view, presented to us upon the argument, that one of the defendants—for example, a freight receiving clerk—can no more refuse to receive freight from a nonunion truck driver than, if he were acting as a conductor of a street railroad car, he could refuse to receive a fare from a nonunion man, and refuse to admit such person to the car as passenger. It is a primary duty of any one engaged in the performance of such a public service to extend that service to all without discrimination. There is no precedent to the contrary. The proposition thus asserted appears to me to be elementary. It is not at all contrary to the doctrine of *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 852, Ann. Cas. 1918D, 661, which merely sustains the right of union men to decline to work with or upon the product of nonunion laborers in private employment. The point here is that these defendants are undertaking, while choosing to render a public service, to discriminate in its performance against a certain class of people. That they may not do.

Therefore the order appealed from should be affirmed, with \$10 costs and disbursements.

PUTNAM, J., concurs.

(189 App. Div. 515)

REARDON v. INTERNATIONAL MERCANTILE MARINE CO. et al.

(Supreme Court, Appellate Division, Second Department. November 21, 1919.)

INJUNCTION ⇐137(1)—**RESTRAINING CARRIER FROM REFUSING TO RECEIVE FREIGHT.**

Injunction should not issue before trial to restrain carrier from refusing to receive freight for shipment, where employes of carrier refused to accept freight from nonunion truckmen, and carrier was powerless because, if it should discharge its men, it could procure no one else to do the work, which was of great importance to the entire community.

Mills and Rich, JJ., dissenting.

Appeal from Special Term, Kings County.

Action by James S. Reardon, as treasurer of the 'Truck Owners' League of the City of New York, an unincorporated association, against the International Mercantile Marine Company and others. From an order (107 Misc. Rep. 541, 177 N. Y. Supp. 803), granting a motion for a preliminary injunction, defendants appeal. Order reversed, and motion denied.

See, also, 189 App. Div. 501, 178 N. Y. Supp. 713.

Argued before JENKS, P. J., and MILLS, RICH, PUTNAM, and KELLY, JJ.

Van Vechten Veeder, of New York City (Roscoe H. Hupper and Ray Rood Allen, both of New York City, on the brief), for appellants International Mercantile Marine Co. and others.

Carroll G. Walter, of New York City (Edward J. Patterson, of New York City, on the brief), for appellant France & Canada S. S. Corporation.

Harold S. Deming, of New York City (Wharton Poor, of New York City, on the brief), for appellants Gans S. S. Line, Eastern S. S. Lines, Inc., Booth S. S. Co., Limited, Ocean S. S. Co., Limited, and Kerr S. S. Co., Inc.

L. De Grove Potter, of New York City, for appellant Gaston, Williams & Wigmore S. S. Corporation.

Richard Reid Rogers, of New York City, for appellant Panama R. Co.

Paul Bonyng, of New York City, for respondent.

KELLY, J. The plaintiff has seen fit to bring this action against the defendants without making the various labor organizations and their members parties to the litigation. The complaint alleges the controversy between the plaintiff and the dock laborers and longshoremen, which is the subject of the action of *P. Reardon, Inc., v. Caton*, 189 App. Div. 501, 178 N. Y. Supp. 713 (decided herewith), and alleges that the members of the Truck Owners' League, an unincorporated association of which plaintiff is the treasurer, and whose names are not stated in the complaint, are interfered with and prevented from carrying on their business by the refusal of the dock laborers to work with the nonunion employes of the members of the league, and it is charged that the defendants, with full knowledge of the premises, have wrongfully permitted the laborers, described as their employes, to declare and enforce an embargo or boycott against the league and its members. The facts concerning the so-called boycott or embargo are fully set forth in the opinion filed in the action of *P. Reardon, Inc., v. Caton*, supra.

It seems to me that the preliminary injunction, granted in this case originally without notice, and continued after argument, is contrary to law for several reasons:

(1) The authority of the plaintiff to maintain the action on behalf of the unnamed members of the league and the interest of such members, is not pleaded or proved. There is nothing to show for whom the plaintiff is assuming to act, or that the individual members of the league, whoever they may be, are in sympathy with or have authorized his action.

(2) The moving affidavits show refusals by the longshoremen and dock laborers to work with the nonunion drivers of the corporation of which the plaintiff is treasurer, and one other truck owner, Daniels & Kennedy; Mr. Kennedy being the president of the league. There is no evidence by affidavit of any difficulty on the part of any other truckman named to carry on his calling.

(3) The action is based entirely upon the allegation that the defendant common carriers knowingly and wrongfully permit the workmen to refuse dealing with the nonunion drivers of the league members. But each of the common carriers makes positive affidavit that the action of the dock laborers is without their assent and without their approval. No conspiracy between the common carriers and the dock laborers is pleaded or suggested. The affidavits for the carriers state that they are powerless in the matter, because, if they discharge their

men, they can procure no one else to do the work, which is of so great importance to the entire community.

As already suggested, the plaintiff has not joined the labor organizations as parties defendant in the action. The preliminary injunction is unnecessary and uncalled for. If the injunction in the action against the labor unions is sustained, there is no reason or necessity for enjoining the steamship companies. If, on the other hand, it is dissolved, in my opinion it would be the height of folly to issue a mandatory injunction such as this against the defendants; because it appears that practically the entire force of dock laborers, checkers, weighers, etc., to the number of some 125,000 men, is unionized, and if they are left free to pursue their work and better their condition by lawful methods, any attempt by the steamship companies to force them to work with nonunion drivers would only result in a general strike and tie-up of the freight of the port. Upon the papers it is uncontradicted that it is impossible from a practical standpoint to obtain nonunion labor to perform the work.

(4) Certain of the defendants demur to the complaint, others deny that they are engaged in business at all, others that they are common carriers, but the preliminary injunction sweeps all these denials aside and issues against defendants who, so far as the proof shows, have no connection with the controversy; and, in addition, by a clause added to the order appealed from, the injunction is made to apply to and inure to the benefit of a number of individuals, copartnerships, and corporations in no way mentioned in the complaint or affidavits, but who are described in the order as "members of the plaintiff association," without evidence to justify such description or opportunity given them to be heard.

Under elementary principles I think the injunction should have been denied. The dispute must be settled in the other case. From every point of view I think it was an abuse of discretion to issue such a mandatory injunction in advance of trial. *People ex rel. Wood v. Assessors*, 137 N. Y. 201, 204, 33 N. E. 145; *Matter of Attorney General*, 124 App. Div. 401, 408, 108 N. Y. Supp. 823. Taking the case by itself, as the plaintiff sees fit to present it to the court, a preliminary injunction may benefit the two trucking concerns mentioned, enabling them to continue their exaction of the 10-hour day and payment of 50 cents for overtime; but it might ruin the 75 per cent. of the truck owners in the port who are in accord with the labor organizations, and result in an embargo on the shipping in and out of New York, and would be unenforceable because it would bring about the very results which it purports to prevent. I think the order should be reversed, and the motion denied.

Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs.

JENKS, P. J., concurs.

PUTNAM, J. (concurring). The delivery clerks, receiving clerks, weighers, and checkers, who by the judgment of this court are no longer enjoined from discriminating against plaintiff's trucks in re-

ceiving freight for shipment, are the very servants and representatives of the carriers by which through traffic with connecting carriers is conducted. If the injunction against the organization of employed weighers, checkers, and other employés is to be reversed, as the majority of this court have voted, then naturally the employers should not be enjoined, while leaving their men free to discriminate. I agree with the reasoning of Mr. Justice Mills, but consider it inapplicable after the reversal in *Reardon, Inc., v. Caton*, 189 App. Div. 501, 178 N. Y. Supp. 713.

MILLS, J. (dissenting). I dissent, and vote for affirmance, for the same reasons that I did in *Reardon, Inc., v. Caton*, 189 App. Div. 501, 178 N. Y. Supp. 713, decided by us simultaneously herewith, and beg to refer to my memorandum of dissent therein. It seems to me that the prevailing opinion upon this appeal serves to accentuate the intolerable condition which that opinion would create or sustain, as I pointed out in my memorandum there. In that appeal that opinion denies the right of injunction against the employé, so that they may not refuse to accept freight tendered by nonunion men, and this one denies the right to such an injunction against the carrier itself. With the two effective, the obligation of common carriers would be entirely gone. By parity of such reasoning a common carrier of passengers could deny passage to nonunion workmen and their families, as well as to the employers of nonunion men.

Here the defendants do not dispute the right of the trucking concerns—individual, firm, or corporation—to have their freight handled at the piers by the employés of the defendants, without any discrimination against those of them who are not members of any union; but the defendants contend that they should not be enjoined, because they do not authorize any such discrimination by their employés, but, on the contrary, forbid their employés to make it, and because, if they were to discharge such employés for such discrimination, they would be unable to fill their places, and so would be prevented from at all performing their duties as common carriers. This amounts to a plea by defendants that, because their employés will not, in that regard, obey their directions, they, the defendants, should be excused from performing, to that extent, their full duty as common carriers. That plea seems to me to be thoroughly bad.

The naked fact that the men, their employés, disobeyed the law before the determination making its meaning and effect plain, does not at all warrant the conclusion that those men will disobey after such determination has been made, as it now has in this case at Special Term. Ours is "a government of laws and not of men," and at least until the contrary has been demonstrated upon due trial we must proceed upon the assumption that all men, in any and every position, will obey the law after it has been judicially declared by the constitutional authority for that purpose. If it should prove that the defendants are unable to employ men to discharge the various functions involved because of the legal requirement that those men cannot, in the discharge of those functions, refuse to extend the

same service to nonunion men as to union men, that fact would no doubt be considered upon any application to punish the defendants for actual disobedience of the injunction.

Our decision in *Reardon, Inc., v. Caton*, being made simultaneously herewith, is not to be deemed an authority governing the decision in this appeal. I regard the two cases as being practically one. It is plain, I think, that the two actions might well have been brought as one against all the defendants in both.

RICH, J., is of the opinion that it is the duty of the carrier to accept the freight, and therefore concurs in the result reached by MILLS, J., in so far as it enjoins the employers.

(109 Misc. Rep. 366)

WOLF v. WOLF.

(Supreme Court, Special Term, Nassau County. November, 1919.)

1. **MARRIAGE §54—VOIDABLE, BUT NOT VOID, WHERE FORMER HUSBAND ABSENT FOR FIVE YEARS.**

Where defendant's former husband, at the time of ceremonial marriage to plaintiff, had absented himself for a period of over 5 years, without being known to her to be living, and she contracted marriage with plaintiff in good faith, based on due investigation, the marriage to plaintiff was voidable, but not void, under Domestic Relations Law, §§ 6, 7.

2. **MARRIAGE §54—VOID WHERE FORMER HUSBAND NOT ABSENT FOR FIVE YEARS.**

Alleged common-law marriage cannot be held voidable merely, where it does not appear that at the time of such marriage defendant's former husband had absented himself for 5 years.

3. **MARRIAGE §60(2)—TIME TO SUE TO ANNUL MARRIAGE.**

Where, prior to her marriage to plaintiff, defendant's former husband had absented himself for more than 5 years without being known to her to be living, and she contracted marriage with plaintiff in good faith, and after plaintiff found out that the former husband was living he continued to live with defendant for over 10 years, and delayed 13 years before bringing suit to annul marriage, marriage will not be annulled; defendant's former husband not having been heard from within 7 years.

4. **DIVORCE §328—FOREIGN DIVORCE BASED ON CONSTRUCTIVE SERVICE NOT RECOGNIZED.**

Nevada divorce decree, based upon constructive service, is not entitled to recognition in New York, under the policy of the New York laws.

5. **DEATH §2(1)—PRESUMPTION FROM ABSENCE.**

Where no competent evidence was produced that defendant's former husband had been heard from within 7 years, the presumption is that he is no longer living.

6. **BASTARDS §12—LEGITIMATED BY VOIDABLE MARRIAGE.**

Son born prior to ceremonial marriage was legitimated by the marriage, notwithstanding that it was voidable.

Action for annulment of marriage by Charles Wolf against Mollie Wolf. Judgment for defendant.

John J. Weiss and Louis Bleier, of New York City (William C. Robeson, of New York City, of counsel), for plaintiff.

William H. Griffin, of New York City, for defendant.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

BENEDICT, J. This is an action by husband against wife for the annulment of a marriage on the ground that at the time of such marriage a former husband of the defendant was living and that her marriage to such former husband was then in full force and effect. The answer contains several defenses, but the gist of them is that prior to said marriage defendant's former husband had absented himself for more than 5 years, without being known to her to be living, and that she contracted the marriage with plaintiff in good faith, in the honest belief that her former husband was dead, and further that after plaintiff found out that the former husband was living he continued to live with defendant in the mutually acknowledged relation of husband and wife for over 10 years longer.

[1] Upon the evidence I have determined, as matter of fact, that defendant's former husband, at the time of the ceremonial marriage in 1900, had absented himself for a period of over 5 years without being known to her to be living, and that she contracted said marriage with plaintiff in good faith, in the honest belief, based upon due investigation, that her former husband was dead. As her former husband was not then dead, such marriage was, of course, voidable, but not void. Domestic Relations Law of 1896, §§ 3 and 4, continued in present Domestic Relations Law [Consol. Laws, c. 14] as sections 6 and 7.

[2] I think I cannot hold the alleged common-law marriage, which is claimed to have been contracted in 1894, to be voidable, rather than void, for the reason that it does not appear that at that time defendant's former husband had absented himself for 5 years.

[3, 4] The defendant's former husband, whose name was Denlea, reappeared in 1905, and again he was in this vicinity in 1911, and perhaps as late as the spring of 1912, which is the last competent evidence we have of his whereabouts or existence. Plaintiff knew of defendant's former marriage to Denlea, in fact was acquainted with both of them before Denlea's first disappearance, and plaintiff himself made or caused to be made the investigations which led up to the conclusion that Denlea was dead. Plaintiff was also informed in 1905 of Denlea's reappearance, but he continued to live with defendant as her husband, assuring her that he would stand by her. In December, 1916, plaintiff went to Nevada and there procured a decree of divorce from defendant, based, however, upon constructive service, and hence not entitled to recognition here under the policy of our laws. He returned in the summer of 1917, and there was a reconciliation between him and defendant, whereupon they again lived together, and continued to live in the same house, at least, almost up to the time of the trial of this action.

[5] Under these circumstances relief should, I think, be denied to plaintiff. The presumption is that Denlea is no longer living, as no competent evidence was produced that he had been heard from within 7 years last past. If the plaintiff wished to have his marriage to defendant annulled because Denlea was in fact living when such marriage was contracted, he should promptly have ceased cohabitation with her, even if he did not bring his action promptly. His continued co-

habitation with defendant for a period of over 10 years, and his delay of 13 years in bringing this action, together with his other conduct above recited, and all the circumstances, render it inequitable to grant him a decree of annulment at this late day. There is, I think, sufficient authority for refusing a decree under such circumstances.

I think the correct doctrine, in cases of voidable marriage, was stated by Mr. Justice Woodward in *Stokes v. Stokes*, 128 App. Div. 838, 841, 113 N. Y. Supp. 142, a case in some respects similar to the case at bar. The judgment of reversal in the Court of Appeals (198 N. Y. 301, 91 N. E. 793) proceeded upon the ground that under the circumstances disclosed the marriage was void and not voidable, and it was, moreover, expressly recognized that there were cases where relief might be denied on equitable grounds. See 198 N. Y. 312, 91 N. E. 797. See, also, *Kaufman v. Kaufman*, 177 App. Div. 162, 165, 163 N. Y. Supp. 566; *Brown v. Brown*, 153 App. Div. 645, 138 N. Y. Supp. 602; *Berry v. Berry*, 130 App. Div. 53, 114 N. Y. Supp. 497; *Taylor v. Taylor*, 63 App. Div. 231, 234, 71 N. Y. Supp. 411, affirmed 173 N. Y. 266, 65 N. E. 1098; *Tiedemann v. Tiedemann*, 94 Misc. Rep. 449, 157 N. Y. Supp. 1101; *McCarron v. McCarron*, 26 Misc. Rep. 158, 56 N. Y. Supp. 745; *Tait v. Tait*, 3 Misc. Rep. 218, 23 N. Y. Supp. 597; *Kerrison v. Kerrison*, 8 Abb. N. C. 444.

[8] I think the son of the parties, born prior to the ceremonial marriage in 1900, was legitimated by that marriage, notwithstanding that it was voidable, for until annulled by decree of a competent court it has all the incidents and effects of a valid marriage. *Houle v. Houle*, 100 Misc. Rep. 28, 166 N. Y. Supp. 67.

Judgment for defendant, dismissing the complaint, on the merits, with costs. Requests to find passed upon.

(109 Misc. Rep. 328),

PEOPLE ex rel. PLUMLEY v. HIGGINS, Chief of Police.

(Supreme Court, Special Term, Erie County. November, 1919.)

1. HABEAS CORPUS ¶92(2)—QUESTIONS PRESENTED IN EXTRADITION CASE.

The questions presented on habeas corpus in an extradition case are as to the identity of the alleged fugitive, whether the crime was committed in the foreign state under its laws, whether the indictment or information charges a crime under such foreign laws, and whether the person apprehended is within the fair and legal sense of the term a fugitive from justice.

2. HABEAS CORPUS ¶85(2)—EVIDENCE MAY BE TAKEN IN EXTRADITION PROCEEDING.

On habeas corpus in an extradition proceeding, evidence may be taken to aid the court in determining the facts bearing upon the legal questions involved, and the questions sometimes are mixed questions of fact and of law.

3. HUSBAND AND WIFE ¶304—RESIDENCE AS AFFECTING DESERTION.

A resident in New York, who while in the service of the United States married a woman in New Jersey, and thereafter took up his residence in New York, and, upon learning that the woman had fraudulently induced the marriage, returned her with her consent to New Jersey, remaining

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there only a few minutes, he was not a resident of New Jersey at the time he left the woman there, and did not violate the laws of New Jersey, prohibiting a resident of that state from deserting his wife.

4. HUSBAND AND WIFE §304—RETURNING TO HER HOME OF WOMAN FRAUDULENTLY INDUCING MARRIAGE NOT "WILLFUL" DESERTION.

Where a resident of New York married a woman in New Jersey, and returned to his home in New York, where a day or two later she had epileptic fits and admitted that she and her parents had fraudulently sworn in New Jersey as to her health in obtaining the marriage license, and asked that he take her to her parents' home, which he did after bringing a suit in New York for annulment of marriage, remaining in New Jersey only a few minutes, he had not "willfully" deserted her, within the meaning of New Jersey statutes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful.]

5. HABEAS CORPUS §92(2)—MATTERS CONSIDERED IN EXTRADITION PROCEEDING.

On habeas corpus by one sought to be extradited by New Jersey to answer a charge of willful wife desertion, New York court, in determining whether a crime was committed at all in New Jersey, could determine the fact whether or not relator had willfully deserted his wife in New Jersey.

6. CRIMINAL LAW §43—ANNULMENT OF MARRIAGE PREVENTING PROSECUTION FOR WIFE DESERTION.

A judgment in New York, declaring a certain marriage void from its inception, while not rendering the marriage inoperative for all purposes, at least relieved plaintiff husband from obligation to support his wife at any place or at any time subsequent to the marriage, and husband could not after its rendition be properly indicted in New Jersey for deserting his wife prior to its entry, notwithstanding Domestic Relations Law, § 7, and Code Civ. Proc. § 1754.

7. EXTRADITION §82—SUFFICIENCY OF INDICTMENT.

Where indictment does not set forth facts or acts constituting a crime under the statutes upon which it is based, it is the duty of courts to refuse extradition.

8. INDICTMENT AND INFORMATION §81(7)—ALLEGATION AS TO RESIDENCE OF ACCUSED.

A recital in a New Jersey indictment that accused was "late of city of Camden, in said county of Camden," did not sufficiently allege the residence of accused to be in Camden at the time of alleged commission of crime.

9. EXTRADITION §30—"FUGITIVE FROM JUSTICE."

Where one, while a few days in New Jersey, married a woman there and immediately returned to New York with her, and several days later the woman had epileptic fits and admitted that she and her parents had deceived and defrauded the husband as to her physical condition, and had fraudulently sworn in New Jersey as to her health in connection with obtaining a marriage license, and asked the husband to take her back to her parents' home in New Jersey, which he did after bringing an action in New York for annulment of the marriage, remaining in New Jersey only a few minutes, the husband could not be considered a "fugitive from justice" when he returned to New York, assuming that leaving his wife in New Jersey was wife desertion, and a statutory offense in New Jersey; the husband not being conscious of any guilt at any time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fugitive from Justice.]

Proceeding in habeas corpus by the People of the State of New York, on the relation of Ernest C. Plumley, against James W. Higgins, as Chief of Police. Relator discharged from custody.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

I. Rumizen and Simon Fleischmann, both of Buffalo, for relator.
Walter F. Hofhein, Deputy Dist. Atty., of Buffalo, for respondent.

MARCUS, J. This is a habeas corpus proceeding, in which the relator, Plumley, asks for his discharge from custody under an extradition warrant issued on the request of the Governor of New Jersey for the return to that state of the relator to answer an indictment there, charging him with the desertion of his wife in New Jersey. The facts set forth in the papers, and adduced on the hearing, are undisputed.

Plumley is 26 years of age, and resides in, and has at all times been a bona fide resident of, the state of New York, having always lived with his parents, and for a number of years last past at Buffalo. He served with the United States army both in this country and in France during the recent war; and on April 5, 1919, married a young woman in Camden, N. J., after having spent but a few days there prior to the wedding. Immediately after the marriage, relator brought his wife to Buffalo, where they took up their residence temporarily with his parents. A day or so after their arrival in Buffalo the wife had epileptic fits, and admitted that she and her parents had deceived and defrauded relator as to her physical condition, and had fraudulently sworn in New Jersey as to her health in connection with obtaining a marriage license in Camden, N. J. The wife confessed to the wrong she had done relator, and asked that he take her back to her parents' home near Camden, which he did, reaching Camden on the morning of April 14, 1919, by ferry from Philadelphia. He engaged an automobile, had his wife taken to her home, a few miles from Camden, and returned to Philadelphia, and thence to Buffalo the same day, having been in New Jersey only a few minutes.

Before leaving Buffalo the relator had process and papers served upon the wife personally within the state of New York, in a civil action which he instituted for the annulment of the marriage on the grounds of fraud and physical incapacity. No defense was interposed, and an interlocutory judgment annulling the marriage was entered July 10, 1919, upon which, under the practice in this state, a final judgment could be and was entered three months thereafter to like effect October 14, 1919. Both the interlocutory and the final judgments provided and decreed in express terms that the marriage was null and void from the date of its inception.

On October 15, 1919, the day after the final judgment of annulment had become operative and effective, the grand jury of Camden county, N. J., returned an indictment against relator, charging him with having deserted his wife at Camden on April 14, 1919, and unlawfully refusing and neglecting to provide for and maintain her. The indictment does not allege that he was or is a resident of New Jersey, but refers to him as "late of the city of Camden, in the said county of Camden." The above are the salient and material undisputed facts.

[1, 2] The questions presented on habeas corpus in a case of this type are as to the identity of the alleged fugitive, whether the crime was committed in the foreign state under its laws, whether the in-

dictment or information charges a crime under such foreign laws, and whether the person apprehended is, within the fair and legal sense of the term, a fugitive from justice. Moore on Extradition, p. 887; *People ex rel. Genna v. McLaughlin*, 145 App. Div. 521, 130 N. Y. Supp. 458; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *Munzie v. Clough*, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. Ed. 515; *McNichols v. Pease*, 207 U. S. 109, 28 Sup. Ct. 58, 52 L. Ed. 121. These authorities also hold that evidence may be taken in such a proceeding to aid the court in determining the facts bearing upon the legal questions involved, and that the questions sometimes become mixed questions of fact and law. I have reached the conclusion that the relator is immune from extradition on each of the last-mentioned three grounds; his identity not being questioned.

[3] In the first place, it is perfectly clear that Plumley was never a resident of, nor did he ever have a domicile in, New Jersey, nor did he have any intention of being, becoming, or remaining such resident of that state. His presence there on the occasion of his marriage, and for a few minutes a few days after his marriage, when he took his wife to Camden at her request, were obviously temporary, and afforded no grounds for regarding him as a resident. Under these circumstances it seems to me that it cannot be held that the defendant did desert his wife in New Jersey.

[4, 5] The statute under which the indictment is found makes it a crime for a husband willfully to desert and to refuse or neglect to provide for and maintain his wife. It is entirely certain that there was nothing willful about relator's taking his wife back to New Jersey, especially as it was on her request, and leaving her there under the circumstances disclosed by the record and upon the hearing, and the judgment in the annulment suit conclusively confirms this view. There was thus lacking, under the New Jersey law itself, a vital element of the statutory crime for which it is sought to extradite the relator. While in one aspect this may be considered a matter of defense, to be presented upon a trial in the courts of New Jersey, I think, in view of the conceded facts disclosed before this court, it can properly be taken into consideration here, under the circumstances of this case, in the determination of the question by this court, as to whether a crime was committed at all in New Jersey, under the laws of that state.

[6] Furthermore, it cannot fairly be said that relator was the husband of the woman he married, at least so as to impose upon him an obligation for her support, either at the time he took her to Camden on his return from Buffalo, or at the time the indictment was found. Before he left the state of New York with his wife for Camden relator had instituted an action for the annulment of the marriage on grounds existing at the time thereof, and he subsequently was granted an interlocutory and a final judgment of annulment. These judgments, as already appears, specifically declare the marriage void from its inception. I appreciate that section 7 of the Domestic Relations Law of the state of New York (Consol. Laws, c. 14) provides that such

a marriage as the present one is void from the time that its nullity is declared by a court.

It does not follow, however, that the provision of the judgment declaring the marriage void from its inception is in itself inoperative for all purposes. It seems to me entirely reasonable to hold this provision valid, in so far as it had the effect under the circumstances of this case of absolute relieving, and having relieved, relator from any obligation to support his wife at any place or at any time subsequent to the marriage. In any event, I do not think the grand jury in Camden county could lawfully find an indictment a day after, or at any time after, the final judgment in the annulment action was entered, irrespective of the validity and force of the provision that the marriage was void from the beginning; and while not decisive of the questions here presented, it is quite inconceivable that the grand jury would have found an indictment, if they had knowledge of, or had had before them, the final judgment of annulment, entered the day before the indictment was returned. Such a procedure would probably have exposed the indictment itself to the further attack that the grand jury failed to give the full faith and credit to the judgment of the Supreme Court of the state of New York to which it was entitled under the federal Constitution, and to the provision of said judgment declaring the marriage void from its inception.

In this connection, attention may be called to Section 1754 of the New York Code of Civil Procedure, which provides that a final judgment annulling a marriage rendered during the lifetime of both parties is conclusive evidence of the invalidity of the marriage in every court of record, or not of record, in any action or special proceeding, civil or criminal. The relator, therefore, as I view it, did not desert his wife, willfully or otherwise, in New Jersey, and was not guilty of any crime under the laws of New Jersey, and therefore cannot be extradited. The prosecuting authorities and the courts of Camden county will doubtless be disposed to dismiss the indictment on learning of the final judgment of annulment rendered by the Supreme Court of the state of New York the day before the indictment was filed.

[7, 8] Like considerations and reasoning lead to the conclusion that the indictment, which is somewhat indefinite, does not set forth facts or acts constituting the crime of desertion, under the statutes upon which it is based, of the state of New Jersey; and, if this be so, it is the duty of the courts here to refuse extradition, or, what is the same thing, to hold it unlawful under the circumstances of this case. The indictment does not allege that the relator, or his wife, were residents of New Jersey, or that either ever had a domicile there, or that relator was actually in New Jersey at the time of the alleged desertion. The allegations of the indictment on these vital points are extremely guarded. The only recital of the indictment on these points is that Plumley is, or was, "late of the city of Camden, in said county of Camden." This certainly does not allege the residence of Plumley, at the time of the alleged commission of the crime of desertion, or at any time, to have been, or to be, in Camden, or in the state of New

Jersey. In view of the somewhat unusual situation presented by the undisputed facts in this case, it seems to me that the indictment is defective in making no reference to the residence or domicile of Plumley, but merely stating that he was "late of the city of Camden," an allegation which, when challenged, is not the equivalent of a statement of residence, and certainly not of residence at any particular time, or at the time, when in the indictment relator deserted, or it is asserted that he deserted, his wife.

[9] Finally, under the circumstances of this case, and in the light of the decisions, I feel warranted, and, indeed, impelled, to hold that the relator is not a fugitive from justice from the state of New Jersey. Moore on Extradition, p. 887, refers with approval to the holding of the Governor of Massachusetts in the famous Vinal Case, wherein the state of New York demanded the extradition of Vinal from Massachusetts, that in a proceeding like the present the flight is a question of fact, and the burden of proving flight is upon the state which asserts it, and it must be proved beyond a reasonable doubt; that to flee must be knowingly to go away from something which one fears, and necessarily implies consciousness of guilt; that, if a person does wrong and goes away, it is to be presumed that it is his intention to escape prosecution for it; that there must be actual flight, caused by apprehension of danger, to justify extradition, and that the fact of flight as indicative of crime must be shown. It was held in the Vinal Case that the state of New York had not met these requirements, and that the person apprehended had therefore not been shown to be a fugitive from justice, and the Governor of Massachusetts refused the demand of the state of New York for his extradition. Moore also refers to the Case of Wyeth, in which Wyeth left Iowa, believing that he was legally divorced, went to Massachusetts to live, after which he was in Iowa for a day or two, and it was held that he could not be extradited.

If these principles are sound, as it seems to me they are, their application to the present case is obvious. Plumley was never a resident of New Jersey, did not become such by being in the state a few minutes, when he took his wife there, at her request, and clearly did not then leave the state conscious of guilt, or with the slightest intention of avoiding or evading its laws. He knew he had been defrauded by his wife and her parents, and that he had already instituted a suit for the annulment of the marriage at his residence and domicile, and that it would undoubtedly be declared void, as his wife acknowledged her wrong and requested to be taken back to her parents, and the outcome in the form of a judgment of annulment conclusively confirms the justice, lawfulness, and correctness of his position. To hold, under these circumstances, all conceded, that the relator became or remains a fugitive from justice, is to do violence alike to the fair, reasonable, or legal meaning of the term "fugitive from justice."

While I appreciate that equitable or personally meritorious considerations cannot govern or control the disposition of a legal question, such as is here presented, it is nevertheless gratifying to note that justice, as well as the law, will be subserved in this case by a refusal

to extradite the relator, and to subject him to financial loss, expense, and annoyance involved in establishing his defense in the courts of New Jersey, far distant from his home, and in proving there the adjudicated wrong which has confessedly been done him by the woman whom he married and by her parents. Plumley served his country faithfully and courageously in active service at the front, and won honors and decorations for bravery and meritorious conduct, for which his unfortunate matrimonial venture should not unnecessarily harass him.

I am satisfied, on the legal principles and considerations applicable to the case, and upon which my decision alone is based, that the writ of habeas corpus should be sustained, and the relator discharged from custody, and an order to that effect may be entered.

(189 App. Div. 459)

KAPITOLA v. KAPITOLA.

(Supreme Court, Appellate Division, First Department. November 21, 1919.)

1. DIVORCE §55—ADULTERY ON PART OF PLAINTIFF.

In view of Code Civ. Proc. § 1758, trial court erred in denying motion for new trial, made by defendant in divorce action prior to entry of judgment in favor of plaintiff on ground of adultery, where motion was made on ground of newly discovered evidence and affidavit that plaintiff herself was guilty of adultery was uncontroverted.

2. DIVORCE §151—NEW TRIAL; SUFFICIENCY OF APPLICATION TO AMEND ANSWER.

In action for divorce for adultery, motion for new trial, made by defendant before entry of judgment, on ground of newly discovered evidence to the effect that plaintiff herself was guilty of adultery, showed sufficiently that defendant wished to amend his answer by setting up plaintiff's adultery as a bar; the general prayer for relief included in the notice of motion being sufficient to cover such application.

Appeal from Special Term, New York County.

Action by Anna Kapitola against Joseph Kapitola. From an interlocutory judgment of divorce in favor of plaintiff, after trial at Special Term, and from an order denying a new trial on the ground of newly discovered evidence, defendant appeals. Interlocutory judgment reversed, new trial ordered, order denying new trial reversed, and motion granted, with leave to defendant to serve amended answer.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, PAGE, and MERRELL, JJ.

Leon Kronfeld, of New York City, for appellant.

Otto H. Droege, of New York City, for respondent.

DOWLING, J. The defendant appeals from an interlocutory judgment of divorce. Upon this phase of the case it is sufficient to say that the evidence amply justified the finding of the learned trial court that the defendant was guilty of the acts of adultery enumerated in the decision herein. The trial of the action took place on February 3, 1919. During the cross-examination of one of the plaintiff's witnesses,

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defendant's counsel asked whether, in view of the fact that he had only received certain information practically that day, the plaintiff's counsel would object to his putting in a counterclaim for the same relief the plaintiff was asking, based on the plaintiff's adultery. The plaintiff's counsel objected, whereupon the court said it would have to be brought out on proper pleadings. No further application was then made to amend the answer, nor for any adjournment of the trial.

On February 13, 1919, however, before the decision herein had been signed or the judgment entered, the defendant made a motion for a new trial on the ground of newly discovered evidence, and for such other and further relief in the premises as to the court might seem just and proper. Upon that application affidavits were presented of the most convincing character, showing that plaintiff had been living in open adultery with one Frank Parizek for a period of upwards of six months in the year 1918 at a certain house in Astoria, Long Island, and that in November, 1918, she had borne a child to said Parizek, by whose name she was known. After her confinement plaintiff admitted to the physician who attended her therein that she was not married to Parizek, who was the father of her child, but that there was a divorce case pending, which she hoped would be soon consummated, enabling her to marry Parizek. These affidavits were in no way controverted by plaintiff.

The defendant satisfactorily explained his failure to learn of these facts sooner. He had been paying the plaintiff, through the department of public charities, the sum of \$3 weekly for the support of his child. Such moneys had accumulated in said department, as the plaintiff had not called for same for several months, and the defendant was advised by officials of the department to discontinue payments until she was heard from. Plaintiff did not put in an appearance until January, 1919, when she called at the department to collect the money for the support of the child and gave her address in Astoria, whereupon defendant obtained the information at the address thus given which he has embodied in his moving affidavits.

The learned trial court, despite the submission of these affidavits, denied the motion for a new trial by an order entered February 27, 1919, and in the interim, on February 21, 1919, signed the decision and interlocutory judgment granting the plaintiff a divorce.

[1] We think the disposition of the motion was erroneous, and that as well the learned trial court should not have signed the decision or entered the judgment based thereon. Before granting judgment in favor of the plaintiff, the court had before it the uncontroverted proof that plaintiff herself had been guilty of adultery, and therefore, being equally guilty with her husband, was not entitled to a decree against him. Section 1758 of the Code of Civil Procedure provides that:

"In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established: * * * 4. Where the plaintiff has also been guilty of adultery, under such circumstances that the defendant would have been entitled, if innocent, to a divorce."

When the court had been duly advised of the plaintiff's adultery, upon positive evidence of which there is no contradiction, and the adul-

tery was such that defendant, if innocent, would have been entitled to a decree against the plaintiff, the plaintiff lost her right to a divorce, and was not entitled to a judgment in her favor. The interlocutory judgment of divorce will therefore be reversed, and a new trial ordered.

[2] While the defendant did not in his notice of motion specifically ask for leave to amend his answer by setting up the plaintiff's adultery as a bar to her right to a decree, still it is obvious that that was the purpose of his motion, and the general prayer for relief included in his notice of motion is sufficient to cover such an application. The order denying a new trial will therefore be reversed, and a new trial granted, with leave to defendant to serve an amended answer setting up plaintiff's misconduct as a bar to her right to recover.

Both parties having been guilty of adultery, this will leave them, unless a new trial should develop other facts, in the position in which the law intends they shall remain, and that is, still husband and wife; both having forfeited any right to complain of the other's misconduct by reason of their own equal guilt.

Settle order on notice. All concur.

PEOPLE ex rel. NEWTON v. TROMBLY, Warden of Dannemora Prison.*

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

Appeal from Special Term, Schenectady County.

Habeas corpus by the People of the State of New York, on the relation of Harvey A. Newton, against John B. Trombly, as Warden of Dannemora Prison. From an order (107 Misc. Rep. 48, 175 N. Y. Supp. 524) releasing relator from custody, defendant Warden appeals. Order affirmed.

See, also, — App. Div. —, 178 N. Y. Supp. 911.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

PER CURIAM. Motion denied. Order affirmed, on the opinion of Whitmyer, J., at Special Term, in *People ex rel. Irwin v. Homer*, 107 Misc. Rep. 677, 177 N. Y. Supp. 482, and on the authority of *People ex rel. Kohler v. Kidney*, 223 N. Y. 666, 119 N. E. 1069. All concur, except

JOHN M. KELLOGG, P. J. (dissenting). The respondent, a prisoner at Great Meadow Prison, serving a sentence for burglary in third degree, was released on parole March 26, 1914, having served from September 18, 1912, on a maximum sentence of five years. Notwithstanding his parole, he was still in legal custody under the control of the warden of the prison, and was in fact serving his sentence. Prison Law (Consol. Laws, c. 43) § 214.

On the 29th of May, 1914, he was convicted of an attempt to commit burglary in the third degree, as a second offense, and sentenced to Sing Sing for four years. June 15, 1914, a warrant for retaking him as a parole prisoner was issued and placed in the hands of the

*"Newton" and "Irwin" are the same man, see 107 Misc. Rep. 677, 177 N. Y. Supp. 482.

prison authorities at Sing Sing, requiring that he be retaken and returned to said state prison (Great Meadow) "before the expiration of his present term in Sing Sing." At the time the warrant was issued and placed in the hands of the prison authorities, he was in Sing Sing under the second conviction, and the prison authorities caused him to be returned to Great Meadow Prison July 2d, 1914. The parole board duly declared him a delinquent under section 217 of the Prison Law on June 19, 1914. After his return to Great Meadow, the prison authorities, under section 149 of the Prison Law, transferred him to Clinton Prison, at Dannemora, from which he has been released on habeas corpus by the order under review.

A discussion as to whether he was arrested upon the warrant of the parole board is unnecessary. He was in the custody of the law, and the warrant was delivered to the warden having him in custody. The order appealed from, the opinion, and the petitions show that the warrant of the parole board requiring the return of the prisoner to the Great Meadow Prison was sent by the superintendent of prisons to the warden of Sing Sing Prison June 16, 1914. The warden also had an extract of the minutes of the parole board of June 19th, showing the respondent was declared a delinquent from that date. These facts, and his immediate transfer to Great Meadow Prison, leave nothing further to be said on the question whether the warrant was executed and the prisoner taken and returned to Great Meadow Prison thereon. Sections 215-217.

Under sections 216 and 217 of the Prison Law, the warrant for a parole prisoner requires him to be returned to the prison from which he was paroled, and that the matter be brought before the board of parole, and, if found delinquent, that he be imprisoned in said prison for the remainder of the unexpired term unless he is again paroled or discharged. The provision that "he be thereafter imprisoned in said prison" did not deprive the prison authorities of the right to transfer him from Great Meadow Prison to Dannemora. The sections referred to are to be read in connection with sections 148 and 149, and mean that he shall remain in prison and not on parole unless he is again paroled. Section 148 of the Prison Law requires the classification and grading of prisoners; section 149 permits promotions and reductions in grades, and authorizes a change of prisoners from one prison to another, with reference to the respective capacity of the several prisons, or with reference to the health or reformation of the prisoners, or with reference to the proper grading of prisoners. It is clear that the paroled prisoner, when returned to prison, stands in the same position under these sections as other prisoners. There is no reason why, if the conditions of the prisons require a transfer of a prisoner, that section 217 should be so construed as to prevent it.

No matter in what state prison a statute requires a prisoner to be confined, section 149, relating to the welfare of the prisons and of the prisoners, gives to the proper prison authorities power to make such transfers as public necessity requires. In any event, the respondent was legally in Great Meadow Prison, after he was declared a delinquent, and if the prison authorities made a mistake in transferring

him to Dannemora Prison, it did not shorten his term or serve the first sentence. If the transfer was in violation of his rights, he could have raised the question that the service of the sentence should be at Great Meadow and not at Dannemora. He should serve his time, and not escape by a technical or strained construction of the statute.

Section 2190 of the Penal Law (Consol. Laws, c. 40) provides that, if a person under sentence for felony commits another felony and is convicted and sentenced to another term of imprisonment, the latter term shall not begin until the expiration of the term of imprisonment to which he has already been sentenced. From this section it follows that immediately upon the receipt by the prison authorities of the parole warrant, and the return of the prisoner to the Great Meadow Prison thereon, his imprisonment was under the first conviction, and, upon the completion of that term, he again began service on a second sentence. It is true the term of the first sentence has expired; it has been served. The imprisonment under the second conviction was suspended on the day the prison authorities returned respondent to Great Meadow Prison, and did not again become effective until the first term had been served. His time is not to be counted as served on each commitment, but the law will determine upon which commitment the service applies.

In *People ex rel. Kohler v. Kidney*, as Agent and Warden of Auburn Prison, 223 N. Y. 666, 119 N. E. 1069, the paroled prisoner was not retaken on parole until after the expiration of the first sentence, and after two subsequent sentences had been served. That case only holds that, the time of the sentence having elapsed, the defendant could not be again returned to prison. Here the first sentence has been fully served, and there is no attempt here to retain the respondent on account of it. The fact that the parole was canceled compelled him to serve the remaining part of the first term, and the term under the second conviction has not been fully served.

I favor a reversal of the order, and a dismissal of the writ.

(189 App. Div. 483)

GEWIRTZ v. GEWIRTZ.

(Supreme Court, Appellate Division, First Department. November 21, 1919.)

1. DIVORCE §187—REVOCATION OF DECREE OF SEPARATION.

Decree of separation can be revoked only by the court and by the method prescribed by Code Civ. Proc. § 1767, requiring joint application of the parties, accompanied by satisfactory evidence of their reconciliation.

2. DIVORCE §246—ANNULMENT OF ALIMONY PROVISION IN DECREE OF SEPARATION.

Alimony provision of decree of separation can be annulled only by the court, and only by the method prescribed in Code Civ. Proc. § 1771, requiring application therefor and notice to adverse party.

3. HUSBAND AND WIFE §51—SEPARATION AGREEMENT AFTER SEPARATION DECREE WITHOUT CONSIDERATION.

Where decree of separation had been rendered providing for alimony to wife, so-called agreement of separation between husband and wife en-

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tered into upon husband's default in payment of alimony, whereby wife agreed to accept the alimony due her in full satisfaction of her support, maintenance, and alimony for the past and in the future, did not affect status of parties, being without consideration, since parties were already separated, and since husband was already bound to pay wife the sum paid, and being void as against public policy, under Domestic Relations Law, § 51, prohibiting contract relieving husband from obligation to support wife.

Clarke, P. J., and Merrell, J., dissenting.

Appeal from Special Term, New York County.

Action by Louisa Gewirtz against Louis Gewirtz. From an order denying plaintiff's motion to punish defendant for contempt of court, plaintiff appeals. Reversed, and motion granted.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, PAGE, and MERRELL, JJ.

Eugene I. Yuells, of New York City, for appellant.

Mortimer W. Solomon, of New York City (Chauncey E. Treadwell, of New York City, of counsel), for respondent.

PAGE, J. The plaintiff obtained a decree of separation from her husband, wherein he was adjudged to pay her \$10 a week alimony. The defendant failed to pay, and when he owed \$1,140 a motion to punish him for contempt was granted. The defendant thereupon threatened to suffer confinement rather than pay; in fact, he expressed a keen desire to go to jail rather than pay. Under duress of this threat the plaintiff was induced to enter into an agreement on August 12, 1918, whereby, in consideration of the payment of \$1,140 to the plaintiff, and in consideration of the defendant waiving his "desire to go to Ludlow Street Jail," the parties agreed to live separate and apart, and the plaintiff agreed to accept the payment of the \$1,140 in full satisfaction of her support, maintenance, and alimony for the past and in the future, until they should again be reconciled and live together as husband and wife. The agreement also provided that the plaintiff agreed to consent to the vacation of the decree and order entered in the action. In pursuance of this last provision of the agreement a stipulation was entered into, signed by the attorneys for the respective parties in the action and by the parties individually, that in view of the amicable adjustment of the controversy between the parties that the said action and all proceedings be discontinued without costs, and that the decree of the court theretofore entered be vacated, set aside, and declared null and void, as if no such action was ever commenced, nor such decree entered, and that an order to that effect might be entered without further notice. No application was made to the court under said stipulation, and the decree remains of record.

On June 18, 1919, a certified copy of the decree, together with notice of entry thereof, and a duplicate original power of attorney was served on the defendant, and demand made for the payment of the sum of \$530 due for alimony under the said decree. Payment being refused, an order to show cause why the defendant should not be punished for a contempt of court was served. The learned justice at Special

Term denied the motion, upon the ground that until the agreement and stipulation were set aside they defeated the plaintiff's right to any further payments, as provided in the decree.

[1, 2] It is the settled law of this state that the only method by which a decree of separation can be revoked is that prescribed by section 1767 of the Code of Civil Procedure, and the only method by which the provision therein for alimony may be annulled is that set forth in section 1771, and in each instance it can only be done by the court. No agreement of the parties has any effect on the decree, unless it is ratified and made effective by judicial sanction. *Jones v. Jones*, 90 Hun, 414, 35 N. Y. Supp. 877; *Hobby v. Hobby*, 5 App. Div. 496, 39 N. Y. Supp. 36. The decree in this case, therefore, remained in full force and effect.

[3] There was no consideration for the agreement, nor did it affect the status of the parties. It purports to be an agreement of separation, but the parties were already separated by a decree of the court. It purports to be made in consideration of the payment of \$1,140. The defendant was not only at that time legally bound to pay that sum to the plaintiff, but he had been adjudged guilty of a contempt of court for failure to pay to her that very sum. His failure to pay was shown to be a flagrant contempt of the decree of the court, for he demonstrated his ability to comply with the decree by making the payment upon the execution of the agreement. His contempt was therefore contumacious. That he escaped punishment for his contempt operated to his benefit, and not to the plaintiff's advantage.

The agreement was void, as against public policy, as evidenced by the statutes of the state. Section 51 of the Domestic Relations Law (Consol. Laws, c. 14) among other things provides:

"A husband and wife cannot contract . . . to relieve the husband from his liability to support his wife."

By this is not meant that the wife may not agree to accept a gross sum in lieu of a provision for periodical payments for future support and maintenance, if fair and reasonable, and entered into in good faith. *Greenfield v. Greenfield*, 161 App. Div. 573, 146 N. Y. Supp. 865; *Van Ness v. Ransom*, 164 App. Div. 483, 150 N. Y. Supp. 251, affirmed *Parsons v. Macfarlane*, 220 N. Y. 605, 115 N. E. 1046; *Levy v. Dockendorff*, 177 App. Div. 249, 163 N. Y. Supp. 435. In the case under consideration there was no payment for future support. The only sum paid was that allowed by the court for present maintenance, which by the failure of the defendant to pay had become due and owing for support and maintenance theretofore. Therefore the purport of this agreement was to absolutely release the husband from all liability to support his wife.

The most that the defendant was entitled to, in consideration of his payment of the \$1,140, was a discontinuance of the proceeding to punish him for contempt. This he received. He complains that he waived his desire to go to jail for contempt of court. He being again in contempt, the opportunity of fulfilling that desire will be restored to him by the granting of this motion.

The order should be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. Order to be settled on notice.

LAUGHLIN and DOWLING, JJ., concur.

MERRELL, J. (dissenting). A decree separating the parties having been made, and the defendant being in default in the payment of alimony therein provided, the parties entered into an agreement in which the plaintiff agreed to accept the sum of \$1,140 in satisfaction of the decree and in lieu of all alimony which might be payable thereunder. On her part the plaintiff also agreed to pay certain bills. The agreement was in writing, under the hands and seals of the parties, and a formal stipulation was entered into, signed by both parties, as well as by their respective attorneys, reciting the amicable adjustment of the controversy between the parties, stipulating a discontinuance of the action, and consenting that the decree of separation be vacated. The sum thus agreed upon by the parties as in lieu of alimony was thereupon paid by defendant.

A motion has now been made by plaintiff to punish defendant for contempt under the decree so agreed to be vacated and set aside, and to compel defendant to furnish security in the sum of \$2,500 to insure the payment of future alimony. The court is asked, on motion, to disregard such agreement of the parties, and to enforce the decree as entered.

The provisions for alimony contained in the decree are but a continuation and a crystallization of defendant's legal liability to support his wife; the amount necessary therefor being thereby judicially determined. The parties, being able to contract, had, however, at all times a legal right to determine for themselves the amount to be paid for such support. Such an agreement having been made, it is binding until set aside by a court of competent jurisdiction. *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453; *Winter v. Winter*, 191 N. Y. 462, 84 N. E. 382, 16 L. R. A. (N. S.) 710; *Benesch v. Benesch*, 182 App. Div. 221, 169 N. Y. Supp. 561; *Cain v. Cain*, 188 App. Div. 780, 177 N. Y. Supp. 178; *Van Ness v. Ransom*, 164 App. Div. 483, 150 N. Y. Supp. 251; affirmed *Parsons v. Macfarlane*, 220 N. Y. 605, 115 N. E. 1046. In the last-mentioned case the agreement was made one day after a decree of absolute divorce was entered. In the agreement the husband agreed to pay a certain sum in lieu of the provisions of the decree. Years later the plaintiff endeavored to recover under the decree, and the court held that the agreement had been substituted therefor, even though all sums mentioned in the agreement had not been paid.

Certainly a party has the right to satisfy a judgment or to release or waive rights under a decree. This the plaintiff has done by two written instruments, neither of which has been set aside by any court of competent jurisdiction. Agreements between husband and wife for the support of the latter have always been enforced. As was

said respecting such an agreement in *Beebe v. Beebe*, 174 App. Div. 408, 160 N. Y. Supp. 967, cited with approval by Mr. Justice Clarke in *Benesch v. Benesch*, supra:

"The plaintiff had her choice of the judgment of the court or agreement. She preferred the latter, and, quite competent to contract, made an agreement that for fairness is not justly attacked."

Such agreements have never been held to be against public policy. The courts should encourage, rather than discourage, amicable agreements between the parties after separation. If the plaintiff wishes to avoid her agreement, she should proceed by action to set the same aside, and if she can show that the contract was procured by fraud, duress, or undue influence, or that the same is against public policy, or for any other reason should not be upheld, she will be entitled to succeed. *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453; *Hungerford v. Hungerford*, 161 N. Y. 550, 56 N. E. 117, and other cases above cited. She cannot, however, admit making the agreement and in disregard thereof proceed by motion under the decree.

The motion to punish defendant for contempt for failure to obey the decree was properly denied, and the order appealed from should be affirmed, with costs.

CLARKE, P. J., concurs.

(189 App. Div. 196)

JOHNSON v. MAY.

(Supreme Court, Appellate Division, Second Department. November 7, 1919.)

1. FALSE IMPRISONMENT § 13—TRESPASS AS PROBABLE CAUSE FOR ARREST.

If plaintiff and companions had trespassed upon defendant's land, erected tent thereon, and refused to move at defendant's request, without reason or explanation, there was *prima facie* reason and probable cause for their arrest, in view of Penal Law, § 2086.

2. FALSE IMPRISONMENT § 13—PROBABLE CAUSE.

Probable cause does not depend upon guilt or innocence of party arrested.

3. ARREST § 64—BY OWNER OF PREMISES TRESPASSED UPON.

If one trespasses upon land, erects structure thereon without owner's consent, and refuses to leave, all in owner's presence, owner himself has a right to arrest trespasser, under Code Cr. Proc. § 183.

4. ARREST § 63(3)—BY POLICE OFFICER OF TRESPASSER.

Under Code Cr. Proc. § 177, police officer had a right to arrest one who was actually trespassing upon another's land.

5. NAVIGABLE WATERS § 36(3)—RIGHT OF PUBLIC ON FORESHORE.

Public's right upon land between high and low water mark is to pass and repass when the tide is out, and to sail and fish over the foreshore when the tide is in, and to make such other reasonable use of foreshore as may be consistent with the rights of others using beach for legitimate purposes.

6. NAVIGABLE WATERS § 39(3)—RIPARIAN RIGHTS IN FORESHORE.

Riparian owner has certain rights in the foreshore in front of his premises, entirely apart from his rights and privileges as one of the

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

public resorting to the beach, one of which is that of access to and from the sea.

7. TRIAL $\Leftrightarrow$ 253(3)—INSTRUCTION AS TO TRESPASS ON SEASHORE IGNORING ISSUE OF RIPARIAN RIGHTS.

In action for false imprisonment and malicious prosecution against defendant, owner of public bathing establishment on seashore, who had caused plaintiff's arrest for trespassing upon and erecting tent on land in front of defendant's bathhouse, instruction that plaintiff had a right to erect and maintain tent against defendant's protest, which instruction lost sight of defendant's paramount right, as riparian owner, of access to and from sea *held* erroneous.

Appeal from Trial Term, Richmond County.

Action by Delinda Johnson against Ivar May. From a judgment for plaintiff upon the verdict of a jury for \$500, and from order denying a motion for a new trial, defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and MILLS, RICH, KELLY, and JAYCOX, JJ.

Joseph V. Mitchell, of New York City, for appellant.

Joseph B. Handy, of Stapleton, for respondent.

KELLY, J. The complaint contains two causes of action; the first for an alleged false imprisonment of the plaintiff by defendant on August 6, 1918, and the second for malicious prosecution based upon the same transaction. It appears that the defendant is the owner of certain premises in the city of New York, at South Beach, Staten Island, on the shore of the lower bay; his title extending to high-water mark. There is no survey or map printed with the papers. The defendant's title deed apparently conveyed to him the fee down to high-water mark, with all the rights of his grantor in the land below or outside high-water mark. There is a reference in one of his deeds to a grant of land under water from the people of the state of New York to one McRoberts, and it is recited that the property was conveyed to defendant by persons named McRoberts; but whether defendant had any record title to the land fronting his premises below high-water mark is not disclosed upon the record here. His property has a frontage of 638 feet on the shore, and is occupied by a hotel, dance hall, bathhouses, and a number of summer cottages.

On the day in question the plaintiff, who resided in a bungalow in the neighborhood, but not on defendant's land, went to the beach with a woman friend and three children. They erected a shelter or tent, by driving posts into the sand, to which they fastened umbrellas, and between the umbrellas spread a blanket. The two ladies and the children were in bathing suits, it was a warm summer day, and their purpose in locating where they did was to go in bathing and to camp out under the shelter. There was a conflict between the parties as to the location of the structure or shelter; the defendant claiming that the plaintiff and her companions went on his upland and some 70 feet inside the high-water mark, while the plaintiff's evidence was that she was between high and low water mark. There was no dis-

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

pute, however, that they were in front of the buildings, boardwalk, and bathhouses erected on defendant's premises, and on a line between the bathing posts from which lines ran out into the water, maintained by the defendant for the use of his patrons.

The plaintiff testifies that at about half past 10 in the morning the defendant came up to her and objected to her erecting her shelter or tent, telling her she must move down to some other location. She refused, and defendant asked her if she wanted him to call an officer, to which she replied: "Yes, if you get an officer and tell us to move, we will move." The defendant walked away, but came back a second time and threatened plaintiff with arrest, to which she replied that, "if I was arrested this time, it would be the first time that I ever had been arrested, but that I couldn't say so much for him." The defendant came back a third time, and plaintiff says he demanded "in the name of the law" that she go with him to the police station. Plaintiff refused unless a police officer took her, and defendant went away, returning for the fourth time with a policeman who put her under arrest and took her to the station house. The policeman asked what the charge was, and defendant said that the party refused to move from his premises. She says "that was the only charge that he made against me, that I refused to move from the premises."

Plaintiff and her party were taken to the bungalow, where she changed her clothing, and from there to the police station. From the police station they were taken to the Magistrate's Court, where she says, she was charged with disorderly conduct. The complaint or information is not in the record. The policeman, called as a witness for plaintiff, said that the defendant complained to him that the parties had erected a tent in front of his place and that they had used abusive language and struck his wife with an umbrella. He further testified that he accompanied May to the tent, and plaintiff said that "May came up and ordered us away from the beach, and we told him that we wouldn't move away, until he got an officer and he would tell us to move," and plaintiff said that defendant had put them under arrest in the name of the law. The officer says that—

"He asked defendant if he had placed the two women under arrest; he said, 'Yes;' I said, 'What do you want me to do?' 'I want you to take them to the station house.' 'All right.'"

The defendant, examined as a witness on his own behalf, testified that he complained to the magistrate that plaintiff was on his property and refused to move, exhibiting his deed. The plaintiff says that at the hearing in the Magistrate's Court the case was dismissed, and that the magistrate did not call her to the stand. The proceedings before the magistrate are not in the record.

The learned trial judge charged the jury that, if the plaintiff and her companions were above high-water mark, they were on defendant's premises, and he had a right to eject them, using force, if necessary. He instructed them that, if plaintiff was a trespasser upon defendant's property, she was guilty of a misdemeanor, and if the crime was committed in presence of the defendant or the police officer the arrest was lawful. But he said to them that the plaintiff contended

that she was at a point on the beach between high and low water mark, and continued:

"If that be the fact, as established by the testimony, then the defendant would have no greater rights or any greater privileges at the point where this took place than would the plaintiff. The rights of the plaintiff and defendant would be equal at any point on the beach front between high and low water mark. All have equal rights on the beach front between high and low water mark. The public own the land between high and low water mark, and their rights cannot be alienated. So, if she was between high and low water mark with her umbrella, her blanket, and the other things that were there, she had just as much right to be there as did Mr. May, and Mr. May had no right to put her off of those premises. Her rights were equal to his, and any one of you would have the same rights as any other person on the beach front between high and low water mark."

Later on the learned trial judge said to the jury:

"The plaintiff contends the property on which she was arrested was the land between high and low water mark; if she has established that, she had a right to be there, and she had the right to pass and repass, as did any other person at that point."

At the close of the charge, the counsel for plaintiff requested the court to charge as follows:

"May I ask your honor to charge that, if the jury finds that the plaintiff was upon the foreland above high-water mark to which the defendant had title as owner in fee, even if she was there without his permission, the mere fact that she refused to move off did not give the defendant the right to arrest her on the charge of disorderly conduct; that, being a trespass in violation of law, must be with criminal intent.

"The Court: I decline to so charge.

"Mr. Handy: I will strike out the last part and leave it as it was—strike out about the trespass in violation of law, and leave it as it was, your honor, and ask your honor to charge that way.

"The Court: I so charge.

"Mr. Mitchell: I except to that, if your honor please, and call your attention to the fact that your honor has already charged from the Penal Code, § 2036. It simply says a person who intrudes upon any lot or piece of land without authority from the owner—makes it a misdemeanor.

"Mr. Handy: *Hewitt v. Newburger*, 141 N. Y. 538 [36 N. E. 593], and *People v. Stevens*, 109 N. Y. 159 [16 N. E. 53], holds it must be with criminal intent.

"The Court: I charge as you request.

"Mr. Mitchell: I will take an exception."

It will be perceived that the net result of the charge of the learned trial judge was practically the direction of a verdict for the plaintiff, because he had already instructed them that, if the plaintiff was between high and low water mark, the defendant had no right to interfere with her, and in granting this last request he told the jury that, even though she was on the land owned by defendant in fee without his permission, and refused to move off, still he had no right to arrest her. This was directly contrary to his previous instruction that if plaintiff was on the premises of the defendant he had the right to eject her, using force, if necessary, and that if plaintiff and her companions were committing any act that could be construed as disorderly conduct, tending to a breach of the peace, he had a right to cause that arrest. He had already instructed them:

"If the plaintiff was arrested while trespassing upon the property of the defendant, and she refused to leave the property when requested so to do, not only by the defendant, but by the officer, the defendant is not responsible."

✓ Penal Law (Consol. Laws, c. 40) § 2036, is as follows:

"Unlawful Intrusion on Real Property.—A person who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever without such authority; and a person who places, erects, or occupies within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor."

[1, 2] If the plaintiff and her companions were trespassing upon defendant's land, having erected thereon a tent supported by posts driven into the ground, and refused to move off at his request, without reason or explanation, it would seem that this was prima facie reason and probable cause for their arrest. Probable cause, as we know, does not depend upon the guilt or innocence of the party arrested.

The case of *Hewitt v. Newburger*, 141 N. Y. 538, 36 N. E. 593, citing *People v. Stevens*, 109 N. Y. 159, 16 N. E. 53, was a case where the plaintiff was charged under the Code of Criminal Procedure (part 2, tit. 2, c. 2, § 84) with threatening to commit a crime against the person and property of another; the crime alleged to have been threatened being found in Pen. Code, §§ 639-654 (now Penal Law, § 1423), and generally described as "malicious mischief." The information filed against the party accused in that case omitted any statement that the threat was willful, malicious, or unlawful, and it was held that it was defective and afforded no warrant for the issuance of a warrant. In the case at bar the plaintiff was not accused of threatening to trespass; the charge was that she was upon defendant's land and refused to leave it.

People v. Stevens, 109 N. Y. 159, 16 N. E. 53, was a case of indictment of the defendant for unlawful intrusion on property, and the Court of Appeals reversed a judgment of the General Term of the Superior Court of Buffalo and affirmed the conviction of the defendant. The Court of Appeals said in that case that intent was a material element of the offense, and if the accused acted under a bona fide mistaken belief that he was placing a boundary fence on the line between his property and his neighbor he was not subject to criminal punishment. But the Court of Appeals reversed the General Term and affirmed the conviction, because, as they say, there was no colorable ground for any claim that the accused had any right or authority to enter upon the premises. X

[3, 4] In the case at bar, the learned trial judge, at request of counsel for respondent, told the jury that, assuming plaintiff was in fact trespassing on defendant's land, and refused to leave it without explanation or adverse claim of any kind, still defendant had no right to cause her arrest. In this we think the learned trial judge erred. If the plaintiff was in fact trespassing on defendant's land, and had erected a structure thereon without his consent, refusing to leave,

and all this in defendant's presence, he had a right to arrest her himself (Code Cr. Proc. § 183), and, assuming that she was actually trespassing, as the request to charge assumed, the police officer had a right to arrest her (Code Cr. Proc. § 177).

At the close of the charge the counsel for the defendant appellant excepted to the court's definition of the relative rights of plaintiff and defendant between high and low water mark:

"In view of the deeds in question, the defendant contends the right not only to high and low water mark, but also under common law, that the plaintiff had simply the right to pass and repass, without any other rights on it."

And defendant also excepted to the submission to the jury of the question of false imprisonment and malicious prosecution. Motions to dismiss the complaint were made at the close of plaintiff's case and again at the close of the entire case, and denied; the defendant excepting. The learned trial judge charged the jury that below high-water mark upon the shore the rights of the plaintiff and defendant were equal, and that all have equal rights on the beach front. He said to the jury:

"So, if she was between high and low water mark with her umbrella, her blanket, and the other things that were there, she had just as much right to be there as did Mr. May, and Mr. May had no right to put her off those premises."

[5] But there is grave doubt whether the plaintiff, or Mr. May, or any one else, had a right, as matter of law, to erect a tent or structure of this description on the foreshore, blocking the passage of the public along the beach. The public right is to pass and repass when the tide is out, and to sail and fish over the foreshore when the tide is in, and to make such other reasonable use of the foreshore as may be consistent with the rights of others. We doubt whether it can be said as matter of law that the erection and maintenance of a tent or structure like the plaintiff's was a reasonable use of the foreshore. We know that the beaches about New York are resorted to in the summer months by multitudes of people, who go there for pleasure and recreation and to bathe in the sea. It may be that at many points on the foreshore the plaintiff's tent, supported upon posts occupying a space said to be 5 feet by 10 feet, would not be an unreasonable or unlawful use of a public way. We would hesitate to decide the question as matter of law. To say as matter of law that such structures are lawful, and that the plaintiff or any one else had the right to erect and maintain them, seems to go too far. It depends on the surrounding conditions whether the structure is an unreasonable use of the beach at the particular point in question, and whether it interferes with the rights of the other members of the body politic using the beach for legitimate purposes.

[6] But to say that the rights of the plaintiff and defendant in the foreshore were equal loses sight of the fact that he was, in any event, the littoral or riparian owner, and had certain rights in the foreshore in front of his premises, entirely apart from his rights and privileges as one of the public resorting to the beach. *Town of Brookhaven v.*

Smith, 188 N. Y. 74, 80 N. E. 665, 9 L. R. A. (N. S.) 326; Barnes v. Midland R. R. Terminal Co., 193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962; Id., 218 N. Y. 91, 112 N. E. 926. One of the most important rights of the riparian owner is that of access to and from the sea. It is a right possessed by him, incident to his ownership of the upland, without reference to whether he has any grant of land under water from the state. The evidence in the case at bar shows that the defendant had erected and maintained a public bathing establishment on his upland. He employed a life saver to look after the bathers, whose duty it was to watch them, and go into the water to assist them in case of accident. It was this particular location, in front of the defendant's bathhouse, that the plaintiff selected to erect her tent. The Court of Appeals, through Werner, J., said in the Barnes Case, supra, which referred to the use of part of this same South Beach, after declaring the right of the upland owner to access to and from the water:

"To the extent that the reasonable exercise of this right necessarily interfered with the right of the public to pass along the foreshore, the former was paramount and the latter was subordinate."

[7] The evidence of the plaintiff is that defendant requested her to "move down"; that is, to move her tent to some other place. We think that the charge of the learned trial judge as to the relative rights of the plaintiff and defendant on the foreshore, emphasized as it was, lost sight of the paramount right of access in the defendant as riparian or littoral owner, and that it was error to instruct the jury as matter of law that plaintiff had a right to erect and maintain her structure against the defendant's protest. For the reasons stated, we are constrained to reverse the judgment.

Judgment and order reversed, and new trial granted, with costs to abide the event. All concur.

WELCH v. TRAVELERS' INS. CO.

(Supreme Court, Trial Term, Erie County. October, 1919.)

1. INSURANCE § 624(5)—NECESSARY PARTIES TO ACTION BY ADMINISTRATOR ON LIFE POLICY.

Where administrator brought action against beneficiary in a policy on deceased's life, to substitute the estate of deceased as beneficiary, the beneficiary having murdered the deceased, and it was adjudged administrator was entitled to such relief, such beneficiary was not a necessary party in an action by the administrator against the insurer to recover the amount of the policy.

2. INSURANCE § 114, 265—STATEMENTS IN APPLICATION AS TO RELATIONSHIP OF BENEFICIARY IMMATERIAL TO RISK.

An insured, taking out insurance on his own life, may designate any person as beneficiary, regardless of the relationship between him and the beneficiary, and whether or not the beneficiary has an insurable interest in insured's life; so that a statement in an application by one taking out insurance on his own life, to the effect that beneficiary was a cousin of insured, was not material to the risk, and was but a representation, and not a warranty, under Insurance Law, § 58.

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. INSURANCE ¶448—LIFE INSURANCE; MURDER OF INSURED BY BENEFICIARY.

Where life insurance policy permitted assignment or surrender without consent of beneficiary, and provided that payment was to be made to the beneficiary in case he survived insured, "otherwise to the estate of the insured," and the policy was taken out at the instance of insured himself, the insurance should not become forfeited, but should be paid to insured's estate where the beneficiary disqualified himself by murdering the insured.

4. INSURANCE ¶542—SERVICE OF COMPLAINT IN ACTION ON LIFE POLICY AS NOTICE OF DEATH.

Service of complaint by administrator of insured upon the insurer in an action against the beneficiary to have the policy reformed constituted written proof of death, although no judgment was asked against the insurer, especially where insurer refused to furnish printed blanks for such purpose.

5. INSURANCE ¶560(1)—WAIVER OF WRITTEN PROOF OF DEATH.

An insurance company waived the defense that there was no written proof of death, where it failed to assert it in an action by administrator of insured against the beneficiary, who had murdered the insured, to reform the policy by substituting the estate of insured as beneficiary, although insurer was not a party, for the purpose of obtaining a personal judgment against it.

6. INSURANCE ¶646(6)—BURDEN OF PROOF OF DEATH IN QUARREL ON INSURER.

In action on life policy, burden was upon insurer to establish its defense that insured was killed while quarreling or fighting, within the meaning of the policy.

7. INSURANCE ¶428—EVIDENCE INSUFFICIENT TO SHOW DEATH OF INSURED WHILE QUARRELING OR FIGHTING.

Whether or not a provision as to quarreling or fighting applies to case of fatal injury to insured, yet where it clearly appears that the "quarreling" was all done by the person who killed insured, and was not provoked or participated in by insured, and the killing was an unprovoked, unwarranted criminal homicide, no defense is established under this policy provision.

8. INSURANCE ¶598—INTEREST RECOVERABLE ON LIFE INSURANCE POLICY AFTER NINETY DAYS.

Under a life insurance policy, where the amount of the policy was to be paid 90 days after notice of death, interest should be charged from 90 days after service of a verified complaint upon the insurer in an equity action against the beneficiary to have the policy reformed, to substitute the estate of the insured as beneficiary; named beneficiary having murdered insured.

Action by Thomas Welch, as administrator of the estate of John E. Welch, deceased, against the Travelers' Insurance Company. Verdict directed for plaintiff.

Charles Oishei, of Buffalo, for plaintiff.

Clinton B. Gibbs, of Buffalo, for defendant.

COLE, J. This case was tried before the court with a jury, and at the close of the evidence each party moved for direction of a verdict; each agreeing that there was no question of fact for the jury, but that the case presented a question of law solely. It was stipulated that the jury might be discharged, and that the court might take such time as it found necessary to dispose of the case, and that, when disposed of, the direction as made be entered upon the minutes, and an exception be

noted by the unsuccessful party. The facts are, briefly stated, as follows:

On or about May 28, 1915, the deceased applied to the defendant for insurance upon his own life in the sum of \$2,000, naming in the application one Frank Harlander as beneficiary, and stating therein that the said Harlander was a cousin. Harlander was in fact in no way related to the insured, although they were and had been for several years intimate personal friends. A policy in said sum was accordingly issued. All premium payments were kept up by the insured. On or about the 3d day of October, 1916, Harlander feloniously shot the deceased, inflicting a mortal wound, from which he died on October 5, 1916, and said Harlander was convicted and sent to Auburn Prison therefor, where he is now confined. On October 6, 1916, the plaintiff was duly appointed administrator of the estate of the deceased, and at once called with his attorney upon the local agent of the defendant, at Buffalo, and asked for blank proofs of death, and was referred to the adjuster of the company, who also resided at Buffalo, upon whom they then called, and notified him of the fact of the killing of the insured by Harlander, and of the circumstances thereof, and asked him for such blanks, and they were refused, and were told that notice of death might be given to the New York state superintendent of insurance.

On the 12th day of October, 1916, the plaintiff as such administrator began an action in equity in the Supreme Court against this defendant and Harlander, serving at the time a copy of the complaint on the defendant herein, asking that the policy be reformed by striking therefrom the name of said Frank Harlander and inserting instead thereof, as the party to whom the insurance be paid, "the estate of John E. Welch, deceased." The complaint in said action set forth fully the fact of death and the circumstances thereof, and that Harlander feloniously shot and killed the insured. Harlander did not answer in said action, but this defendant did, asking affirmative relief that the policy be adjudged void and of no binding effect on this defendant. The complaint therein stated specifically that no personal judgment was sought against this defendant, except that it be required to conform to the orders of the court as against said Harlander. On October 31, 1917, judgment by default was taken and entered, by which it was adjudged that the plaintiff was entitled to the relief demanded, and that on service of a certified copy of the judgment on this defendant it modify or correct the policy, by striking therefrom the name of Frank Harlander, and by inserting in place thereof "the estate of John E. Welch, deceased."

Thereafter, and on November 14, 1917, on the application of this defendant, the judgment as to it (but not as to Harlander) was vacated and the default opened. In the meantime, and after judgment was entered as aforesaid as against Harlander, this action was begun. The issues in the equity action between the plaintiff and this defendant were thereafter, to wit, on January 23, 1918, brought on and tried, and on March 12, 1918, judgment was entered whereby it was found and adjudged "that the plaintiff is entitled to the judgment of this court that

the issues in said action so commenced by the service of a summons and complaint upon the Travelers' Insurance Company, as sole defendant, on the 31st day of October, 1917, be tried by jury; that the defense of the defendant the Travelers' Insurance Company, in this action, be dismissed."

An appeal was taken by this defendant from the said judgment to the Appellate Division, Fourth Department, and on January 22, 1919, the judgment of the appellate court was entered, by which it was ordered:

"That the appeal taken from said order [the order denying a new trial] be and the same is hereby dismissed, without costs, and that the judgment so appealed from be and the same hereby is reversed, with costs, and the complaint dismissed as to the appellant, without costs.

"Per Curiam. We are of the opinion that no cause of action is alleged or proved against the appellant; but as the plaintiff's counsel disclaimed any personal judgment against appellant, and the affirmative answer and counterclaim are likewise not available to appellant in this action, the reversal of the judgment and dismissal of the complaint should be without costs to either party."

187 App. Div. 918, 174 N. Y. Supp. 925.

I have reached the conclusion that a verdict should be directed in plaintiff's favor, and my reasons therefor are as follows:

[1] 1. Although no judgment was rendered against this defendant in the former action, yet the judgment against Harlander stands. He is foreclosed from maintaining an action by the provisions of that judgment, and the defendant is amply protected thereby. He is clearly not a necessary party to this action, and his presence is not necessary as a protection to the defendant. *Christman v. Thatcher*, 48 Hun, 446, 1 N. Y. Supp. 451; *Jewett v. Schmidt*, 45 Misc. Rep. 37, 90 N. Y. Supp. 848.

[2] 2. The statement in the application that Harlander was a cousin of the insured was not material to the risk. The application was not made by Harlander, but by the deceased for insurance on his own life, and he had a right to designate any person as beneficiary, regardless of the relationship between him and such beneficiary, and whether or not such beneficiary had an insurable interest in the life of said insured. *Olmsted v. Keyes*, 85 N. Y. 598; *Reed v. Provident Ins. Co.*, 190 N. Y. 118, 82 N. E. 734; *Simon v. O'Brien*, 87 Hun, 160, 33 N. Y. Supp. 815; *Moore v. Prudential Ins. Co.*, 170 App. Div. 853, 156 N. Y. Supp. 892. With regard to such a policy, the statement that Harlander was his cousin was at the most a representation, and immaterial, and not a warranty. *Moore v. Prudential Ins. Co.*, 170 App. Div. 853, 156 N. Y. Supp. 892; *Ruoff v. John Hancock Co.*, 86 App. Div. 448, 83 N. Y. Supp. 758; section 58, Insurance Law (Consol. Laws, c. 28).

[3] 3. The primary purpose of the insured in effecting insurance and in keeping up the premiums was to insure his life. The policy itself permitted assignment or surrender without the consent of the beneficiary. It also provided for the payment to such beneficiary in case he survived the insured; "otherwise, to the estate of the insured." Under such a policy, taken out at the instance of the insured himself, I think it must be held that, when the beneficiary by his own act dis-

qualified himself from taking, the insurance, which both insurer and insured contemplated should be paid to some one, should not become forfeited, but should be paid to the legal representative (the plaintiff in this case). *Walsh v. Mutual Ins. Co.*, 133 N. Y. 409-419, 31 N. E. 228, 28 Am. St. Rep. 651; *Wokal v. Belsky*, 53 App. Div. 167-170, 65 N. Y. Supp. 815.

[4, 5] 4. The service of the complaint in the equity action constituted sufficient written proof of death, and especially in view of the fact that the defendant failed to furnish printed blanks for such purpose. *Johnson v. Roach*, 83 App. Div. 357, 82 N. Y. Supp. 203; *Walsh v. Washington Ins. Co.*, 32 N. Y. 427-442. I think, also, that the defendant waived this defense by failing to assert it in the former action. *Carleton v. Lombard*, 149 N. Y. 151, 43 N. E. 422; *Dobson v. Hartford Ins. Co.*, 86 App. Div. 120, 83 N. Y. Supp. 456; *Miles v. Casualty Co. (Sup.)* 115 N. Y. Supp. 3, affirmed 136 App. Div. 908, 120 N. Y. Supp. 1135.

[6] 5. The burden was upon the defendant to establish its defense that the insured was killed while quarreling or fighting, within the meaning of the policy. *Cluff v. Mutual Ins. Co.*, 13 Allen (Mass.) 307.

[7] (a) It is very doubtful if this provision of the policy is applicable to the case of a fatal injury. *American Accident Co. v. Carson*, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301, 59 Am. St. Rep. 473.

(b) In any event, the proof clearly shows that the "quarreling" was all done by Harlander, and was in no way provoked or participated in by the insured. It was an unprovoked, unwarranted criminal homicide. This defense is not established. *Coles v. N. Y. Casualty Co.*, 87 App. Div. 44, 83 N. Y. Supp. 1063; *Jones v. Accident Ass'n*, 92 Iowa, 655, 61 N. W. 485.

[8] The amount became due in 90 days after notice of death, which I think must be held to be 90 days from October 12, 1916, when the verified complaint in the equity action was served to wit, January 10, 1917. A verdict is directed for the plaintiff against the defendant for the sum of \$2,000, with interest thereon from January 10, 1917, to the date of the trial of this action.

(189 App. Div. 467)

HUMISTON v. UNIVERSAL FILM MFG. CO. et al.

(Supreme Court, Appellate Division, First Department. November 21, 1919.)

1. INJUNCTION ¶96—RIGHT TO USE PRIVATE PERSON'S NAME AND PICTURE IN NEWS FILMS; "TRADE."

Although the publication of moving pictures is a trade, it is not such a "trade" as was within the contemplation of the Legislature in the passage of Civil Rights Law, §§ 50, 51, and such statute does not prohibit the publication of a person's picture or name without his consent in a single set of films of actual events used at one time for distribution in different parts of the country before different audiences as a matter of current news.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trade.]

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. INJUNCTION ~~¶~~102—CRIMINAL STATUTES GIVING RIGHT TO INJUNCTION AND DAMAGES STRICTLY CONSTRUED.

When a right to an injunction and to damages given by statute is based on an act made criminal by the same statute, the law of strict construction should lead the court to interpret the act in favor of the party charged with crime, in an action to enjoin and for damages.

3. INJUNCTION ~~¶~~96—RIGHT TO USE PERSON'S NAME AND PICTURE IN PICTURE ADVERTISING NEWS FILM.

Civil Rights Law, §§ 50, 51, do not prohibit the use upon the billboards in front of a theater of the pictures and names of persons appearing in motion pictures of actual events without their consent.

Clarke, P. J., and Dowling, J., dissenting in part.

Appeal from Trial Term, New York County.

Action by Grace Humiston against the Universal Film Manufacturing Company and the Universal Film Exchange of New York, Incorporated. From an interlocutory judgment, granting an injunction and directing an assessment of damages by a jury at the plaintiff's request as a matter of right, the defendants appeal. Judgment reversed, and complaint dismissed.

See, also, 101 Misc. Rep. 3, 167 N. Y. Supp. 98; affirmed 182 App. Div. 882, 168 N. Y. Supp. 1112.

Argued before CLARKE, P. J., and LAUGHLIN, DOWLING, SMITH, and MERRELL, JJ.

Stanchfield & Levy, of New York City (Siegfried F. Hartman, of New York City, of counsel, and John B. Stanchfield, of New York City, on the brief), for appellant Universal Film Mfg. Co.

Siegfried F. Hartman, of New York City, for appellant Universal Film Exchange of New York, Inc.

Edward K. Sumerwell, of New York City, for respondent.

SMITH, J. The action is brought under sections 50 and 51 of the Civil Rights Law (Consol. Laws, c. 6), prohibiting the use of a person's name or picture, without his written consent "for advertising purposes or for the purposes of trade." The acts enjoined by the judgment appealed from are, first, the presentation of the plaintiff's name and picture as news in a motion picture film depicting current events; and, second, the publication of the plaintiff's name and picture on certain posters used to announce the subjects of current interest exhibited by the film. The court below found the publication of the plaintiff's name and picture in the motion picture film to be a use "for purposes of trade," but also found that it was not a use "for advertising purposes." On the other hand, the court found that the publication of the plaintiff's name and picture in the posters was a use both for advertising purposes and for purposes of trade. In its decision the court made the following findings:

I. The pictures of the plaintiff complained of were presented in a current number of a weekly film review of current events, known as "Universal Animated Weekly" and "Universal Current Events," being a "series of reels of films * * * presenting subjects of news interest."

II. The pictures of events contained in these news reels "are pictures taken on the spot at the time of the occurrence of the event depicted," and "are not reproductions or re-enactments of the events depicted."

III. The news films "contain no advertising matter" and "are not used by
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the defendant * * * to advertise or exploit other pictures produced by it"; their production being "an independent enterprise," "not related in any way to the production of other pictures by the defendant."

IV. The pictures complained of had to do with the plaintiff's solution of a famous murder mystery, a current event of great news interest, which was prominently featured by the public press in the news of the day.

V. The pictures were published by the defendants at the same time that the plaintiff's name and picture were prominently featured in the public press and her work widely commented on and discussed.

VI. The pictures relating to this murder mystery constituted one of ten subjects of current news interest, all presented with equal prominence in the same current number of "Animated Weekly."

VII. The pictures of the plaintiff were actual photographs, showing her seated in an automobile with a member of the New York police department, and were taken while the plaintiff was actually engaged in her work on the murder mystery.

VIII. Accompanying the pictures of the plaintiff were photographs of scenes and persons connected with the murder mystery.

IX. The pictures of and the references to the plaintiff truthfully depicted facts connected with the murder mystery.

X. The pictures of the plaintiff as exhibited through this film "were incidental to the presentation of a current event in motion picture form."

The court further held that the plaintiff was entitled under the act to the trial of her damages before a jury as a matter of right.

The defendant Universal Film Manufacturing Company is one of five companies engaged in the business of producing motion picture films of current events and news items. The films produced by this defendant, containing such pictures of current events, are entitled "Universal Animated Weekly" and "Universal Current Events." Each week the defendant publishes and distributes one number or issue of the "Animated Weekly" and one number or issue of the "Current Events." Each number or issue is comprised in a reel or film approximately 1,000 feet in length, presenting from 10 to 15 subjects, each a matter of current news. For the production of these news reels the defendant maintains a large organization devoted exclusively to the gathering and editing of news items in motion picture form. The photographs which are presented are taken by a corps of motion picture photographers or "reporters" stationed at various parts of the country. Each of these correspondents has a camera, and when a news event occurs or is about to occur in the territory assigned to him, he photographs the event and forwards the negative to the main office of the defendant in New York. There are thus submitted each week to the defendant, for inclusion in the two weekly reels of news films, many times more than the 2,000 feet of negative required, so that it is necessary to cull out of the great quantity of pictures submitted 2,000 feet of the most important material. From the negatives thus submitted the selection is made by men of newspaper experience, who also compose the captions or explanatory reading matter which preface the presentation of the successive subjects portrayed.

The defendant's news service is shown in motion picture theaters, schools, churches, cantonments, vessels of the navy—in fact, wherever there are motion picture machines. The news reels are utilized by the government of the United States and by municipal governments for

purposes of public good. They have been used for the promoting of the Liberty Loans, and by the Food Administrator, and by the Fuel Administrator, by the Secretary of War and the Secretary of the Navy for recruiting for the Army and Navy, and by the board of health of the city of New York to prevent the spread of Spanish influenza. These are all found as facts by the court below.

The Universal Film Exchange is another corporation through which the picture films made by the Universal Film Manufacturing Company are distributed to the trade.

There is a clear distinction between a news reel and a motion picture photoplay. A photoplay is inherently a work of fiction. A news reel contains no fiction, but shows only actual photographs of current events of public interest. The news reel is taken on the spot, at the very moment of the occurrence depicted, and is an actual photograph of the event itself. The photoplay, as the result of fiction, retains its interest, irrespective of the length of time which has elapsed since its first production; whereas, a news reel, to be of any value in large cities, must be published almost simultaneously with the occurrence of the events which it portrays. This news service, as far as it goes, is a truthful, accurate purveyor of news, quite as strictly so as a newspaper. While a newspaper account conveys the news almost entirely by words, the news service conveys the same by photographs, with incidental verbal explanation.

This action is brought by this plaintiff, who is a lawyer in the city of New York, to enjoin the publication of a film and for damages claimed to have been suffered by its publication. This film represented her as she was engaged in legal work connected with the solution of the mystery of the disappearance of Ruth Cruger. The body of this girl was, through the efforts of this plaintiff, discovered buried under the floor in the back room of the shop of an Italian in the city of New York. The police had been searching diligently to unravel the mystery of the absence of Ruth Cruger, and it was not until this plaintiff took charge of the matter and insisted upon excavating under the shop of this Italian that the body was discovered. The daily papers, all of them, displayed prominently the fact of this discovery, and the name and picture of the plaintiff as the one through whose persistence and intelligence the discovery had been made. Facts in connection with this discovery were pictured by the reporters of the defendant manufacturing company, and among other things was the picture of the plaintiff in an automobile with a captain of police, while she was actually engaged in the matter. This picture was a truthful picture taken of a current event at the time that it happened. The trial court has held that it was unlawfully published, without the written consent of the plaintiff, under sections 50 and 51 of the Civil Rights Law, and this presents the first question for our consideration.

Section 50 provides as follows:

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

Section 51 gives to a person whose name, portrait, or picture is used within the state for advertising purposes, or for the purpose of trade, without the written consent first obtained, an equitable action to prevent and restrain the use thereof and he—

“may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages.”

Now, this law was passed in 1903. It was passed after a decision by the Court of Appeals in 1902, in the case of *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828, which held that there was no right of privacy, and further held:

“An injunction cannot be granted to restrain the unauthorized publication and distribution of lithographic prints, or copies, of a photograph of a young woman as part of an advertisement of a legitimate manufactured article, where there is no allegation that the picture is libelous in any respect, but, on the contrary, the gravamen of the complaint is that the likeness is so good that it is easily recognized, and that it has been and is used to attract attention to the advertisement upon which it is placed, although the publication has caused her great mental and physical distress, necessitating the employment and attendance of a physician.”

In view of the passage of this act at the next session of the Legislature after this decision was handed down by the Court of Appeals, it thus appears what was the primary object of the Legislature in passing this act. At that time the moving picture industry had not been developed. There was no such thing as the publication of current news items by moving picture films, so that it is clear that the Legislature did not have this class of publication in mind at the time of the passage of the law.

[1] It cannot be contended that the publication of moving pictures is not a trade. But we think it is not such trade as was within the contemplation of the Legislature in the passage of the act. They are published for profit, as a newspaper is published for profit. Their profit depends upon their ability to present accurate and interesting news, as well as the photoplays of fiction. It is precisely the same with a newspaper. That the publication of moving pictures is a publication made in trade is held in the case of *Binns v. Vitagraph Co. of America*, 210 N. Y. 51, 103 N. E. 1108, L. R. A. 1915C, 839, Ann. Cas. 1915B, 1024. It does not necessarily follow, however, that the statute was meant to apply to all publications, even for the purposes of trade. To determine whether the publication complained of was within the statute, the whole statute must be considered, both in its origin and in its effect. The presumable motive for its enactment has been indicated as shown in the *Roberson Case* cited. The effect of the statute, interpreted as it has been interpreted by the trial court, is very far-reaching and even startling. Not only is the publication of a portrait or picture without the written consent of the party made a misdemeanor, but the publication of the name of a party without written permission is made a misdemeanor. The exhibition of a motion picture of a public parade

would, under the trial court's interpretation, subject the defendant to prosecution for crime. The exhibition of a motion picture showing a game of baseball, or a game of football, would, under the trial court's interpretation of the statute be a crime, unless with the written consent of every person either among the players or among the spectators shown upon the film whose likeness was distinguishable. The question is not whether any one, whose picture or name is represented, may feel aggrieved; but the commission of a misdemeanor is a matter of public concern, and the party guilty may be prosecuted upon the complaint of any person, whether aggrieved or not.

Waiving for the moment the question of constitutional right, every newspaper every day would be guilty of a crime, if the construction of the court below be right, in the description of any event wherein persons are named without their written consent. In the *Binns Case* Judge Chase says that this act clearly would not apply in the case of a single publication in a single newspaper. Why not, if it applies to the case here presented? These motion picture films are distributed and shown to different audiences in different parts of the country, just as a newspaper is circulated in different parts of the country and reaches different readers. For this purpose a number of films are made, just as a number of editions of a paper are printed and sent to different communities. When the matter is fresh, the event is a matter of interest; but the public soon tires of it and wants fresh news. I am unable to see any practical difference between the presentation of these current events in a motion picture film and in a newspaper, and when it is considered that under plaintiff's interpretation of the statute the mention in any newspaper or motion picture film, or any publication of any kind of a single name in connection with any private or public matter, without the written consent of the person named, is a misdemeanor, the court should be slow to so interpret the act. If this statute had simply provided for the right of injunction to prevent the portrayal of the picture of any person without his written consent, a different question might be presented. Under such a statute the court in the case at bar might hold the statute applicable. But where the statute goes further, and includes either the name or the picture of a person, and makes the publication of either without a written consent a misdemeanor, the reasonable and necessary inference is not only that the statute does not apply to the publication of a newspaper in a single issue, but also the statute does not apply to the publication of a picture or name in a single set of films of actual events issued at one time for distribution in different parts of the country before different audiences as a matter of current news. It matters not what may be the motive in the publishing of these films, whether instructive, or whether to satisfy the morbid curiosity, any more than it matters what may be the motive in the publishing of actual news items in a newspaper. The rule of law as held by the Trial Term would make practically impossible the exhibition of films representing current events wherein the name or picture of a living person is given, whether of interesting, instructive, or elevating events, or whether introduced for the purpose of courting publicity.

In the same issue of the *Animated Weekly* was published a picture of President Hibben, conferring a degree upon a distinguished foreigner. Under the rule of law announced by the Special Term, if such publication was without his written consent, the defendant is guilty of a misdemeanor, not only in the publication of this picture, but in the mention of the name of President Hibben, in the descriptive words which appear as the picture is presented. The defendant would be also guilty of a misdemeanor by exhibiting the picture of the diplomat upon whom the degree was bestowed, and also guilty of a misdemeanor in showing the portrait of some outsider who happened to be within the bounds of the picture. With this interpretation of the statute I cannot agree.

The authorities, so far as they discuss the question, seem to me to be in entire harmony with the conclusion which I have reached. In the *Jeffries Case*, reported 67 Misc. Rep. 570, 124 N. Y. Supp. 780, Judge Whitney writes that the picture of a person is not used for trade purposes, within the meaning of the section, when used merely for the dissemination of information and not for commerce or traffic. This decision has been approved in the *Colyer Case*, reported in 162 App. Div. 297, 146 N. Y. Supp. 999, in the Second Department, where it was held that an actress, whose portrait was published in a weekly periodical without her consent, but not for advertising purposes, could not recover damages under the act. In that case a professional diver had had her picture taken in costume, which was produced in the *Police Gazette* without her consent, together with other vaudeville actresses in costume, under a heading:

"Five of a Kind. Most of Them Adorn the Burlesque Stage. All of Them are Favorites with the Bald-Headed Boys."

It would seem that if, under any such circumstances, the statute could be held to apply, it would have been held to have applied in that case; but it was there held that the publication was not within the act, as for advertising or for trade purposes.

[2] In the *Binns Case*, 210 N. Y. 51, 103 N. E. 1108, L. R. A. 1915C, 839, Anp. Cas. 1915B, 1024, the presentation was not of pictures actually taken at the time of the occurrence of the events but the film was taken in a studio, with actors dressed for the occasion, in order to present a representation of what might have occurred. It was held to be pure fiction, and not fact, and as such it was held to be within the act, and the exhibition of that film was enjoined. In that case Judge Chase said in his opinion:

"It would not be within the evil sought to be remedied by that act to construe it so as to prohibit the use of the name, portrait, or picture of a living person in truthfully recounting or portraying an actual current event, as is commonly done in a single issue of a regular newspaper."

The representation of this plaintiff was published in a single set of films, to be distributed at the same time to different parts of the country as a news item. It was interesting when first exhibited. The fact that these films were widely distributed, so as to be seen by many people, cannot make the offense any greater than would be the offense in

a newspaper with a large circulation, publishing the same picture or the same names in a single issue. The fact that the picture may have been seen by the same person more than once would not condemn the publication, because a single issue of a newspaper is often seen several times by the same person. The exhibitor of these films, with the interest of the public in view, is not going to exhibit any news item after the interest in the item has died out. The fact that this publication is so markedly different from the publication which is recognized as the inspiration of the passage of the law in question in itself furnishes a strong probability that it is not within the prohibitive act, and when the right to an injunction and to damages is based upon an act made criminal by the same statute, the law of strict construction should lead us to interpret the act in favor of the party charged with crime.

[3] A further question arises as to the use of the name and the picture of the plaintiff upon posters used to advertise this exhibition. If it be held that they cannot be used under the statute for the purposes of advertising these motion pictures, then it is clear that they cannot advertise the motion pictures at all, because they cannot be fully advertised, at least, without giving the name of the parties represented. When King Albert landed in New York, one of these companies procured moving pictures of the landing. Those were exhibited the same night in the city of New York, and upon the billboard at the entrance of the theater it was announced that pictures of the landing of King Albert were to appear that night. Were they guilty of a misdemeanor for this announcement? If the conclusion which I have reached upon the other branch of the case be correct, the presentation of the film describing that landing would not be against the spirit of the act. If so, it is difficult to distinguish, and say that the advertising of the film with the simple use of King Albert's name constituted a crime. If the use of his name alone in advertising the film did not constitute a crime, the use of his picture would be no more criminal. So, in the case at bar, if the presentation of this film be not a crime, the use of the plaintiff's name or picture in the approach to the theater and upon the billboards in front, as advertising what was to appear upon the screen, is I think incidental to the exhibition of the film itself. The statute, we think, only prohibits advertising with respect to a trade falling within the scope of the statute. The act should not reasonably be construed to prohibit such use of a name or picture.

The appellants also challenge the holding of the trial court that the plaintiff is entitled to have the jury assess her damages as matter of right. If I am right in my conclusion that neither the production of the film nor the publication of the name or posters as incidental to the production of that film is within the prohibition of the statute, consideration of this question becomes unnecessary.

The judgment appealed from should be reversed, with costs, and the complaint dismissed, with costs. Settle order on notice.

LAUGHLIN and MERRELL, JJ., concur.

CLARKE, P. J., and DOWLING, J., dissent as to the poster advertisements.

(108 Misc. Rep. 717)

PHINNEY v. ANDRUS.

(City Court of New York, Special Term. September 3, 1919.)

1. DIVORCE $\Leftrightarrow$ 277—PROCEDURE TO OBTAIN ALIMONY DUE.

To enforce payment of accrued alimony, the wife cannot bring an independent action, but must proceed by sequestration and contempt proceedings, under Code Civ. Proc. §§ 1771, 1772.

2. HUSBAND AND WIFE $\Leftrightarrow$ 279(1)—SUM DUE WIFE UNDER SEPARATION AGREEMENT ASSIGNABLE.

Where husband defaults in payments under a separation agreement, divorced wife may assign her cause of action therefor.

3. PLEADING $\Leftrightarrow$ 311—INSTRUMENTS REFERRED TO AS PART OF COMPLAINT.

Any facts recited in a contract, made part of a complaint and referred to therein, are to be considered as alleged in the complaint.

4. HUSBAND AND WIFE $\Leftrightarrow$ 281—WHEN WIFE ASSIGNING RIGHT OF ACTION UNDER SEPARATION AGREEMENT UNNECESSARY PARTY THERETO.

Where husband defaults in a payment under a separation agreement, and wife assigns her cause of action, the assignee need not join the wife as a party in a suit by him against the husband.

5. HUSBAND AND WIFE $\Leftrightarrow$ 281—ALLEGING PERFORMANCE OF SEPARATION AGREEMENT PERMITS PROOF THAT WIFE HAS NOT REMARRIED.

Under allegation that wife had duly performed all conditions of the agreement, in action by assignee of claim of wife against husband for payments due her under a separation agreement, which was made a part of the complaint, plaintiff could show that wife had not remarried at time payment became due.

Action by Horace A. Phinney against Harry W. Andrus. On motion by plaintiff and cross-motion by defendant for judgment on the pleadings. Plaintiff's motion granted, and defendant's motion denied, with leave to withdraw demurrer and answer.

Young & Hughes, of New York City, for plaintiff.

Austin & Abruzzo, of New York City (Arnold O. Schramm, of New York City, of counsel), for defendant.

FINELITE, J. These are cross-motions. The defendant demurs to the amended complaint upon the ground that it does not state facts sufficient to constitute a cause of action; that there is a defect of parties plaintiff, in that plaintiff's assignor is a necessary party to the action, and has not been made a party herein; and that plaintiff has not legal capacity to sue, in that the separation agreement annexed to the complaint, and made part thereof, shows upon its face that the alleged contract between the defendant and his wife (plaintiff's assignor) was personal to her, and the right to receive payment of the amounts stipulated thereunder was and is not assignable by her. Plaintiff moves for judgment on the pleadings, and the defendant makes a cross-motion for judgment in his favor, thus bringing up the demurrer for decision.

The action is predicated upon a written agreement entered into between the defendant and his wife (plaintiff's assignor), wherein said persons agreed to live separate and apart from each other during their

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natural lives; the defendant promising to pay or cause to be paid to his said wife the sum of \$70 between the 1st and 10th of each and every month, and the said payments to be made by checks to be forwarded by him to her at her place of residence, and the plaintiff's assignor agreeing to take in full satisfaction for her support and maintenance the said sum of \$70 a month, payable as aforesaid. Defendant failed to make the payment due in August, 1917, and also failed to make the payments due in the 10 succeeding months. This action is brought to recover for said defaulted payments, which were assigned to this plaintiff before the commencement of this action, and after their accrual.

[1] The defendant urges in support of his demurrer and his motion for judgment that the right to recover said moneys is not assignable. There is a distinction between alimony awarded pursuant to judicial decree and an agreed sum due and payable under an agreement of separation between husband and wife. In the former instance the remedy is to enforce the payment of alimony thus awarded according to the remedies granted by sections 1771 and 1772 of the Code of Civil Procedure by sequestration proceedings, and if no property can be found, upon his failure to pay the accrued alimony awarded, then to move to punish him as for a contempt. Such remedies are exclusive, and therefore no separate action may be brought for the recovery of alimony thus awarded. *Jacobson v. Jacobson*, 85 Misc. Rep. 253, 148 N. Y. Supp. 34.

[2] There is no action pending between said husband and wife, and said money now due and payable became so pursuant to an agreement between them. The right of plaintiff's assignor to said money, for the recovery of which this action is brought, is a chose in action, and is assignable. *Matter of Thrall*, 12 App. Div. 235, 42 N. Y. Supp. 439, affirmed 153 N. Y. 644, 47 N. E. 1111.

[3, 4] The separation agreement is made part of the complaint and referred to therein, and any facts recited in such instrument are to be considered as alleged in the pleading. *Slack v. Heath*, 4 E. D. Smith, 95, 109, affirmed by Court of Appeals, June, 1860, not reported. The right to the payment of this money is assignable by the wife, and this action is properly brought by plaintiff's assignor.

[5] The objection made by the defendant that there is no allegation that the plaintiff's assignor has not remarried is met by the allegation that she has duly performed all the conditions of said agreement on her part to be performed; under such an allegation, performance on her part and that she had not remarried before the amount had become due and payable, may be shown. *Spence v. Woods*, 134 App. Div. 182, 118 N. Y. Supp. 807, and *Winter v. Winter*, 191 N. Y. 462, 84 N. E. 382, 16 L. R. A. (N. S.) 710.

Plaintiff's motion for judgment on the pleadings is granted, with \$10 costs, with leave to the defendant to withdraw his said demurrer and serve an answer herein within six days after service of a copy of the order hereon, with notice of entry thereof, upon payment of said costs; and the motion of defendant on the pleadings in his favor is denied, with \$10 costs, with leave to withdraw said demurrer and

serve an answer within six days after service of a copy of the order hereon, with notice of entry thereof on payment of said costs.

Orders on both motions signed and filed.

(109 Misc. Rep. 276)

In re SHONTS' ESTATE.

(Surrogate's Court, New York County. November 19, 1919.)

1. **EXECUTORS AND ADMINISTRATORS §22(3)—TEMPORARY APPOINTMENT; VACATION OF ORDER AND STAY OF INTESTATE PROCEEDINGS ON FILING OF WILL.**
On the filing of a formal will, with petition for probate, after the designation of the widow as temporary administratrix in proceedings based on intestacy, in which no letters have been issued, the Surrogate's Court has inherent power, even under the Practice Act, to vacate the designation and stay the proceedings until the issue of testacy is determined, and is bound to do so on its own motion, without petition, under section 2569.
2. **EXECUTORS AND ADMINISTRATORS §22(3)—APPOINTMENT OF TEMPORARY ADMINISTRATOR.**
Upon an application in contested probate proceedings for the appointment of a temporary administrator, the court is not at liberty to look at the particular provisions of the will for the purpose of weighing the equitable or moral rights of the beneficiaries.
3. **EXECUTORS AND ADMINISTRATORS §22(1)—TEMPORARY APPOINTMENT; WIDOW'S RIGHT TO APPOINTMENT.**
Where the designation of the widow as temporary administratrix in an intestate proceeding is vacated on the filing of a formal will for probate, a solvent and uninterested executor, instead of the widow, will be appointed temporary administrator pending the contest in the proceedings to probate the will.

In the matter of the estate of Theodore P. Shonts, deceased. Hearing on order to show cause why an order designating the widow as temporary administratrix should not be annulled, and the executors named in will be granted temporary administration pending will contest. Order vacated, and one of the executors named as temporary administrator.

Cornelius J. Sullivan, of New York City, for executors.

Warren Dixon and George W. Files, both of New York City, for respondent.

FOWLER, S. This matter comes on for hearing on an order to show cause (1) why my order designating Mrs. Shonts as temporary administratrix should not be annulled; and (2) why temporary administration pending the contest in the proceeding to probate the will of the late Theodore Shonts should not be granted to the executors named in said will.

[1] It appears that an order granting temporary letters of administration was made by me to the widow in a course of administration, and on the judicial proof and assumption that there was no will. No letters to Mrs. Shonts have been issued, and nothing further has been done in the proceeding based on an alleged intestacy. Since then an executed will in writing appears, and is placed on file, with a petition

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for its probate. This tremendous fact in law alters the situation when Mrs. Shonts was first named receiver in a course of administration. When a will is produced in this court, with a petition for its probate, the jurisdictional requisite for an administration proceeding ceases ipso facto. There can be no presumption by the surrogate that the will so produced is at this stage invalid. The mere production of a formal will in courts of this character is and always has been a fact of great legal consequence, even before probate. It absolutely precludes the issuance of letters in a course of administration on the ground of intestacy. In England, with its similar laws, the mere suggestion of a will, without other proof, defeats a grant of any administration for intestacy.

It is certainly anomalous to proceed in a course of administration after a will is produced. *Matter of Mayer's Estate*, 84 Misc. Rep. at page 10, 145 N. Y. Supp. 665. Much of the probate law of this country was formulated before the dominant and institution making element of our population migrated here. This great law they brought with them, and it alone, in the judgment of many, has enabled our political institutions and Constitutions to operate with success in our national domain. Had it not been for the common law, national development would have pursued other lines less successful.

In modern times in this state it is, as I fear, too much the habit to assume, counter to that common law, that the production of a will before probate is a mere formality, and a matter of no legal consequence whatever until probate. It is not a correct assumption to assume that the production in this court of an executed will in writing is of no legal consequence before the will is subjected to judicial scrutiny and final judgment.

The idea that such a will is in the first instance dependent for its validity only on the subsequent action of courts of probate, or the chance verdicts of common juries, now allowed therein, is not correct. Such a conception belittles the inherent effect of the most solemn instrument of conveyance known to the law. This too common idea gives rise in this country, I think, to many speculative suits to annul the effect of testators' wishes, and this is not consonant with the remarkable affection for law and order which the people of this country in other respects exhibit in a greater degree than the people of other countries. The result of this aberration is that in this country, and in this state in particular, "will cases," so called, are far more common than in other great countries.

At common law a will did not depend on probate for its validity, and before probate there were certain presumptions, such as of *animus testandi*, which flowed from the mere production of the will of a testator. Unfortunately a presumption of *animus testandi* is, as I pointed out in a recent case (*Matter of Paez's Estate*, 107 Misc. Rep. 586, 176 N. Y. Supp. 751), now postponed in this state until after proof of the statutory requirements (*Matter of Foley's Will*, 76 Misc. Rep. at page 171, 136 N. Y. Supp. 933; *Matter of Gedney*, 142 N. Y. Supp. 161). That is to say, it is postponed if the will is a mere testament, or, in other words, when it purports to convey personal estate alone. It

is still to some extent, as at common law, otherwise when the will is a conveyance of realty. No probate is necessary for a will of real estate, except sub modo as to certain subsequent purchasers of the realty, without notice of the will. *Matter of Connell's Will*, 75 Misc. Rep. at page 577, 136 N. Y. Supp. 166.

Even if a will is of personalty only, the titles of the executors flow from the will, and not from the probate, as I have often pointed out, not only in *Matter of Kennedy's Will*, 106 Misc. Rep. at page 219, 174 N. Y. Supp. 429, and in *Matter of Ripley*, 101 Misc. Rep. 468, 167 N. Y. Supp. 162, but in many other adjudications. It is for this reason, among many others, that I have been always opposed to a practice of appointing others than executors nominated in the will the custodians of estates of the dead pendente lite. The executors chosen by a dead person himself should always be preferred for receivers pendente lite in probate cases, unless there is some overwhelming necessity to look elsewhere.

But it is contended by eminent and very learned counsel, Mr. Griggs, who appeared for the widow of testator, that the court is without power to vacate its prior designation of Mrs. Shonts, even though such designation was based on a wrong assumption by the court that there was no will, and it is also claimed that such vacatur may be made only on a petition and citation. Section 2569, C. C. P. Had Mrs. Shonts received letters on her application, this might possibly be so, but she has not received letters. I do not say that it is so, even if she had received letters, for there are other sections of the Code to be considered, notably subdivision 6 of section 2490, Code of Civil Procedure. And see *Matter of Smith's Estate*, 65 Misc. Rep. 417, 121 N. Y. Supp. 1087.

The jurisdiction and procedure of this court in proceedings not based on a will are quite distinct from its jurisdiction and procedure where a will is produced and offered for probate. To affirm that the court must proceed in a course of administration, based on intestacy, even after a will is produced in this court, would be to affirm an anomaly in courts of this character. On the contrary, its jurisdiction, if based on alleged intestacy, ceases when the matter becomes apparently one of testacy. When a will appears the court is bound of its own motion to stay the proceeding based on such wrong assumption until the allegation of testacy is regularly disposed of in the prescribed course of judicial procedure.

In consequence of the production of a will in this court I am bound of my own motion, to revoke the designation of Mrs. Shonts allowed in the course of administration, and I so do. Any court of record has the power to recall its mere designation when a process or procedure to appoint is not completed.

It is quite true that it is often said, as in this case, that the powers of this court are strictly statutory. But this is true only in part, and it is equally true of all American courts. There are no courts in this country possessed of a jurisdiction by virtue of the common law alone, except it be some old courts of the public markets called "pie poudre" courts. These once existed here for a time. The jurisdiction of all

American courts is defined in some organic act transferring an older jurisdiction. The transfer of the jurisdiction necessarily carries with it the judicial powers incident to the jurisdiction unless restrained. What is generally meant by the contention in question is that, where a statute directs a court of this character to proceed in one way, it may proceed in no other. But the Practice Act of this court (chapter 18, C. C. P.) does not pretend to provide for all cases, and it is doubtful if it provides for the precise state of facts I have mentioned above. That I have an inherent power to recall my designation of Mrs. Shonts as temporary administratrix, or to stay her proceeding as such, I make no doubt, for the cause has now become one in a course of testacy, thus superseding all former steps on this estate.

Let me remark at this point that the present Revised Practice Act for this court (chapter 18, C. C. P.) has become inadequate for the largely extended modern jurisdiction now invested in this court. The court is now invested by recent laws with much equitable jurisdiction formerly exercised by the chancellors of this state, and with much legal jurisdiction formerly exercised by our old courts of law. The grant of such additional powers to this court ipso facto carries with it the judicial powers ordinarily invested in those who formerly exercised the jurisdictions. To grant such additional jurisdiction, and then to continue to insist that the court is circumscribed by an old Practice Act, intended for a different and more confined jurisdiction, or to insist that the old act continues to govern exclusively the new jurisdiction conferred, would be to embarrass litigants in many cases.

If the Legislature intended that result, which I do not contemplate, they are in the position of one who, having builded a great and stately house in an old field, leaves as the only approach to it the poor path which formerly led to a demolished hut, superseded by the new structure. But by these last remarks I refer largely to the newly extended jurisdiction of this court when it sits in the newly transferred courses of equity and law, and not to our probate jurisdiction, which is very ancient, and may well be limited in its exercise, as was intended doubtless by the old Practice Act. But even under the old act, as revised, I have power to annul, as I said, my mere designation in an order of Mrs. Shonts, mistakenly made in the course of the procedure relative to intestacy, and I am so bound to do. This is also the course universally adopted in the probate courts of other common-law countries. Such a course is the only one consonant with reason and the orderly administration of justice.

[2, 3] We come, then, next to the application for the appointment of temporary administrators in the proceeding for probate. It is argued that the claims of the widow are superior to the claims of one not a widow. This is of course a fundamentally correct proposition in law and in fact; but the one not a widow is making no claim to be appointed temporary administratrix. The claim is by an executor named in the will. I cannot weigh, at this stage of the contest, the equitable or moral rights of any one named in the will as legatee or

devisee. It is quite unnecessary for any present purpose so to do, and the law wisely precludes it.

On an application in a contested probate proceeding for the appointment of receivers, now designated in this court "temporary administrators," the court is not at liberty to look at the particular provisions of the will propounded. The power of courts to inspect all documents—wills included—is, contrary to popular notions, a very limited one. Surrogates are not at liberty to rummage at their pleasure through the contents of wills propounded for probate. It is only on the actual trial of a contested probate and after evidence given that the surrogate may look at particular provisions of the alleged will offered for probate, and then only when it is claimed that such provisions on their face bear evidence of mental incompetency of the testator, or where fraud is charged and the will bears evidence of that charge. A charge of fraud or duress concerning a document proceeded on always brings that writing in evidence on the trial of the issues, and then it is regularly before the court, but not before trial.

Of course, in a case for construction of a will, which this is not, the instrument to be construed is brought into court for that purpose, and it is then regularly before the court. So on an application before probate to expunge matter in a will alleged to be too scandalous to be recorded, the surrogate may look into the will, after proof of the will, to determine the matter proper for recording. As a probate proceeding is one in rem, and the res is actually brought into court and proceeded on, the power of the surrogate to look at the writing produced is perhaps somewhat greater than it is in other tribunals of a purely legal or equitable nature. But the instances noted are about all the occasions I now recall offhand when the surrogate may consider at large the contents of wills produced in this court for probate. At this time this case falls within none of the rules stated, and the court will not on this application look at the contents of the will of Mr. Shonts further than I indicate in this opinion.

Argument is advanced, in substance, that a certain legacy or devise in the will is not legal or proper. The surrogate at this stage of the will contest cannot, as stated, pass on the legality of particular provisions of Mr. Shonts' will. The instrument must be proved before such an investigation as that can be undertaken by the surrogate.

Nor can the surrogate at any stage of the probate proceeding pass upon mere ethical claims of those contestants who allege impropriety in certain provisions of the will. The surrogate is not censor morum. The propriety of particular devises, legacies or bequests is never for the surrogate. Their legality only may be brought before him on or after a trial, not before.

At this stage of this probate proceeding but just begun the court can see only that an instrument in writing, apparently on its face executed in conformity with the statute of wills, is propounded for probate, that a contest over it has arisen, and that pending the trial the appointment of receivers, aliter "temporary administrators," is asked. For such purpose the surrogate may ascertain who are the executors named in the will, and he is even at liberty to read their names at this

stage of the proceeding, for the purpose of taking cognizance of their persons on the application for the appointment of receivers. Further than that he may not go.

While the court must shut its eyes to particular provisions of the propounded paper at this state of the contest, it is not so blind that it cannot see what all the rest of the world is permitted to see. It cannot ignore, for example, charges placed before it on argument. In regard to these charges, I may be allowed to point out, however, that the argument made from them is not sound. A bequest or devise of residuary to a friend of the testator, not of his family, is not of itself evidence of anything except a bequest. The court cannot assume its illegality, much less its impropriety. Circumstances may be shown on the trial which will justify both the legality and the propriety of the legacy. I cannot now know what will be proved on the trial. The gift of the residue may be, and probably is, a very trifling sum, and in that event the alleged impropriety ceases. If it shall appear that the main estate, which is not by modern standards large, passes or has passed to testator's own family, and only a trifle to one not of his family, the situation bruited about out of doors by quid nuncs will be quite changed. Even if the bequest of the residuary prove considerable, the legal situation will not be altered, if the testator was of sound mind and competent to make a will, and there was no overreaching or fraud practiced on him. The law at last is always kind in its assumptions raised before trial of issues of fact; it cannot assume, what irresponsible laymen too often assume, impropriety in legacies which may, in due course, be reconciled with propriety.

I am not apologizing, and am not obligated to apologize, for particular provisions of this or any will offered for probate. All kinds of people make wills; the modern, untutored, and aggressive type of people of affairs, often so offensive to the old-fashioned monogamous traditions of this country, may make wills as freely as great gentlemen of better traditions, habits, and training. The law does not confine the power of making wills to those possessed of a good sense of propriety. The surrogate cannot undertake, and indeed, is prohibited from considering, the mere propriety of legacies. Every kind of citizen has and may have his own notions of the amenities of life and he may express them in his will, for if of sound and disposing mind he may by the law of the land do what and how he likes with his own, subject to certain rules of law, regarding perpetuities and future estates, not necessary to mention here.

It has been my uniform practice, while here, to nominate for temporary administrators (who are really the receivers of this court) in all contested probates the executors named in the will, and if this is not possible, I name a trust company. It is my firm belief that the appointment of the executors named in a will as temporary administrators during contested probates is not only more economical for suitors and estates in ninety-nine cases out of a hundred, but more consonant with the dignity of a court of this character. The intrusion of nominees of the court, strangers to the dead, very distasteful to the inhabitants of this state, should be as rare as possible in this court

if people of property are to continue to feel at ease and in security in this state.

The only cases where the nominated executors cannot be so appointed receivers pendente lite, is, I think, where the executor is shown to have drafted the disputed will and takes a benefit therefrom, or where he is shown to be a person of doubtful solvency or character, or where he is charged under oath with undue influence or with fraud in the procurement of the will itself. In such cases it has been my reluctant practice, even when the executors were of the highest repute, and when I believed the charges under oath likely to prove unfounded, to name a trust company as temporary administrator or, in other words, receiver pendente lite. In most contested probates the executor has no interest and nothing to do with the creation of the will, and in such cases should always be appointed temporary administrator, as then, in the event of ultimate probate (which most always results) double fees and charges are saved for the estate.

The will of Mr. Shonts, I observe, names two gentlemen as his executors and a trust company in good standing. The two gentlemen named virtually renounce. There is not any good and sufficient reason advanced why the other executor, the trust company, a solvent state corporation, should not be named temporary administrator in conformity with my usual practice. The argument, so courteously and firmly advanced by Mr. Griggs, the learned counsel for Mrs. Shonts, that the temporary administrator should be a stranger, is an argument which, if pressed to extremes, would always be an excuse for excluding executors named in a will. If such exclusion were to become the universal practice in this state, I know that if I were a very rich father of a family living here, and regardful of my succession, I should immediately choose a state for a domicile where that practice was not allowed to prevail.

It is in the interest of all concerned that the trust company named as executor in Mr. Shonts' will should be named as temporary administrator pending the contested probate proceeding, and it is so named. Settle order accordingly before me, enumerating with particularity all papers used on the motions.

(109 Misc. Rep. 287)

In re PHRANER et al.

In re LAKE'S WILL

(Surrogate's Court, New York County. November 18, 1919.)

1. WILLS §634(10)—CONSTRUCTION; VESTING OF REMAINDER ON LIFE TENANT'S DEATH.

Will creating trust for benefit of testator's wife and son, and directing that "from and after the death of both my wife and my said son I give * * * the said share to the heirs at law of my said son," held to vest future estate in son's heirs at time of son's death, on son predeceasing wife, and not to postpone vesting until wife's death.

2. WILLS §629—CONSTRUCTION; VESTED FUTURE ESTATES.

Construction of will which favors vested future estates will be preferred.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. WILLS ⇨506(2)—CONSTRUCTION; SON'S STEPBROTHER WITHIN TERMS "HEIRS AT LAW" AND "NEXT OF KIN."

Where will created a trust, with remainder over to testator's son's "heirs at law," son's stepbrother was entitled to participate in remainder under Decedent Estate Law, §§ 90, 98, though not of the blood of testator, and though share bequeathed was personalty; the stepbrother being both heir at law and next of kin of the son, and the terms "heirs at law" and "next of kin" often being used interchangeably.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs at Law; Next of Kin.]

4. COURTS ⇨201—JURISDICTION OF SURROGATE TO DETERMINE VALIDITY OF ASSIGNMENT OF VESTED REMAINDER.

Where, on judicial settlement of the account of proceedings of executors and testamentary trustees, it is claimed that assignment of vested remainder is void, because usurious, surrogate has jurisdiction to pass upon validity of assignment and existence of usury; the proper method of raising the issue in such case being, in view of Code Civ. Proc. §§ 521, 2519, for the respondents who urge usury in their answers to serve their pleadings with cross-notice upon other parties who may be affected by adjudication of such issue, and for court thereupon to set date for hearing.

5. WILLS ⇨487(1)—CONSTRUCTION; EXTRINSIC EVIDENCE.

Extrinsic evidence is not admissible to show testator's intention, where there is no patent ambiguity, where terms used by testator are technical, and where evidence offered cannot explain, and can only contradict, testator's meaning.

In the matter of the judicial settlement of the account of proceedings of Francis S. Phraner and others, as executors and testamentary trustees under the last will and testament of George G. Lake, deceased. Decree ordered.

John T. Hancock, of New York City (John T. Hancock, of New York City, of counsel), for petitioners.

Theron L. Carman, of New York City, for Elizabeth Steers, as executrix, and others.

Kenneth B. Halstead, of New York City, for executors of estate of John H. Seed, deceased.

Arthur L. Livermore, of New York City (George K. Shields, of New York City, of counsel), for James R. S. Lake.

Rosendale & Dodd, of New York City (George Rosendale, of New York City, of counsel), for Zoe C. Price, Lorraine Price, and Zoe C. Price, as administratrix.

Frank B. Washburn, of New York City, special guardian.

FOWLER, S. This is an interesting case, and several points of practice are novel in this court. Before a distribution of the estate of testator, George G. Lake, may be ordered in this proceeding, it becomes necessary to consider the meaning and effect of paragraph 4 of the will. Testator therein provided that his residuary estate should be divided into as many separate equal shares as he should leave children surviving, and he made similar provisions and directions in regard to each share. The provision in favor of the testator's son, George S. Lake, is typical of the others. The only controversy centers about the trust created for his benefit. It is quoted in full, as follows:

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"I give devise and bequeath one other of said six shares to my executors and trustees hereinafter named in trust to invest and keep the same invested during the lives of my wife Frances E. Lake and of my son George Steers Lake in such property and securities as they may think best and from time to time to change manage and control the said investment at their discretion to collect and receive the rents interest income and profits arising from or growing out of the same and to pay one equal third part of the net rents interest income and profits so received by them (semi-annually or quarter-yearly as the same shall be received) to my wife Frances E. Lake during her life and the other two-thirds thereof to my said son during his life. Should my said son survive my wife then and in that case from and after the death of my wife to pay the whole of said rents interest income and profits to my said son during his life. Should my wife survive my said son then and in that case from and after the death of my said son to pay the said two-thirds of said income to his lawful issue if any, or if there are none to my surviving children in equal shares but in case any of my other children shall in the meantime have died leaving lawful issue then such income shall be divided equally among my children and the lawful issue of my children per stirpes and not per capita. From and after the death of both my wife and my said son I give devise and bequeath the said share to the heirs at law of my said son."

The testator was survived by five children and his widow. The widow died only recently, in January, 1919. Shortly after the death of the testator, in 1884, George S. Lake died without issue, but leaving him surviving half-brothers and sisters as his only next of kin. In the interim between the death of George and that of his mother there have been several changes by death among these half-brothers and sisters. All of them were children of the testator, with the exception of James Waterbury Steers, who was a stepson of the testator. The testator married thrice, and James Waterbury Steers was a son of his second wife by a former husband. George S. Lake, above referred to, was a son of the testator by this second wife. James Waterbury Steers died in October, 1905, survived by eight children. He had made an assignment to J. H. Seed, whose legal representatives are cited, of all of his interest in the above named estate. Mary Thompson, a half-sister of George S. Lake, also survived testator, and also predeceased Mrs. Lake. The other children who survived the testator are still living. Now that the widow is dead, the share set apart for George S. Lake is to be distributed. If it vested upon the death of George, either the legal representatives or the assignee of James W. Steers would share. On the other hand, if vesting was postponed until the death of Mrs. Lake, the children of James W. Steers will take and not his legal representatives or assignee.

It is contended that no matter when the estate vested James W. Steers should not be allowed to participate in the share bequeathed to George, for the reason that the testator used the term "heirs at law" in a restricted sense to mean only those of his own blood. The executrix of James W. Steers and also the latter's children raise the further claim that the assignee (Seed) can have no title because the assignment was made upon usurious consideration.

[1, 2] The future estate in the share given to George S. Lake vested upon his death. There is neither expression nor indication in the will of a contrary purpose. The preference of the law for a construction which favors vested future estates must be indulged. The use of the

words "from and after" do not cause a postponement of the vesting until the death of the widow. *Connelly v. O'Brien*, 166 N. Y. 406, 60 N. E. 20; *Hersee v. Simpson*, 154 N. Y. 496, 48 N. E. 890; *Matter of Van Kleeck*, 95 Misc. Rep. 40, 158 N. Y. Supp. 539, affirmed 177 App. Div. 917, 164 N. Y. Supp. 1096; *Matter of Myers*, 98 Misc. Rep. 108, 162 N. Y. Supp. 119; *Matter of Lowerre*, 104 Misc. Rep. 570, 172 N. Y. Supp. 171. There is nothing which points to the application of the "divide and pay over rule." There are words of direct gift; thus we are saved the perplexity of applying that rule. The interposition of a trust does not prevent vesting. *Matter of Van Kleeck*, supra.

The testator could in no better way have stated that he created a trust to last during two lives and that the remainder interest belonged to the heirs at law of George. It is not material in this present proceeding to determine whether or not the estate vested at once upon the death of the testator. That question is at present academic and will not be decided. *In re Shrier's Estate*, 103 Misc. Rep. 132, 169 N. Y. Supp. 330, and cases cited. It suffices to determine whether the estate vested upon the death of George or later upon the death of Mrs. Lake.

If we heed, as we must, the rule that an entire will is to govern interpretation, an examination of the entire will discloses no reason for a different conclusion from that which the surrogate has reached. In paragraph 6 of the will the testator provides:

"In the event of either of my said children dying before me and leaving lawful issue, then the rents, interest, income and profits herein given to such child shall go to said issue in equal shares and my said trustees shall hold in trust the share which would have come to the issue of such child at the death of my said wife for and during the lives of my said wife and the youngest child of such issue living at the time of my death, and upon the death of my wife and said youngest child of said issue my said trustee shall pay over the principal of said share to the heirs at law of my said child."

This provision in the case of children predeceasing testator, and leaving issue them surviving, is somewhat different from the former provision in favor of living children. A longer trust term is limited. Instead of making it terminate with the lives of the child and the widow, the testator provided that the term shall last during the lives of the widow and the youngest issue surviving him. The remainder interest is not given in words of direct gift. The trustees are directed to pay over the principal of the respective shares. This may perhaps be deemed some indication of a purpose to postpone vesting until the death of the widow under the "divide and pay over rule." That point it is not now necessary to determine. All the shares which have been created are for the benefit of children who actually survived the testator. Paragraph 6 has consequently not been called into operation.

Even if the testator had intended a future interest contingent upon the widow's death in this particular paragraph, it would not follow that the testator intended a like result in the earlier paragraph of his will. He might very well expect to give a different future estate

where children survive than was intended in the instance where only their issue survive. He created a longer trust term in the latter instance, and he may not have been so anxious about the nature of the interest bequeathed to heirs at law. At the termination of the longer trust term, where only issue survive, heirs at law were not likely to include issue, but only collaterals of the deceased child. At the death of the widow, and of any of the children who survived the testator, heirs at law would very probably include issue. Very well may the testator have felt greater concern for issue of any child than for collateral relatives. Apart from such conjecture, the words of gift in the fourth paragraph of the will are repeated in identically the same language in six instances. The mere change of phraseology in the sixth paragraph, if explicable on no other ground, must be regarded as inadvertence.

Furthermore, if the class of heirs at law is to be deemed fixed only after the deaths of both the widow and George S. Lake, the language of the testator was not appropriate. The widow's death does not in any way determine the heirs at law of George. Were it desired not to close the class before her death, the provision would have no doubt been differently expressed. The term "heirs" has been held to include heirs presumptive (*Montignani v. Blade*, 145 N. Y. 111, 39 N. E. 719), in order to accelerate vesting. Here the converse would have to hold. "Heirs" would have to be determined long after the demise of the ancestor, and this in order to work a postponement in the vesting.

In *Salter v. Drowne*, 205 N. Y. 204, 98 N. E. 401, the words "heirs at law" and "next of kin" were deemed to mean those who would have inherited by intestate succession, had their ancestor survived until the period of distribution. The reason there found controlling was an intention not to give the life tenant, an heir at law and next of kin, any remainder interest. In order to exclude her it was held that the class of remaindermen was to be fixed only after the termination of the life estate. Paragraph 4 of our testator's will does not present such a situation. The term "heirs at law" might perhaps be construed as it was in *Salter v. Drowne*. But this is not so with paragraph 4.

[3] Upon the death of George S. Lake those who were his heirs at law took the realty, and those who were his next of kin took the personalty. It happens that they were the same persons. It is immaterial that the testator used the term "heirs at law" in referring to those who should succeed to the personalty. The term is often used interchangeably with "next of kin." *Doctor v. Hughes*, 225 N. Y. 305, 313, 122 N. E. 221; *Montignani v. Blade*, supra; *Lawton v. Corlies*, 127 N. Y. 100, 106, 27 N. E. 847. James W. Steers must be included to participate in the remainder bequeathed upon the death of George. Though not of the blood of the testator, he was both heir at law and next of kin of George. Sections 90 and 98, *Decedent Estate Law* (Consol. Laws, c. 13). The words are in no way limited. They must be applied in their technical sense. *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 859. As James takes directly from the testator

under the will and not from George, it matters not that James W. Steers is not of the blood of the testator. The statute has no application. *Stack v. Leberman*, 169 App. Div. 92, 154 N. Y. Supp. 490.

[4] The interest of James W. Steers was vested when he assigned to Seed. The title of the latter is therefore a necessary issue upon this accounting. Usury is alleged, but no proof of usury has been offered. This cause, therefore, is not ripe for complete determination. The surrogate has jurisdiction to pass upon the validity of the assignment and the existence of usury (*Matter of Thornburgh*, 72 Misc. Rep. 619, 132 N. Y. Supp. 268; *Matter of Dollard*, 74 Misc. Rep. 312, 133 N. Y. Supp. 1107), but the issue should be raised properly.

The mere allegation in the papers of the existence of usury does not suffice. In the Supreme Court, where codefendants seek relief as between themselves, their answers are served upon their codefendants in accordance with the old equity practice. Section 521, C. C. P. This practice should be followed here. Section 2519, C. C. P. The surrogate therefore directs that the respondents who urge usury in their answers should serve their pleadings with cross-notice upon the other parties who may be affected by a final adjudication of that issue. The issue may then be set down for a hearing at some subsequent term. Let the answers setting up usury be so served on or before November 30 next.

[5] There is another question raised: After the cause was first submitted the petitioners moved for leave to offer extrinsic proof to aid in the interpretation of the will. At the hearing noticed by them, petitioners offered to prove that George was in ill health when the will was made, and that the testator knew this, and further that, on the other hand, James W. Steers did not visit the testator for some time before the will was made, and that the testator never referred to him in the presence of his family. This evidence, it is claimed, tended to show that the testator did not intend to include James amongst the heirs at law of George. The use of parol or extrinsic evidence in interpreting wills has been definitely limited. *Matter of Lummis*, 101 Misc. Rep. 258, 166 N. Y. Supp. 936; *Matter of Farmer*, 99 Misc. Rep. 437, 163 N. Y. Supp. 1089, and cases therein cited. There must first be found an ambiguity not resolvable from the will. *Matter of Vasseler*, 89 Misc. Rep. 674, 152 N. Y. Supp. 208; *Id.*, 170 App. Div. 10, 155 N. Y. Supp. 845; *Id.*, 220 N. Y. 225, 115 N. E. 462. Here the terms used by the testator are technical. The evidence offered cannot explain the testator's meaning. It can only contradict it. There is no patent ambiguity. The operation of the will upon the objects of the testator's bounty presents no latent ambiguity. The extrinsic evidence of the petitioners affords no assistance whatever in interpreting the will. Ordinarily the court need not rule upon an offer of proof. *Matter of Potter*, 161 N. Y. 84, 55 N. E. 387. Here, however, there is no danger of erring. The ruling I made upon the hearing on this point will be adhered to.

The decree will award distribution of the share set apart for George in paragraph 4, one-fifth to each of the three surviving children of the testator, one-fifth to the administratrix of Mary L. Thompson, and

the remaining one-fifth to either the executrix of James W. Steers or the executors of John H. Seed, depending upon who prevails upon the trial of usury.

A proposed decree may be prepared in conformity with this opinion, to be served and settled, on due notice, before me. The proposed decree should contain a provision for thereafter inserting at the foot thereof, by way of supplement, the results and effect of the aforesaid trial of the issue of usury. Such insertion at the foot of my decree may be made by my successor, without disturbing or affecting the portions of my decree which construe the will of George G. Lake, deceased.

Proceed accordingly.

In re NOE'S ESTATE.

(Surrogate's Court, New York County. December 5, 1919.)

1. EXECUTORS AND ADMINISTRATORS ⇨509(8)—MODIFICATION OF DECREE ON ACCOUNTING.

Decree of Surrogate's Court, settling the account of the executors, will not be modified, in the absence of a clear showing of fraud, mistake of fact, or clerical error.

2. EXECUTORS AND ADMINISTRATORS ⇨513(11)—INTEREST ON CLAIM DIRECTED TO BE PAID.

Where decree of Surrogate's Court, settling account of executors, directed payment of certain amount to deceased's creditor on receipt by executors of the proceeds of sale of deceased's real estate, the amount drew interest from date of entry of decree, under Code Civ. Proc. § 1211.

In the matter of the estate of Nellie M. Noe. On application by executors to modify a decree settling the account of the executors. Denied.

See, also, 94 Misc. Rep. 63, 157 N. Y. Supp. 679; 94 Misc. Rep. 60, 157 N. Y. Supp. 681.

Edward M. Burghard, of New York City (Louis V. Ebert, of New York City, of counsel), for executors.

Strauss, Reich & Boyer, of New York City, for Dr. Joseph Byrne.

FOWLER, S. This is an application by the executors of the estate of the deceased to modify the decree of this court entered on the 15th of June, 1916, settling the account of the executors. The decree sought to be modified contains the following clause:

"Ordered that the claim of Dr. Joseph Byrne, in the sum of \$99,568, be, and the same hereby is, fixed, adjusted, settled, and allowed in the sum of \$16,000."

The proposed modification is to the effect that the said sum of \$16,000 be paid by the executors as follows: \$5,000 upon the entry of this order, and the balance of \$11,000 shortly after the proceeds of sale of decedent's real estate are received by the executors.

[1] The effect of the modification asked for by the petitioners would be to deprive Dr. Byrne of any interest upon the unpaid balance of

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his claim, namely, \$11,000, from June 15, 1916, the date of the decree, until the date of payment from the proceeds of the sale of the real estate. The attorneys for Dr. Byrne contend that it was not the intention of the parties, in compromising the doctor's claim for \$16,000, to waive interest on any part of the claim which remained unpaid after the entry of the decree. In view of the conflicting contentions of the parties as to their intention in making the settlement, there are no established, conceded facts submitted to the court which would warrant it in vacating its decree. No mistake of fact is alleged; neither is there any allegation of fraud or clerical error. The rights of the parties were incorporated in the decree entered by this court upon the account of the executors, and, in the absence of a clear showing of fraud, mistake of fact, or clerical error, this court will not modify that decree.

[2] The executors also ask for instructions as to the payment of interest upon the \$11,000 remaining unpaid after the entry of the decree above referred to. The executors do not need the instruction of the court upon this point, as section 1211, C. C. P., provides that a judgment directing payment of money bears interest from the time it is entered.

The application to modify the decree is denied.

IN RE HAAREN'S ESTATE.

(Surrogate's Court, New York County. December 1, 1919.)

1. JUDGMENT $\Leftrightarrow$ 286—VACATING TRANSCRIPT OF DECREE OF SURROGATE'S COURT.

Transcript of Surrogate's Court decree adjudging certain amount due from executor to legatee, in form substantially complying with Code Civ. Proc. §§ 1246, 2551, and docket of the judgment docketed thereon in the Supreme Court, will not be vacated because of failure of transcript or judgment to recite that decree was against executor in his representative capacity, and not personally, since such judgment, even if it had contained such a recital, could have been enforced against executor's individual property under section 2553, being against him personally.

2. EXECUTORS AND ADMINISTRATORS $\Leftrightarrow$ 508(3)—ACCOUNTING; EXECUTION ON DECREE FOR AMOUNT DUE LEGATEE.

An executor is personally liable to a legatee for the amount which the surrogate's decree settling executor's account directs him to pay the legatee, and such amount may be collected by execution against executor's individual property.

In the matter of the estate of Claus Haaren. On application by John W. Haaren to vacate and set aside transcript of a decree of Surrogate's Court, and to vacate and set aside the docket of the judgment docketed thereon in the Supreme Court. Application denied.

Thompson, Freedman & Cooke, of New York City (Henry Thompson, of New York City, of counsel), for executor and trustee.

John G. Snyder, of New York City, for beneficiary.

FOWLER, S. This is an application to vacate and set aside the transcript of a decree of this court, which was issued by the clerk of the

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court and to vacate and set aside the docket of the judgment docketed thereon in the Supreme Court in favor of Clarence S. Haaren and against John W. Haaren for the sum of \$51,815.01, upon the ground that the transcript was filed and the judgment docketed against John W. Haaren, individually, and not against him as executor and trustee under the will of Claus Haaren, deceased.

[1] In the proceeding brought in this court to judicially settle the account of John W. Haaren, as executor and trustee under the will of Claus Haaren, deceased, a decree was entered adjudging that there was due from the executor John W. Haaren, to Clarence S. Haaren, a legatee under the will of the deceased, the sum of \$50,901.21, and directing the said John W. Haaren to pay this amount to the legatee. A transcript of the decree was obtained from the clerk of this court by the legatee in accordance with the provisions of section 2551, C. C. P. The form of the transcript was as follows:

"Against John W. Haaren in favor of Clarence S. Haaren, amount decreed to be paid \$51,815.01; time of filing, October 15, 1919."

This form was in substantial compliance with the requirements of sections 1246 and 2551, C. C. P. The transcript was duly docketed in the office of the clerk of the Supreme Court of New York county. The executor upon this application contends that both the transcript issued by the clerk of this court and the judgment entered in the docket book of the clerk of the Supreme Court of New York county should recite the fact that the decree or judgment was against John W. Haaren, as executor and trustee. It is difficult to understand what benefit could accrue to the applicant from a recital of the fact that the decree was rendered against him in his capacity of executor of the estate of Claus Haaren, deceased, as the "decree * * * may be enforced by an execution against the property of the party directed to make the payment." Section 2553, C. C. P. Even if the transcript did contain such a recital, the execution would necessarily issue against the property of the executor individually. *Matter of Quackenbos*, 38 Misc. Rep. 66, 76 N. Y. Supp. 964.

[2] The executor is personally liable to the legatee for the amount which the decree of this court directed him to pay, and this amount may be collected by execution against the individual property of the executor. *Matter of Taber*, 132 App. Div. 495, 116 N. Y. Supp. 960. Besides, a final decree against an executor which adjudges that money in his hands is due and payable to legatees is against him personally and *de bonis propriis*. *Power v. Speckman*, 126 N. Y. 354, 27 N. E. 474. Therefore it is unnecessary for the clerk of this court in issuing a transcript upon a decree to state that the decree was rendered against the executor as such.

Application denied.

(109 Misc. Rep. 474)

In re LUBIN'S ESTATE.

(Surrogate's Court, New York County. December 3, 1919.)

EXECUTORS AND ADMINISTRATORS §26(1)—WITHDRAWAL OF DEPOSIT MADE TO REDUCE PENALTY OF BOND.

Under Code Civ. Proc. § 2576, where executors deposited bonds in amount of \$50,000 to reduce penalty of bond, and thereafter filed bond in sum of \$86,000, they will not, after having received in addition more than \$100,000, be permitted to collect the coupons of the deposited bonds, without giving an additional bond, without giving proof in accounting proceeding, in which all interested parties are before court, that estate has been so reduced that original bond will be sufficient to satisfy the law, if security so withdrawn is also reckoned in the estate.

In the matter of the estate of David Lubin. Application by executors for order directing payment to them of the amount of coupons collected by trust company from bonds deposited to reduce penalty of bond. Denied conditionally.

James Garfield Moses, of New York City, for executors.

FOWLER, S. The executors herein, by order of this court, deposited \$50,000 of Liberty Bonds with the Guaranty Trust Company in order to reduce the penalty of the bond and thereafter filed a bond in the sum of \$86,000. They have, in addition, according to their petition, received \$101,150.96, of which they claim to have disbursed \$45,870.45, and now have on hand \$55,280.51. They ask for an order directing the payment to them by the Guaranty Trust Company of \$837.50, the amount of coupons collected by the said trust company, without giving an additional bond. They claim that they are entitled to this order under the provisions of section 2576, C. C. P. This section provides that no person other than the proper officer of the depository shall receive or collect any of the principal or interest of the securities deposited without the special order of the surrogate, and such order can only be made where an additional bond has been given, or "upon proof that the estate or fund has been so reduced, by payment or otherwise, that the penalty of the bond originally given will be sufficient in amount to satisfy the provisions of law relating to the penalty thereof, if the security so withdrawn is also reckoned in the estate or fund."

In this case, where there is such a great difference between the amount received by the executors and the amount of the bond, I think the proof required by this section should be made in an accounting proceeding where all parties interested will be before the court, as there is a possibility that on such accounting the executors may be surcharged with large amounts of the alleged disbursements, in which case the bond given by them would be inadequate to protect the estate.

The application is therefore denied, unless the executors file an additional bond to cover the amount sought to be withdrawn.

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(109 Misc. Rep. 409)

In re FIELD'S WILL.

(Surrogate's Court, Westchester County. December 1, 1919.)

1. WILLS §207—PROBATE OF DUPLICATE WILL.

Where testatrix has executed duplicate wills, one of such duplicates cannot be probated, unless the other is produced or its absence satisfactorily explained.

2. WILLS §175—REVOCATION BY DESTRUCTION OF DUPLICATE WILL.

Where testatrix had executed duplicate wills, and it appeared that one of the duplicates had been in decedent's possession, but could not be found, upon the offer of the other for probate, it will be presumed that the will had been destroyed by testatrix animo revocandi.

Proceeding to probate the last will and testament of Augusta Currie Field, deceased. Probate denied.

Charles T. Lark, of New York City, for heirs at law of decedent.

SLATER, S. From an examination of the petition herein, it appears that the decedent executed her will in duplicate and that the paper herein offered for probate is one of the duplicates. An examination of the paper itself reveals that it is a carbon or second carbon copy, and not an original or first copy, as one would expect to find a last will and testament to be, if executed in one part only, and also that decedent stated in the "in testimonium" clause therein that she executed it in duplicate. The petition further states that the other duplicate part of the instrument was in the personal possession of the decedent about a year prior to the time of her death, and that decedent stated at that time that she expected to change her will. That duplicate was never seen again, and could not be found after the death of the decedent.

All of these facts point to the conclusion that the decedent executed her will in duplicate, that she had one of the duplicate parts in her personal possession, that she later decided to change the will, and destroyed the duplicate in her possession, with the intention of revoking the will.

[1, 2] The law of this state seems to be settled, by the cases of *Crossman v. Crossman*, 95 N. Y. 145, and *Matter of Schofield*, 72 Misc. Rep. 281, 129 N. Y. Supp. 190, that such destruction by the testatrix of one of the duplicate wills would be a revocation of the will, or at any rate that one of the duplicate examples of a will executed in duplicate cannot be probated unless the other example is produced before the surrogate, or its absence satisfactorily explained. In this case there is no suggestion that the missing duplicate was fraudulently destroyed before the death of the decedent, nor that it was in existence at, and has been lost or destroyed since, the decedent's death. It has simply disappeared after having been in the possession of the decedent as above stated. There can be no doubt that to such a state of facts

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we must apply the established presumption that a will proven to have had existence, and not found on the death of the testatrix, was destroyed *animo revocandi*, *Knapp v. Knapp*, 10 N. Y. 276, 278; *Matter of Cunnion*, 201 N. Y. 123, 94 N. E. 648, Ann. Cas. 1912A, 838; *Matter of Wear's Will*, 131 App. Div. 875, 116 N. Y. Supp. 304.

I accordingly hold that the will of Augusta Currie Field was revoked by her in her lifetime, and that probate of the paper or example produced in court must therefore be denied.

(109 Misc. Rep. 486)

IN RE GERBEREUX'S WILL

(Surrogate's Court, Westchester County. December 2, 1919.)

DEPOSITIONS § 29—POWER OF SURROGATE'S COURT.

Surrogate's Court has power to grant application for a commission to take a deposition without the state, under Code Civ. Proc. § 888.

In the matter of the probate of the last will and testament of Eugene Gerbereux, deceased. On application to take deposition without the state, pursuant to Code Civ. Proc. § 888. Granted.

Oscar Le Roy Warren, of White Plains, for the motion.

William A. Walsh, of Yonkers, opposed.

SLATER, S. This is an application to take a deposition without the state, pursuant to section 888 of the Code of Civil Procedure. Surrogate Fowler, in the Matter of the Estate of Hodgman, 107 Misc. Rep. 70, 175 N. Y. Supp. 608, denied an application for examination before trial within the state on a contested probate. Afterwards a mandamus was granted to compel the surrogate to grant the application for examination before trial. *People ex rel. Lewis v. Fowler*, 107 Misc. Rep. 253, 176 N. Y. Supp. 806. Upon appeal, the Appellate Division, First Department, held that a mandamus will not lie to compel a surrogate to issue an order for examination before trial of a party to a special proceeding; that the effect of the action of the Special Term was to substitute its discretion for that of the surrogate. The court further held, Justice Philbin dissenting, that applications for the examination of parties before trial, as provided in section 870 et seq. of the Code of Civil Procedure, do not apply to and have not been extended to proceedings in the Surrogate's Court. 189 App. Div. 335, 178 N. Y. Supp. 500.

The latter part of the opinion is apparently dictum, and was not necessary to a decision to be rendered upon the appeal. I shall grant this application for a commission.

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(100 Misc. Rep. 476)

In re WHITTEMORE.

In re KEELER'S ESTATE.

(Surrogate's Court, Westchester County. December 4, 1919.)

1. EXECUTORS AND ADMINISTRATORS §227(4)—REVIEW BY COURT OF REJECTED CLAIM.

A claim disallowed by the executor will be considered on its merits, though proof of claim was served prior to the publication of notice to present claims, where the attorneys for the executor and claimant are both in court.

2. COURTS §201—JURISDICTION OF SURROGATE'S COURT TO DETERMINE FRAUD.

While the act of 1914 (Laws 1914, c. 443), by the enactment of Code Civ. Proc. § 2510, extended and enlarged the powers of the surrogate, the Surrogates Court is without jurisdiction to determine the claim of an executor that a second mortgage executed by testatrix in the course of an exchange of property was obtained by fraud; it appearing that the parties to the original transaction were not before the court.

In the matter of the judicial settlement of the account of Reginald G. Whittemore, executor of Helena Glaser Keeler, deceased. Account settled by decree allowing claim of Westchester Trust Company.

William Cravath White, of New York City, for executor.

Henry Martyn Baird, Jr., of Yonkers, for general guardian.

Henry H. Holmstrom, of Yonkers, for administratrix of Rachel Adele Glaser.

Stephen F. Thayer, of Yonkers, special guardian.

SLATER, S. This proceeding is one for the intermediate judicial settlement of the account of the executor of decedent. The matter in controversy relates to the claim of the Westchester Trust Company, as general guardian of the property of Katherine Gage Cox, an infant, for the amount of \$2,500, with interest, upon a bond and mortgage made by the decedent.

[1] There appears to be some contention regarding the proof of the claim. Letters testamentary issued July 13, 1917. Proof of this claim was served upon the executor July 16, 1917. The notice given to persons to present claims was published beginning September 24, 1917. The executor states in his account that notice of the disallowance of the claim was given to attorney for claimant, without naming the date when the notice of disallowance was given. On August 19, 1919, the attorney for executor notified the attorneys for the claimant that the executor disallowed the claim. This statement of fact is found in the memorandum presented by the attorney for the executor. In any event the attorney for the claimant and the attorney for the executor are in court, one urging the claim and the other contending against it, and I shall proceed to pass upon the merits of the claim.

[2] It appears that about 10 years ago decedent exchanged properties with other parties not now before the court in this proceeding, and gave a second mortgage upon her property for \$2,500, which came

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into the hands of the claimant herein. The first mortgage was foreclosed and the property sold, there not being sufficient realized from the sale to pay any part of the second mortgage. The executor is in court contending that fraud entered into the transaction of the exchange of properties and the giving of this particular second mortgage. The question arises whether the court has power to take proof and pass upon the allegation of fraud.

In *Matter of Schnabel*, 202 N. Y. 134, 95 N. E. 698 (1911), before the Surrogate's Act of 1914 (Laws 1914, c. 443), the court held that the Surrogate's Court was without jurisdiction to hear and determine the question as to the validity of a bill of sale and that, until competently set aside in a proper action, it was conclusive evidence as to personal interest of the administratrix in the property. The appellant in that case contended that the surrogate had power to decide the question of fraud, inasmuch as there was a contest between the administratrix, who was the accounting party, and the petitioning creditor. The court held that the power to set aside the instrument by which the property was transferred by deceased to his wife could only be exercised by a court possessing general equitable jurisdiction. The court in that case also stated the question should be regarded as definitely settled by decisions of this court in cases where similarly it has been contended that the jurisdiction of the surrogate extended to the setting aside or annulment of instruments of release and of assignments affecting the distribution of estates and claimed to have been fraudulent. *Matter of Martin*, 211 N. Y. 328, 105 N. E. 1089; *Matter of Finn*, 44 Misc. Rep. 622, 90 N. Y. Supp. 159.

The Surrogate's Act of 1914 extended and enlarged the powers of the surrogate by the enactment of section 2510 of the Code of Civil Procedure. In exercising the equitable jurisdiction conferred by section 2510, it has been held the Surrogate's Court is confined to the cases and to the manner of exercising such jurisdiction as therein particularly specified, and the Court of Appeals has confined such grants of equitable powers to the instances particularly specified in subdivisions 1 to 8 of section 2510. *Matter of Holzworth*, 166 App. Div. 150, 151 N. Y. Supp. 1072, affirmed 215 N. Y. 700, 109 N. E. 1079; *Matter of Coombs*, 185 App. Div. 312, 173 N. Y. Supp. 58; *Matter of Malcolmson*, 188 App. Div. 600, 177 N. Y. Supp. 238.

The decision in *Matter of Mondshain*, 186 App. Div. 528, 174 N. Y. Supp. 599, by Mr. Justice Dowling, is not in conflict with the *Matter of Holzworth* and the similar cases above cited. The court in the *Mondshain Case* had the question squarely presented whether the Surrogate's Court had jurisdiction to set aside a general release under seal. The court said:

"Such jurisdiction must be found under section 2510 of the Code of Civil Procedure," that "setting aside a general release on the alleged ground of fraud is not within any of the cases specified in the 8 subdivisions of section 2510 of the Code of Civil Procedure, and the surrogate was without jurisdiction to try the issue and make the order appealed from."

The instant case in my opinion falls within the decision of the *Mondshain Case*. In the present accounting proceeding the parties

interested in the estate and the claimant are the only ones before the court. The people who had to do with the original exchange of property made some years ago with the decedent are not, and cannot be, brought into this court. The court is without power to hear and determine the issue of fraud, which properly belongs to a court of competent general jurisdiction.

Proof was taken upon the hearing, and I find that the claim for the amount of \$2,500 and interest at 5 per cent. from June 1, 1914, is a proper claim as presented by the claimant against the estate.

Let decree be entered allowing the claim.

(109 Misc. Rep. 406)

In re RHODES' ESTATE.

(Surrogate's Court, Westchester County. October 8, 1919.)

1. TAXATION §900(1)—POWER OF SURROGATE TO CONSTRUER WILL IN DETERMINING TRANSFER TAX.

On review of the order of the transfer tax appraiser in proceedings to fix transfer tax on the estate of a decedent, the surrogate is without power to construe her will and determine whether legacies are a charge on the realty.

2. WILLS §732(2)—LEGACIES CHARGEABLE ON REAL ESTATE.

Whether legacies are impliedly charged on testatrix's realty is always a question of intent.

3. EXECUTORS AND ADMINISTRATORS §272—EXPENSES AND DEBTS AS CHARGE ON LAND.

The expenses of administration and the debts of an estate are a primary charge on the personal estate, and land cannot be resorted to, except under statutory authority.

4. EXECUTORS AND ADMINISTRATORS §495(3)—NO COMMISSIONS ON UNDISTRIBUTED REALTY.

Where testatrix's real estate has not been delivered to devisees, nor distributed, and has not been converted into money, there can be no commissions paid the executor upon it.

5. EXECUTORS AND ADMINISTRATORS §495(1)—NO COMMISSIONS ON AMOUNTS ADVANCED TO PAY LEGACIES AND DEBTS.

Where testatrix's executor, personalty being insufficient to pay in full legacies not charged on realty, together with the debts and expenses of administration, himself advanced difference of about \$20,000 between personal estate and amount of legacies and debts, he is entitled to commissions only on the amount of personal property left by testatrix and distributed by him, and not on the amount voluntarily paid by him.

6. CONVERSION §3—ADVANCEMENT OF MONEY TO SATISFY CHARGE ON REALTY.

Where the personal estate of a wife was insufficient to pay legacies, and her husband, the executor, contributed from his own pocket the difference between what would have gone to the legatees on the theory of an abatement and the amount the will gave, no conversion of the wife's realty resulted from such payment by the executor husband, who was not entitled on such theory to commissions on the entire amount of the estate.

In the matter of the transfer tax on the estate of Caroline A. Rhodes. From the pro forma order entered on the report of the transfer tax appraiser, the executor appeals. Affirmed.

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R. Emmet Digney, of White Plains, for appellant.

Francis A. Winslow, of New York City, for respondent.

SLATER, S. This matter arises on an appeal from the pro forma order entered upon the report of the transfer tax appraiser. The appraiser allows a deduction for commissions to the executor in the sum of \$879.84, being commissions upon \$68,984.57, the entire amount of the personal property of the decedent. The executor contends it should have been much more.

[1] It appears that the decedent left personal estate to the above amount, and real estate to the value of about \$130,000. By her will the decedent gave legacies amounting to over \$84,000. The will gave the residuary estate, which consisted of lands, to the husband of the decedent. A decision herein will really fix the amount of the commissions of the executor to be paid upon the final accounting. It is claimed by the executor that the debts and legacies are charged upon the real property, and to that extent the real estate has been equitably converted. It appears from the evidence taken before the appraiser, which is now before me for review, that at the time of the making of the will the personal property exceeded the amount of the several legacies. Considerable personal property was expended thereafter for the care of the decedent, so that at the date of her death the personal property was insufficient to pay the legatees in full. While I am without power in this proceeding to construe the will and determine whether the legacies are a charge upon the real estate, it seems that, in reaching a conclusion in this matter, I will be practically deciding that question.

[2] The several legacies are not specifically charged upon the real estate of the decedent by the terms of the will. Whether they are impliedly charged is always a question of the intent of the testator. *Ely v. Megie*, 219 N. Y. 112, 113 N. E. 800; *Carley v. Harper*, 219 N. Y. 295, 114 N. E. 351; *Matter of Noe*, 94 Misc. Rep. 63, 157 N. Y. Supp. 679. Legacies have been held to be charged upon real estate when, at the time of making the will, the testator's personalty is considerably less than the amount of the legacies, indicating an intention on the part of the decedent to have the legacies paid out of the real estate. From the evidence before me, this state of facts does not obtain here. The evidence taken by the appraiser indicates plainly that at the time the will was executed, the personal property of the decedent exceeded the amount of the legacies.

[3] The expenses of administration and the debts of an estate are a primary charge upon the personal estate, and land cannot be resorted to, except under statutory authority. *Jessup-Redfield*, p. 1145; *Schmidt v. Limmer*, 91 App. Div. 360, 86 N. Y. Supp. 657; *McGoldrick v. Bodkin*, 140 App. Div. 196, 125 N. Y. Supp. 101; *Matter of Lummis*, 101 Misc. Rep. 258, 166 N. Y. Supp. 936.

It appears that the executor has paid the legatees, also the debts and expenses of administration in full, amounting to \$95,530.11. To the extent of the difference between the personal estate and the amount of the legacies, about \$20,000, the executor makes himself a volunteer. A mere volunteer cannot force his services or property upon another

and exact payment therefor. He contends that he should have commissions, not only upon the amount of the personal property left by the decedent, but upon the amount voluntarily paid by him to the legatees, as well as the debts and expenses of the administration of the estate. He also asks for commissions upon the real estate.

The basis for the claim of commissions is found in section 2753 of the Code of Civil Procedure. It reads as follows:

"The value of any real or personal property, and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions."

[4] The real estate has not been delivered, nor distributed, nor has it been converted into money; therefore there could be no commissions upon the real estate. *Matter of Wanninger*, 120 App. Div. 273, 105 N. Y. Supp. 4; *Matter of Hardenbrook*, 23 Misc. Rep. 528, 52 N. Y. Supp. 845; *Matter of McGlynn*, 41 Misc. Rep. 156, 83 N. Y. Supp. 975.

[5] The legacies not having been expressly charged upon the real estate, and it not being the intention of the decedent so to do, the legatees were only entitled to be paid pro rata. Evidently the executor, the husband of the decedent, desired to carry into effect the wishes of his wife, and did contribute from his own pocket the difference between what would have gone to the legatees on the theory of an abatement and the amount the will gave.

[8] I cannot hold, with the contention of the appellant, that a conversion of the real estate resulted, and that by reason thereof the executor is entitled to commissions upon the entire amount of the estate. I think the report of the appraiser is a proper one, when it gave commissions to the executor on the amount of the entire personal property of the decedent, out of which personal property, in the orderly distribution of the estate, he should pay all expenses and debts; the balance thereof to be paid to the legatees pro rata. For any contribution that he has made over and above this rightful procedure, he cannot secure commissions upon.

The report of the appraiser is affirmed.

(189 App. Div. 699)

FINEGAN v. H. C. & A. I. PIERCY CONTRACTING CO. et al.

(Supreme Court, Appellate Division, First Department. December 5, 1918.)

MASTER AND SERVANT — 301(4) — **HIRER OF TRUCK WITH CHAUFFEUR LIABLE FOR NEGLIGENT DRIVING.**

P. not having been engaged as an independent contractor to deliver goods for D., but having let its truck and driver to D. with which D. could make its own deliveries, D. alone was the driver's superior, responsible to a third person for injury from the driver's negligence in making a delivery, even if the ultimate liability as between D. and P. was, under their contract, on P.; that liability not inuring to the benefit of the injured person.

Smith, J., dissenting in part.

Appeal from Trial Term, New York County.

Action by Christine Finegan, administratrix, against the H. C. & A. I. Piercy Contracting Company and the A. De Pinna Company, Incorporated. There was judgment on a verdict for plaintiff, motions to set aside the verdict and for new trial were denied, and defendants appeal. Reversed in part, and affirmed in part.

Argued before CLARKE, P. J., and DOWLING, SMITH, PAGE, and MERRELL, JJ.

Levy & Levy, of New York City (Elias V. Levy, of New York City, of counsel), for appellant Piercy Contracting Co.

William Dike Reed, of New York City (Murray G. Jenkins, of New York City, of counsel), for appellant A. De Pinna Co.

Sidney L. Teven, of New York City, for respondent.

PAGE, J. The action was to recover damages for personal injuries resulting from the alleged negligence of the driver of an automobile truck. The truck in question was owned and the chauffeur was employed by the defendant H. C. & A. I. Piercy Contracting Company. The agreement whereby the motor truck was hired by the defendant De Pinna Company provided:

"Second. The employes to be furnished, supplied, and paid for by the party of the first part, H. C. & A. I. Piercy Contracting Company, as hereinafter set forth, shall be under the control and orders of the party of the first part, H. C. & A. I. Piercy Contracting Company, it being understood and hereby intended to establish the fact that said employes are working in the business of the party of the first part, H. C. & A. I. Piercy Contracting Company, and that the relation of master and servant shall not exist as between them and the party of the second part, A. De Pinna Company, Incorporated, to the end and in the event of accident or damages caused by the negligence of said employe or employes, no claim by reason thereof shall be made against the party of the second part, A. De Pinna Company, Incorporated."

The contract further specifically provided that, in the event of legal liability attaching to the A. De Pinna Company, Incorporated, through any act of the chauffeurs supplied by the H. C. & A. I. Piercy

Contracting Company, the H. C. & A. I. Piercy Contracting Company should be held to indemnify the A. De Pinna Company, Incorporated, for its said loss. It was further agreed between the parties that indemnity insurance should be taken out by the H. C. & A. I. Piercy Contracting Company indemnifying the A. De Pinna Company, Incorporated, against liability for damage or loss caused by the operation of these automobiles.

The chauffeurs were paid by the H. C. & A. I. Piercy Contracting Company. They reported morning and night to the H. C. & A. I. Piercy Contracting Company's garage. They received their orders from the H. C. & A. I. Piercy Contracting Company. The right to hire them and discharge them was exclusively reserved to the H. C. & A. I. Piercy Contracting Company.

When the chauffeur arrived with the truck at the place of business of the De Pinna Company, he was subject to the directions and orders of the De Pinna Company in making delivery of its goods. While in the course of making such a delivery the accident happened to the plaintiff's decedent. The sole question presented on this appeal is the liability of each defendant, each claiming that the other was the employer, and therefore liable. The court held as a matter of law that they were both liable, and sent the case to the jury upon the questions of negligence, contributory negligence, and damages.

In our opinion, the defendant the H. C. & A. I. Piercy Contracting Company could not be held liable for the injury. Whatever may be the ultimate liability between the De Pinna Company and the Piercy Company as a result of the contract, that liability does not inure to the benefit of the injured party. The questions to be determined are: Under whose direction and control was the chauffeur? and in whose business was he engaged at the time? Recourse to the contract can be had to determine this question. From that it appears that the De Pinna Company hired the truck and driver from the Piercy Company; that the De Pinna Company used the truck and chauffeur to make delivery of its goods, and gave directions as to how those deliveries were to be made. It was therefore liable for a negligent act of the chauffeur while engaged in its business and subject to its direction and control. The Piercy Company was not an independent contractor. It did not agree to deliver goods for the De Pinna Company. It merely let to the De Pinna Company the truck and chauffeur with which the De Pinna Company could make its own deliveries. *Howard v. Ludwig*, 171 N. Y. 507, 64 N. E. 172; *Hartell v. Simonson & Sons Co.*, 218 N. Y. 345, 113 N. E. 255; *De Perri v. Motor Haulage Co.*, 185 App. Div. 384, 173 N. Y. Supp. 189. Where the concurrent negligent acts of two persons contribute to the injury, they may be held jointly liable. In this case the injury was occasioned by the negligent act of one person, and the question is simply who was the superior who was bound to respond for that person's act. Clearly it was the De Pinna Company.

The judgment against the defendant H. C. & A. I. Piercy Contracting Company is therefore reversed, with costs, and the complaint as

to it dismissed, with costs. The judgment against the A. De Pinna Company is affirmed, with costs to the respondent. Order filed.

CLARKE, P. J., and DOWLING and MERRELL, JJ., concur.

SMITH, J., dissents as to the H. C. & A. I. Piercy Contracting Company.

(108 Misc. Rep. 635)

PEOPLE v. VOLLERO.

(Supreme Court, Special Term, Kings County. September, 1919.)

1. CRIMINAL LAW § 1023(13)—RULING ON MOTION FOR NEW TRIAL FINAL AND UNAPPEALABLE.

On a motion for new trial in a prosecution for homicide, after affirmance of a conviction by the Court of Appeals by a divided court and without opinion, under Code Cr. Proc. § 542, the decision of a justice of the Supreme Court on defendant's motion for a new trial on the ground of newly discovered evidence is final and unappealable, either by defendant or by the people.

2. CRIMINAL LAW § 59(1)—WHAT CONSTITUTES AN "ACCOMPLICE."

To be an "accomplice" one must be so connected with a crime that at common law he might have been convicted, either as a principal or as an accessory before the fact.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

3. HOMICIDE § 30(1, 3)—ACCOMPLICE LIABLE AS PRINCIPAL.

If a conspiracy was entered into to murder six persons, and three of them were murdered by different members of the conspiracy, all the conspirators were principals in the commission of each murder, within Penal Law, § 2, and thereunder those aiding or abetting in their commission were "connected with the commission" of all the crimes, whether present or absent when each crime was committed, and became accessories before the fact, and liable as "principals," though not actually participating in any of the homicides.

4. CRIMINAL LAW § 511(10)—ACCOMPLICE TESTIMONY AS CORROBORATION.

In a prosecution for murder growing out of an alleged conspiracy to kill six men, three of whom were murdered, the testimony of an accomplice to such crime was insufficient to corroborate that of a confessed accomplice, under Code Cr. Proc. § 399.

5. CRIMINAL LAW § 510—CORROBORATION OF ACCOMPLICE TESTIMONY.

Code Cr. Proc. § 399, requiring corroboration of accomplice testimony to warrant a conviction, extends to proceedings before the grand jury which found the indictment, in view of section 253.

6. CRIMINAL LAW § 511(10)—CORROBORATION OF ACCOMPLICE TESTIMONY BY ANOTHER ACCOMPLICE.

Corroboration of testimony of an accomplice, necessary under Code Cr. Proc. § 399, to a conviction, is subject to the exception that the fact that if, on trial of an indictment, two accomplices testify as to defendant's guilt, instead of one, is not a corroboration, and in such a case it requires the same amount of other evidence to connect the defendant with the crime as if but one accomplice testified, in order to establish his guilt.

7. CRIMINAL LAW § 511(10)—CORROBORATION OF ACCOMPLICE TESTIMONY.

Corroboration by independent evidence is not dispensed with, where several accomplices testify against accused, as the accomplices are not deemed to corroborate each other, so that, where one was not only an accomplice in fact, but on the testimony of a confessed accomplice, was an

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accomplice at law, his testimony was wholly ineffective to corroborate the testimony of the confessed accomplice.

8. CRIMINAL LAW §945(1)—NEW TRIAL ON ACCOUNT OF NEWLY DISCOVERED EVIDENCE.

In prosecution for murder growing out of a conspiracy of one gang to kill six members of another gang, where a witness for prosecution, in corroboration of a confessed accomplice, was an accomplice, but was not so treated by parties or by court, and was subsequently indicted, a motion for new trial under Code Cr. Proc. § 465, subd. 7, for newly discovered evidence, would be granted, as a different verdict would be probable after his relation to the offense became known, in view of the trial proceedings.

9. CRIMINAL LAW §949(1)—SUFFICIENCY OF MOTION FOR NEW TRIAL.

Defendant's motion for a new trial, after his conviction of murder in the first degree had been affirmed by the Court of Appeals by a divided court and without opinion, under Code Cr. Proc. § 542, based upon section 465, subd. 7, authorizing a new trial where defendant on another trial can produce evidence which would probably change the result after a showing of due diligence, *held* sufficient in form to authorize the grant of a new trial.

Alessandrio Vollero moves for new trial after a conviction of murder in the first degree. Motion granted.

Edward J. Reilly, of Brooklyn, for the motion.

Harry E. Lewis, Dist. Atty., of Brooklyn (Herbert N. Warbasse and Ralph E. Hemstreet, both of Brooklyn, of counsel), opposed.

BENEDICT, J. The defendant, Alessandrio Vollero, was convicted by a jury in this court of the crime of murder in the first degree. Upon appeal the Court of Appeals affirmed the conviction by a divided court and without opinion, under section 542 of the Code of Criminal Procedure; the section providing that the court must give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties. 226 N. Y. 587, 123 N. E. 883. The defendant has moved this court at Special Term for a new trial under section 465 of the Code of Criminal Procedure upon the ground of newly discovered evidence. Although the motion was heard on June 7th last, the brief of the district attorney was, with the court's concurrence, not submitted until July 5th, and the great length of the printed record, comprising more than 1,000 pages, and the importance of the questions involved in the motion, both to the defendant and to the public, have precluded an earlier determination.

Whatever doubt this court may entertain as to the legality of the original conviction must remain unexpressed, in deference to the judgment of the Court of Appeals that any technical errors or defects upon the trial as disclosed by the record did not affect the defendant's substantial rights. The only question which now requires solution is that raised by the defendant's motion for a new trial upon the grounds which the statute expressly authorizes, as set forth in the section above referred to. That section, in subdivision 7, provides that the court has power to grant a new trial—

"where it is made to appear, by affidavit, that upon another trial the defendant can produce evidence such as, if before received, would probably have

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changed the verdict; if such evidence has been discovered since the trial, is not cumulative, and the failure to produce it on the trial was not owing to want of diligence."

[1] The court has approached the consideration of the question involved with full appreciation of the grave responsibility resting upon it, and recognizing that its decision upon the question is final and unappealable, after affirmance of the original judgment of conviction, either by the defendant (see *People v. Trezza*, 128 N. Y. 529, 28 N. E. 533; *People v. Mayhew*, 151 N. Y. 607, 45 N. E. 1123; *Hebberd v. Loeb*, 125 App. Div. 579, 109 N. Y. Supp. 1116), or by the people (*People v. Beckwith*, 42 Hun, 366; *People v. Priori*, 163 N. Y. 99, 57 N. E. 85).

The defendant was indicted with eight other men for the killing of Charles Ubriaco. He demanded and obtained a separate trial. The theory upon which he was tried was that certain persons, known as "the Navy Street Gang," in order to obtain control of certain lines of graft and blackmail which were supposed to be levied upon Italians from and by a gang known as "the Morellos," in Harlem, borough of Manhattan, as well as to have revenge against the Morellos for the murder of one Del Guardio, entered into a conspiracy to kill six men belonging to the Morello gang. Three of these six men were actually killed, viz. Charles Ubriaco and Nicholas Morello on September 7, 1916, and Antonio Ferrazano on October 6, 1916. The three other members of the Morello gang, who it is claimed were to have been killed by the conspirators, escaped. The defendant himself did not actually participate in the killing of any of the three men who were killed, nor was he present at the commission of the murders; but the prosecution claimed that he plotted and planned the murder of Ubriaco, and that he was one of the acknowledged leaders of "the Navy Street Gang." To quote from the very able and comprehensive brief of the district attorney submitted to the Court of Appeals:

"The whole case of the prosecution was based upon the theory that a criminal conspiracy existed to kill these six men."

And in order to prove the existence of such conspiracy the people introduced evidence showing at least 36 conferences which took place at different places and between different individuals, beginning in August, 1916, three weeks before the murders, which took place on the 7th of September, and continuing at intervals down to some time in the winter, after Ferrazano had been killed. The proof showed that the defendant and Raffele Daniello, hereinafter referred to, were present at almost all of these conferences, and that one Giovanni or John Mancini, hereinafter referred to, was present at at least 6 conferences, of which 3 were before and 3 after the murders of September 7, 1916. The brief of the district attorney before the Court of Appeals contains this statement:

"Raffele Daniello, whose complete confession brought about this prosecution, and who was the chief witness for the people, participated in and described on the witness stand a great many different conferences held by various members of the Navy Street gang, at which the conspiracy to kill the Morellos and obtain possession of their various forms of graft was discussed,

and plans were laid for the successful accomplishment of its ultimate purpose." Brief, p. 25. "The prosecution presented its case to the jury upon the theory of a conspiracy, of which the killing of Charles Ubriaco and Nicholas Morello was only a part. * * * The existence of the conspiracy was relied upon to justify the admission of a great deal of the proof that was accepted by the court." Id. p. 65. "The theory of the defense was that Daniello, to save himself, related to the jury a true story, into which he falsely wove the name of Vollero." Id. p. 67.

It is undeniable that without Daniello's testimony the defendant's conviction would have been impossible. There is no attempt to dispute the fact that it was his confession that caused the conviction. He is repeatedly referred to in the district attorney's brief as the "principal witness for the prosecution." He was regarded for all purposes of the trial as an accomplice both in law and in fact. The trial justice, in charging the jury, said:

"There is no question about his being an accomplice, if you believe what he says, because he says he is, and that settles that point."

Daniello, having turned state's evidence, later, with consent of the district attorney, took a plea and was released, at the request of the district attorney, under a suspended sentence.

[2] The rule as to who may be regarded as an accomplice is thus stated in *People v. Sweeney*, 213 N. Y. 37, at page 46, 106 N. E. 913, at page 917:

"To constitute an accomplice one must be so connected with a crime that at common law he might himself have been convicted either as a principal or as an accessory before the fact. *People v. Zucker*, 20 App. Div. 363, 365 [46 N. Y. Supp. 766], affirmed on opinion below 154 N. Y. 770 [49 N. E. 1102]; *People v. Bright*, 203 N. Y. 73, 79 [96 N. E. 362, Ann. Cas. 1913A, 771]."

Assuming therefore, that Daniello was an accomplice within the meaning of the statute next referred to, what was the effect of such complicity upon his evidence? Section 399 of the Code of Criminal Procedure reads as follows:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

The prosecution contended, both upon the trial, in the Court of Appeals, and upon the present motion that there was sufficient corroboration of the testimony of Daniello to sustain the charge of murder made against the defendant. Such corroboration was claimed to rest principally, although not wholly, on the testimony of John Mancini. The prosecution maintained that Mancini was not, like Daniello, an accomplice, but that he was, so to speak, a mere witness or spectator, whose evidence had the force of corroboration from an independent source or disinterested standpoint. At page 123 of the people's brief in the Court of Appeals this occurs:

"There is not one word of evidence in the entire case from which Mancini could possibly be convicted as a principal of this crime; not one word of evidence that connects him directly or indirectly with its commission."

His relation to the case is then compared with that of a maid working in a disorderly house with full knowledge of the character of the place, and who has been held not to be an accomplice as a matter of law.

[3, 4] I am wholly unable to subscribe to this proposition. Mancini, as will be seen, was indicted as a principal for the murder of Ferrazano, who was one of the six men whose death was the object of the conspiracy. If a conspiracy were entered into, either for the purpose of effecting, or resulting in, the murder of six persons, and three of them were murdered by different members of the criminal conspiracy, all the conspirators are liable as principals for the commission of each murder. If it be true that a criminal conspiracy to commit these murders was formed, and that Mancini aided or abetted in their commission, he was "concerned in the commission" of all the crimes, whether present or absent when each crime was committed. He thereby became an accessory before the fact, and liable as a "principal," even though he did not actually participate in any of the homicides. Penal Law (Consol. Laws, c. 40) § 2.

Hence, if Mancini were an accomplice in those crimes, his testimony was insufficient to corroborate that of Daniello. What is to be deemed sufficient corroboration under our statute has repeatedly been defined by our courts. A brief notice of the principal authorities will not be out of place.

In *People v. Hooghkerk*, 96 N. Y. 150, at page 162, Judge Andrews, after referring to this statute, said:

"Prior to this statute the rule in the state permitted the jury to convict a defendant upon the uncorroborated testimony of an accomplice (*People v. Costello*, 1 Denio, 88); but it was the uniform custom of judges to advise the jury that the evidence of the accomplice should be received with great caution, and it rarely happened that a conviction was had upon his unsupported evidence. The rule now embodied in the statute is substantially the rule which before the statute courts were in the habit of stating to the jury for their guidance, although, as has been said, it was not enforced as a rule of law.

"It is plain that independently of the statutory rule corroborative evidence to have any value must be evidence from an independent source of some material fact tending to show not only that the crime has been committed, but that the defendant was implicated in it, and such is the doctrine of the best considered cases. But neither the doctrine hitherto declared by the courts, nor the rule embodied in the statute, requires that the whole case should be proved outside of the testimony of the accomplice. Such a rule would render the testimony of an accomplice in most cases unnecessary, and would defeat the policy of the law, which permits the use of accomplices as witnesses in aid of and in the interests of public justice."

In *People v. Plath*, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236, Chief Judge Ruger, in referring to the rule as to corroboration before the statute, said:

"Although such cases are not strictly analogous to those where corroboration is required by statute, they yet furnish some help in determining the degree of proof required in the latter case. The rule as to the corroboration of an accomplice is stated in *Roscoe's Criminal Evidence*, 122, as follows: 'That there should be some fact deposed to, independently altogether of the evidence of the accomplice, which taken by itself leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it. *Russell on Crimes*, 962, says that 'it is not sufficient to corroborate an accomplice as to

the facts of the case generally, but that he must be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged."

The latter case is referred to by Judge Peckham in *People v. Ogle*, 104 N. Y. 511, at page 515, 11 N. E. 53, at page 54, where he says of the Plath Case:

"It only requires a corroboration as to some material fact which goes to prove the prisoner was connected with the crime."

And he then points out:

"That the witnesses, in regard to whom the request was made, were not accomplices in any sense of the word," and that "even if the rule as to the evidence, of an accomplice had been erroneously stated by the court, it was therefore wholly immaterial in this case."

In *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62, Judge Earl says, speaking of the section in question:

"This section has changed that rule of law and requires that there should be simply corroborative evidence, which tends to connect the defendant with the commission of the crime. * * * Whether that evidence was sufficient corroboration of the accomplice was for the determination of the jury. The law is complied with if there is some other evidence fairly tending to connect the defendant with the commission of the crime so that his conviction will not rest entirely upon the evidence of the accomplice."

In *People v. Elliott*, 106 N. Y. 288, at page 292, 12 N. E. 602, at page 603, Judge Earl said:

"It is not necessary that the corroborative evidence of itself should be sufficient to show the commission of the crime, or to connect the defendant with it. It is sufficient if it tends to connect the defendant with the commission of the crime. Nor need the corroborative evidence be wholly inconsistent with the theory of the defendant's innocence. The court, before it should submit the case to the jury, should be satisfied that there is some corroborative evidence fairly tending to connect the defendant with the commission of the crime, and when there is, then it is for the jury to determine whether the corroboration is sufficient to satisfy them of the defendant's guilt."

To the same effect is the case of *People v. Mayhew*, 150 N. Y. 346, 44 N. E. 971.

In *People v. Christian*, 78 Hun, 28, 29 N. Y. Supp. 271, affirmed 143 N. Y. 666, 39 N. E. 21, on opinion below it was held that—

"Under this statute it matters not how consistent the narration of the accomplice, how much it is fortified by detail in the statement itself, or how reasonable and convincing the relation of facts by her, it is not enough, unless corroborated by such other testimony as tends to connect the defendant with the commission of the crime."

In *People v. Patrick*, 182 N. Y. 131, 74 N. E. 843, Judge Gray, writing the prevailing opinion, quotes from the Mayhew Case and says of the rule there stated:

"This is but just; or, otherwise, if the statute is to be given a narrower construction, the ends of justice might be often defeated. The law, in its humane policy, intends that the life, or the liberty, of an accused person shall not be sworn away by an accomplice, unless the accomplice be so corroborated, as to

some material fact, or facts, as that a belief in his credibility becomes reasonable, and therefore safe to be entertained."

[5] This rule of corroboration extends also to the proceedings before the grand jury which found the indictment.

In *People v. Sweeney*, 213 N. Y. 37, at page 42, 106 N. E. 913, at page 915, Judge Chase, after referring to the section under consideration, says in reference to the Code of Criminal Procedure:

"It also provides that 'the grand jury can receive none but legal evidence' (section 256), and that an indictment should not be found by a grand jury unless 'all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury' (section 258). It is manifest, therefore, that if the only testimony before the grand jury is the testimony of accomplices, it cannot be said to be sufficient, if unexplained or uncontradicted, to warrant a conviction by the trial jury."

[6] The rule as to corroboration of the testimony of an accomplice is subject to an important exception which has bearing upon the question to be decided at this time. The exception is stated in the syllabus of the case of *People v. O'Farrell*, 175 N. Y. 323, 67 N. E. 588, as follows:

"The fact that upon the trial of an indictment * * * two accomplices testified in regard to the defendant's guilt instead of one is not a corroboration within the meaning of the statute, and in such a case it requires the same amount of other evidence to connect the defendant with the crime as if but one accomplice testified, in order to establish his guilt."

[7] In this case the Court of Appeals unanimously reversed the Appellate Division and said (at page 327 of 175 N. Y., at page 589 of 67 N. E.):

"This brings us to the consideration of the second question, whether the fact that two accomplices testified in regard to the crime instead of one, removed the case from the effect of section 399. We think it did not. The obvious purpose of that statute was not to secure the evidence of more than one accomplice, but related to the quality of the evidence rather than the quantity, and was to forbid the conviction of any person upon the evidence of an accomplice or accomplices, unless corroborated by other evidence. In the language of Judge Foster in *State v. Williamson*, 42 Conn. 261, 265: 'Merely adding to the number of broken reeds gives no increase of strength. The confirmation required to give the testimony of an accomplice the necessary weight should come from an unimpeached source, not from partners in guilt.' Such are the views of the text-writers who discuss this subject. Greenleaf, in his work on Evidence (volume 1, § 381), says: 'If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if there were but one.' The same doctrine is stated in substantially the same language in 1 Taylor on Evidence, § 970. In 1 Phillips on Evidence (Cowen & Hill's Notes, 4th Ed.) p. 113, it is said: 'The practice of requiring confirmation, when the case for the prosecution is supported by an accomplice, applies equally when two or more accomplices are brought forward against a prisoner.' In Underhill on Criminal Evidence, § 75, it is said: 'Corroboration by independent evidence is not dispensed with where several accomplices testify against the accused. The accomplices are not deemed to corroborate each other.'"

Bearing in mind the principles which have been adverted to, we are now in a position to discuss the grounds upon which the present application rests.

The contention of the defendant upon this motion is that since the trial of this case the defendant has discovered certain facts in regard to the witness Giovanni Mancini which, had they been known at the time of the trial and had the court and jury been put in possession of them, would have changed the result of the trial. Mancini was permitted to testify and did testify in support of the story told by Raffele Daniello regarding the conspiracy in which it was claimed the defendant was involved. As will be shown, the testimony of Mancini was submitted to the jury for the purpose of corroborating Daniello and under instructions to the jury to determine upon the evidence in the case whether Mancini was or was not an accomplice. The affidavit submitted by the defendant states that, upon the same day when this defendant was indicted in Kings county for the killing of Ubriaco and Morello, Mancini was indicted in New York county for the killing of Ferrazano. The indictment against Mancini was what is known as a secret indictment, and defendant's counsel in the moving affidavit states that it is his belief that it was not known to the trial court in the present case at the time of the trial that Mancini had been indicted, but that knowledge of the fact of such indictment having been found against him was known at the time of defendant's trial only to the district attorneys of Kings and New York counties.

The defendant further contends that the assistant district attorney who tried the case against this defendant endeavored to withhold from the court and the jury knowledge that the witness Mancini was then a codefendant under indictment in connection with one of the murders which were the result of the conspiracy. In support of his contention he refers to the record of the cross-examination of Mancini, as follows:

"Q. And you are under indictment now, aren't you, for murder?

"Mr. Warbasse: That is objected to unless the same rule, by consent, applies to the defendant and all of the defendant's witnesses.

"The Court: Let him say whether he is under indictment for murder arising out of this same occurrence.

"Mr. Warbasse: I have no objection to that.

"The Interpreter: Question, please?

"By Mr. Reilly: Q. You are under indictment for murder—for one of the murders that Daniello told the police about?

"The Court: That is excluded. That is not what I said I would allow.

"By Mr. Reilly: Q. Well, whom are you under indictment for the murder of?

"Mr. Warbasse: That is objected to as assuming he is.

"The Court: That is excluded.

"By Mr. Reilly: Q. Are you indicted for the killing of Ubriaco? A. I never killed anybody.

"Q. I say, are you indicted? A. Never."

On redirect examination Mr. Warbasse, the trial assistant district attorney, asked these questions:

"Q. Last November, when you were sent to police headquarters, you were sent there under arrest as a witness, were you? A. I was arrested as a witness; yes.

"Q. And you are still held as a witness? A. Yes; as a witness. I am under \$25,000 bail.

"Q. You testified before the grand jury, didn't you, in this case? A. Yes."

On re-cross-examination by Mr. Reilly the following took place:

"Q. You say you are here as a witness now? A. Yes.

"Q. Haven't you been indicted in New York, and haven't you pleaded not guilty to the indictment of murder in the first degree?

"Mr. Warbasse: Objected to. Your honor has already excluded it as improper.

"The Court: Well, I will allow him to answer.

"The Witness: I have not killed anybody yet. What do I know?

"By Mr. Reilly: Q. Have you pleaded to an indictment in New York.

A. I was only before the grand jury. I was not before the court.

"Q. Have you been over to New York since you have been arrested? A. Yes; after they called me here, they sent me to New York."

The rule has already been referred to that one accomplice cannot be used to corroborate another accomplice. Mancini was not only an accomplice in fact, if the testimony of Daniello is to be believed, but he was an accomplice in law, and his testimony was wholly ineffective in corroboration of the testimony given by Daniello.

After the trial and conviction of the defendant, and on the 13th of December, 1918, Mancini pleaded guilty to manslaughter in the second degree, in that he, with others, conspired to kill Ferrazano, and upon the recommendation of the district attorney of Kings county he received the same terms and benefit as Daniello had received, namely, a suspended sentence and probation.

[8] The question is thus squarely presented whether, if the jury by whom the defendant was convicted had been aware of the relation of Mancini to the conspiracy, and the fact that at the time when he testified he was an accomplice and under indictment for the commission of one of these murders, would the jury have regarded his testimony in the same light as they presumably regarded it in reaching the conclusion which they did?

It is apparent from what will now be stated that the question of the corroboration of Daniello's testimony by that of Mancini was a factor of extreme importance in the minds of the jury. I am unable to give any stronger proof in support of this statement than is found in a perusal of the record itself. In the summation of the case by the assistant district attorney great weight was placed upon the fact that Mancini's testimony corroborated that of Daniello, and that Daniello's testimony corroborated that of Mancini upon the fundamental point in the case, namely, that the defendant was initiated into the band of criminals forming the Camorra, which was organized for the purpose of dealing in murder and stealing. At the conclusion of the testimony the following discussion took place between court and counsel:

"The Court: Now, as to those two witnesses that you spoke of, Daniello first; on what theory do you claim, Mr. District Attorney, that the question of whether he is an accomplice should be submitted to the jury as a question of fact?

"Mr. Warbasse: First, because the complicity of any witness is always a question of fact. * * *

"The Court: Now, as to Mancini; will you tell me, Mr. Reilly, please, what evidence in the case you think justifies leaving to the jury, as a question of fact, whether Mancini is an accomplice?

"Mr. Reilly: The evidence is that six men were named in the general scheme to get rid of the Morellos. Six men were named in Philadelphia.

"The Court: Yes.

"Mr. Reilly: The evidence is that certain persons got rid of Ubriaco and Morello as a part of the scheme. Then Ralph Daniello and John Mancini are sent from Brooklyn over to New York to kill Ferrazano. Ferrazano is killed by two other men, while these two are waiting outside, and had Ferrazano come out at the door at which they were waiting they would have killed him themselves.

"The Court: I thought there might be a possibility of inferring that Mancini was sent over there to kill him; but there is no evidence at all that Mancini was sent over there to kill him.

"Mr. Warbasse: Let me call your honor's attention, in that connection, to Daniello's testimony that Mancini knew nothing about the mission for which they went over.

"Mr. Reilly: My recollection is, and the copy of the evidence that I have shows, that Mancini waited outside.

"The Court: With Daniello?

"Mr. Reilly: Yes; and that as soon as it was over they both came back to Brooklyn, and both went to Alessandrio's house to tell him it was done, and rang the door bell, which was not answered, and then, when there was no response—

"The Court: I hardly think there is any evidence there from which the jury could possibly infer it, though perhaps I could leave it to them as a question of fact. There is no direct evidence—none that I recall, at any rate.

"Mr. Reilly: No; no evidence but that which I have stated. If from that evidence they make up their minds that he was an accomplice, and arrive at the conclusion that he was an accomplice, then he is just as much an accomplice in law as Daniello.

"The Court: I think that I will probably explain to the jury what an accomplice is, and say they can decide for themselves whether there is any proof in the case which justifies finding that Mancini was an accomplice.

"Mr. Warbasse: It seems to me that, before your honor could submit the question of the complicity of Mancini to the jury, there would have to be some evidence in the case upon which a conviction against Mancini could be based.

"The Court: That is true, but there are certain circumstances that are suggestive, at least, about Mancini going over there. What was he there for?

"Mr. Reilly: They were all members of the one gang. They knew in Navy street what they were going to do to the Morellos. He was present that day, and he was present at the banquet when the toast was drunk: 'Here is to the health of the Neapolitans and the destruction of the Sicilians.'

"Mr. Warbasse: You will recall, for instance, that not only Paolo Panzoni said, but Daniello said, that the conference was almost over at the restaurant when Mancini came in.

"Mr. Reilly: He was unfortunate in being late, but he was down at the banquet that night, and knew what they had done.

"The Court: He claims that they were down at his own place when some of them were sworn into the Camorra, and they may have made him a member of the Camorra, for all I know. That sounded about like what they were doing."

The court charged the jury regarding Mancini as follows:

"The people claim that, among other witnesses, they have corroborated what Daniello said, and have shown the defendant's connection with this crime by the witness Mancini. Mancini, you may remember, was the man who testified that he was a partner of Daniello some years ago in the restaurant business, and claims that he was present at one or two of the conferences at Coney Island and elsewhere, and also in the restaurant on Myrtle avenue on the day of the alleged murder. Mancini claims that he was in those places; that he heard some of the talk as to the planning of this shooting in Navy street; and that he went over to New York with Daniello at the time of the killing of Ferrazano, who is said to have been the third member of the Morello gang to be killed pursuant to this conspiracy. Although there is no claim that Mancini had a hand in the actual killing of Ferrazano, he appears to

have been outside of or near the restaurant with Daniello at the time that the two other men went into the restaurant and did the actual killing. The claim of the defense is that Mancini was also an accomplice; that he was a party to this same undertaking, and was just as guilty as Daniello.

"An accomplice, very briefly, is any one who has a hand in the commission of a crime, where the proof shows that he himself could be indicted for the crime. In other words, the proof has to show, before a jury can find that a witness is an accomplice, that the alleged accomplice could himself have been legally and properly charged with the commission of the offense in question. I have said, as to Daniello, that there is no question about his being an accomplice, if you believe what he says, because he says he is, and that settles that point. But, as to Mancini, he does not say that he was a member of the gang, or had any hand at all in this killing. That he knew the others, that he went with them more or less, and met them here and there, is not denied; but whether or not he was an accomplice in the eyes of the law I am going to leave to you as a question of fact. It will be determined, as I have already indicated to you, by your decision as to whether or not you find on the proof in this case that he (Mancini) could himself have been properly and legally prosecuted for this particular crime. If he could have been, he is an accomplice; if he could not have been, he is not an accomplice. If he is not an accomplice, and you believe what he says, then you might—I do not say you would—find in his testimony corroboration of what Daniello said, at least as to some part, tending to connect the defendant with the commission of this crime."

The jury retired at 6:31 o'clock p. m. They returned into court at 2:23 o'clock on the following morning, and the following took place:

"The Court: Mr. Foreman, you say you want a part of the charge read?

"The Foreman of the Jury: The part of the charge in which you state the law about John Mancini in this case.

"The Court: All right; the stenographer will read that to you. (The stenographer read as follows:)

"They have corroborated what Daniello said, and have shown the defendant's connection with this crime by the witness Mancini. Mancini, you may remember, was the man who testified that he was a partner of Daniello some years ago in the restaurant business, and claims that he was present at one or two of the conferences at Coney Island and elsewhere, and also in the restaurant on Myrtle avenue on the day of the alleged murder. Mancini claims that he was in those places, that he heard some of the talk as to the planning of this shooting in Navy street, and that he went over to New York with Daniello at the time of the killing of Ferrazano, who is said to have been the third member of the Morello gang to be killed pursuant to this conspiracy. Although there is no claim that Mancini had a hand in the actual killing of Ferrazano, he appears to have been outside of or near the restaurant with Daniello at the time that two other men went into the restaurant and did the actual killing. The claim of the defense is that Mancini was also an accomplice; that he was a party to this same undertaking, and was just as guilty as Daniello.

"An accomplice, very briefly, is any one who has a hand in the commission of a crime, where the proof shows that he himself could be indicted for the crime. In other words, the proof has to show, before a jury can find that a witness is an accomplice, that the alleged accomplice could himself have been legally and properly charged with the commission of the offense in question. I have said, as to Daniello, that there is no question about his being an accomplice, if you believe what he says, because he says he is, and that settles that point. But, as to Mancini, he does not say that he was a member of the gang or had any hand at all in this killing. That he knew the others, that he went with them more or less and met them here and there is not denied; but whether or not he was an accomplice in the eyes of the law I am going to leave to you as a question of fact. It will be determined, as I have already indicated to you, by your decision as to whether or not you find on the proof in this case that he (Mancini) could himself have been properly and legally prosecuted for this particular crime. If he could have been, he is an accomplice; if he

could not have been, he is not an accomplice. If he is not an accomplice, and you believe what he says, then you might—I do not say you would—find in his testimony corroboration of what Daniello said, at least as to some part, tending to connect the defendant with the commission of this crime.’

“The Court: Gentlemen, if that is not all you want, please let me know now, I shall be here all night, and if there is anything you want at any time, if you will let me know, you may come in and have it.”

At 2:28 o'clock a. m. the jury again retired. At 3:08 o'clock a. m. the jury again returned into court.

“The Court: Gentlemen, after you retired, I had my attention called to the fact that the stenographer, when he began to read to you, began in the middle of a sentence; and in order that there may be no possibility of any misapprehension about it I have asked you to come back. I think it is clear to you what was meant; but he started off as though I had stated it as a fact that there was a corroboration. Of course, you know that I did not state that as a fact. I said that it is for you to say whether there is. I said that the prosecution claims that there was corroboration in the opening part of the sentence which the stenographer omitted to read to you, and which just preceded the point at which he began. I think it was plain, anyhow, but in the abundance of caution I asked you to come back that I might say that to you. In listening to the stenographer read what I said about accomplices, I am afraid that perhaps my definition of accomplice might be misunderstood by laymen. What I am going to say to you about it now is exactly the same in legal meaning as what I did say to you.

“I said that an accomplice is one who could properly and legally be indicted for the offense in question. That is correct, because no one could properly and legally be indicted unless the proof was sufficient to convict him. You might not know that, however, and I am just going to say that what that meant is that an accomplice is one who could be convicted of the offense charged, and that is equivalent to saying that he could be lawfully indicted, because you cannot find a lawful indictment unless there is sufficient proof to convict. Not being lawyers, however, you might not know that. I am not making any change at all in the legal effect of the charge, but am just explaining to you what perhaps I should have explained in the first instance. I think you will get that clearly. An accomplice is one who himself, on the proof in the case, would be guilty of the offense charged. If he would not be guilty on the proof in the case of the offense charged, he is not an accomplice. I hope that is plain.”

In view of this recital of the proceedings upon the trial, and in view of the facts which have developed with regard to Mancini's indictment and subsequent conviction, is it possible to resist the conclusion that, if the facts regarding his indictment for complicity in the crimes which were the outcome of the conspiracy had been known to the jury, the result of their long deliberations would have been different? Whether knowledge of the fact of Mancini's indictment for murder was deliberately kept from the trial court and the jury by the assistant district attorney who tried the case, as is claimed by the defendant, or whether it was then unknown to the prosecuting officer, is immaterial. I do not decide that question. It is sufficient that the jury did not know the fact. Clearly the trial justice himself was not aware of it. If he had been, he most certainly would not have charged the jury as he did regarding Mancini. Moreover, there is nothing in the elaborate briefs which were submitted to the Court of Appeals which disclosed the fact to that court. As a matter of fact, the fourth point in the brief of the learned district attorney before that court states as a proposition:

"It was not error for the court not to charge as a matter of law that the witness Mancini was an accomplice."

The case was presented both before the trial court and upon the appeal with Mancini occupying merely the position of a material witness held under bail and not as an accomplice. He was produced before the jury as apparently, and on this motion is asserted to be, one who was merely a spectator or "innocent bystander" to the criminal conspiracy, not as a principal then under secret indictment as a co-conspirator. By some arrangement he was not required to plead to the indictment until June 25, 1918, after the trial of this defendant, and then he pleaded not guilty, which plea on December 13, 1918, he changed to a plea of manslaughter in the second degree, and thereupon his sentence was suspended. In reality his position was similar to that of the three witnesses in the first Becker trial who were concededly implicated with him and obtained immunity by giving evidence tending to convict the defendant in that case. That conviction was reversed (*People v. Becker*, 210 N. Y. 274, 104 N. E. 396) largely because the court held that it was questionable whether there was any testimony corroborating the testimony of these witnesses as to the guilt of the defendant. Upon the appeal from the second trial the court held that there was evidence in the case other than that of the accomplices, tending to connect the defendant with the commission of the crime. In reviewing the second trial the Court of Appeals said:

"The jury were properly warned that, in weighing the words of Rose, Valion, and Webber, the fact that these witnesses had been granted immunity, provided they did not actually fire the fatal shots, should be taken into account, and the further fact that they had an interest to shield themselves in the testimony they should give." 215 N. Y. 126, 140, 109 N. E. 127, 131, Ann. Cas. 1917A, 600.

In the case at bar no such warning was given with regard to Mancini, and in that respect the Becker jury was in a better position to pass upon the credibility of the witnesses referred to than the jury in the present case, if, as seems not unlikely, an arrangement for immunity had been made with Mancini.

The assistant district attorney who opposed the present application contends that, even without regard to the testimony of Mancini, there was sufficient corroboration of the story told by Daniello to support the conviction of the defendant; but he does not specify how otherwise it was corroborated. I regret that I cannot concur in the contention. Such corroboration as there was came from the mouths of other members of the conspiracy who were equally steeped in the crimes committed. If, then, we regard Mancini as an accomplice in the crime, his testimony is valueless as corroboration of the testimony given by Daniello, also an accomplice. I am accordingly forced to the conclusion that the jury would in all probability not have found a verdict of guilty against the defendant, if the real facts which are now known concerning Mancini's indictment as a principal in one of the murders had been known to the trial court and explained, in its legal effect, to the jury. Indeed, I am not at all sure that, if the facts concerning his indictment and the suspension of his sentence had been disclosed to the Court of Appeals, a different result would not have been reached in that court.

[9] There remain for consideration certain matters involved in the decision of this application which are discussed in the brief submitted in opposition by the district attorney. He cites the case of *People v. Priori*, 164 N. Y. 459, 58 N. E. 668, in which the Court of Appeals declares the rule applicable to such a motion as this as follows:

"Newly discovered evidence in order to be sufficient must fulfill all the following requirements: (1) It must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be cumulative to the former issue; and (6) it must not be merely impeaching or contradicting the former evidence." 164 N. Y. 472, 58 N. E. 672.

As to the first of these conditions, I assume that the language employed by the court is equivalent to the language used in section 465 of the Code of Criminal Procedure, viz.:

"Where it is made to appear, by affidavit, that upon another trial the defendant can produce evidence such as, if before received, would probably have changed the verdict."

This phase of the case has already been considered and requires no further comment. As to the second and third conditions, the moving affidavit of defendant's counsel states:

"At the close of the trial of this defendant, the court not being aware that Mancini had been indicted in this conspiracy and the counsel for the defendant and defendant not having been able to obtain such information, the following discussion took place between the trial court, the trial district attorney, and the counsel for the defendant."

And in his memorandum, submitted to the court, he says that he had stated under oath that he did not know the fact that Mancini had been indicted in this conspiracy. The district attorney does not meet these statements with anything more substantial than surmises that defendant and his counsel must have known of Mancini's indictment for the murder of Ferrazano.

The question of Mancini's participation in the conspiracy as a principal as affecting the right of the prosecution to use him as a material and disinterested witness to corroborate Daniello was a close one. Good faith, not alone to the court presiding at the trial, but also to the jury and to the defendant on trial for his life, demanded that the district attorney reveal the fact to them, if he was aware of it, that Mancini was under indictment as a principal, and not merely held as a material witness under bail. Moreover, if it were the fact, as the defendant now claims, that an agreement then existed between the district attorney's offices in New York and Brooklyn to permit Daniello and Mancini to plead to crimes of a lesser degree and to obtain suspended sentences in consideration of giving evidence against this defendant upon his trial, then that scrupulous good faith which is expected of a prosecuting officer required a disclosure of the fact of the indictment of Mancini so that court and jury might judge the weight to be given to his evidence in the light of such agreement.

On the contrary, however, it appears, as has already been stated, that Mancini has been charged with the crime of murder of one of

the three members of the Morello gang, whose death was one of the objects of the conspiracy. This had been done by a secret indictment on the same day on which the defendant herein had been indicted for the murder of another one of the three victims of the conspiracy. The statement to this effect in the moving affidavit is not contradicted by the answering affidavits, and, as to its having been secret, it is corroborated by the affidavit of Higgins, a county detective, who avers that the deputy clerk of the Court of General Sessions of New York City informed him that the original indictment was secret by order of the court, and that the names of the other defendants could not be disclosed to him, because some of them had not been apprehended. Under all these circumstances, I am of opinion that the defendant has met the conditions stated as to discovery and due diligence as to the indictment of Mancini.

As to the fourth, fifth, and sixth conditions above stated: The evidence in question is certainly material (see 5 Chamberlayne on Evidence, § 3754), and it was not cumulative in its nature, nor does it merely impeach or contradict the former evidence.

To my mind the fact that no affidavit by the learned district attorney or his trial assistant is submitted in contradiction of the statement that the fact of Mancini's indictment was known to the district attorneys of Kings and New York counties at the time of defendant's trial is significant. Their silence upon this point seems quite remarkable, in view of the serious charge made in the moving affidavit. In my opinion, the answering affidavits are singularly unsatisfactory and incomplete, and were it not for that fact, I should have less difficulty in reaching a conclusion more satisfactory to my own mind and conscience and one which would not involve the expense and labor of a new trial of this defendant.

In the light of all that has been stated in this memorandum, which I fear only inadequately covers the matters involved in this application, I have concluded, in the exercise of the judicial discretion which the law reposes in the court, to grant a new trial to this defendant.

Motion granted. Settle order on notice.

(108 Misc. Rep. 514)

UNITED STATES TRUST CO. OF NEW YORK v. TAYLOR et al.

(Supreme Court, Special Term, New York County. July 7, 1919.)

1. WILLS §§524(6), 634(15)—VESTING OF REMAINDERS AND TIME OF ASCERTAINMENT OF CLASS.

On a bequest to trustees, in trust to collect and pay over the income of a fund to a life tenant, and after the death of the life tenant to pay over and distribute the fund, the remainder will not vest in the beneficiaries until the time for payment arrives, and the class of beneficiaries is fixed as of the date of the life tenant's death, and not as of testator's death.

2. WILLS §§552(5), 634(13)—REMAINDER TO NEXT HEIRS GIFT TO CLASS.

Under a will directing the income from a trust fund to be paid to testator's sister during her life, and on her death the capital to be distributed among his "next heirs" by blood according to the statute of distribution, *held*, on the death of life tenant after testator, that the "next heirs" took as members of a class, no vested remainder to testator's next of kin being intended, so that his nephews and nieces did not take by representation from their ancestors, but in their own rights, and his grand-nephews and grandnieces took the share of their immediate ancestor.

Action by the United States Trust Company of New York, as trustee under the will of Peter B. Taylor, deceased, against Irving K. Taylor and others, to construe the will. Order of construction entered.

Stewart & Shearer, of New York City, for plaintiff.

Larkin & Perry, of New York City, for defendant Perry.

Taylor, Jackson, Brophy & Nash, of New York City, for defendant Pemberton.

Whitridge, Butler & Rice, of New York City, for defendant Fannie T. Taylor.

John F. Coffin, of New York City, for defendants Fannie T. Baldwin and others.

Maurice J. Moore, of New York City, for defendants Irving K. Taylor and others.

John Francis Moore, of New York City, for defendants Buchanan and Adelaide B. Baldwin.

LEHMAN, J. The testator, Peter B. Taylor, died in the city of New York on or about the 4th day of January, 1909, leaving a last will and testament which was duly admitted to probate. In his will he provided among other things:

"Fourth. I direct my executors hereinafter named, to divide all the rest, residue and remainder of my estate, real and personal, of whatsoever kind or nature and wheresoever situated, of which I may die seized or possessed or be in any way entitled to, into twenty-two equal parts or portions, which parts or portions I give and bequeath and direct my executors to pay over and distribute as follows: * * * Four other of said twenty-two parts to my sister, Jeannie McKewan, if she be living at the time of my death, for her own use and benefit forever, and if she be then dead, then to my next heirs by blood to be distributed between them by my executors according to the statute of distribution of the state of New York.

"Fifth. If my sister, Jeannie McKewan, shall be living at the time of my death then in that case I give and bequeath four other of said twenty-two parts to the United States Trust Company in the City of New York, upon the

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

trusts and to and for the uses and purposes following, that is to say: in trust to collect and receive all the rents, profits, dividends, interest moneys and income arising therefrom and after paying all taxes, charges, costs and expenses thereon and incident thereto, to pay over the net annual income thereof in quarterly payments to my sister, Jeannie McKewan, for and during her life, and on her death to convey, pay over and distribute the whole capital of such four parts to and among my next heirs by blood according to the statute of distribution of the state of New York."

The testator's sister survived the testator and died on April 13, 1918. The trustee now asks for a construction of the fifth paragraph of the will and a direction as to the distribution of the trust fund provided for in that paragraph. Inasmuch as the fund must be regarded as personal property and the testator expressly provided that it be distributed according to the statute of distributions, it is quite evident that he has used the words "next heirs by blood" in the sense of next of kin, and it is not disputed that they should be given this construction. The serious question involved in this case, however, is whether the distribution must be made among the next of kin living at the testator's death or among those persons who would have stood in the relation of next of kin to him at the time of his death, if he had survived the life tenant.

[1, 2] "The next heirs" under the will take as members of a class. There is no present gift in express terms to the members of that class, but they take only under the provision of the will that after the death of the life tenant the trustees should "convey, pay over and distribute" this fund among them. Under well-established canons of construction, ordinarily where there is a bequest to trustees in trust to collect and pay over the income of a fund to a life tenant and after the death of the life tenant to pay over and distribute the fund, the remainder will not vest in the beneficiaries until the time for payment arrives (*Wright v. Wright*, 225 N. Y. 329, 122 N. E. 213, and cases there cited), and the class of beneficiaries is fixed as of the date of the death of the life tenant, and not as of the death of the testator.

The testator left him surviving a brother and sister and descendants of a predeceased brother and sister. At the time of the death of the life tenant, Jeannie McKewan, one son of the life tenant, survived, and numerous other nephews and nieces, as well as the descendants of a deceased nephew and niece, of the testator. If the remainder after the death of the life tenant vested in the testator's next of kin at the death of the testator, the descendants of each brother and sister take the share which their ancestor would have taken. If, on the other hand, the will is to be interpreted in accordance with the usual canons of construction, and the gift over gave to the members of the beneficiary class living at the death of the testator no vested interest, then their ancestors will take, not by representation from their ancestors, but as present next of kin.

The contention is now urged by some of the nephews and nieces, or their assignee, that this rule of construction has no application to the present case, because the word "heirs" means those persons who succeed to an estate upon the death of their ancestor or kin by descent or the right of relationship, and the class must therefore of necessity

be fixed at the date of such death and at no other time. There is no doubt but that the primary meaning of the word "heirs" is in accordance with this contention, but where the will shows on its face that the testator used the word in an inexact sense, and did not intend that any estate should vest in his "heirs" until a future time, and that the class should be determined as of that time, the courts will carry out the intention of the testator and give to the word "heirs" a secondary meaning, to wit, the persons who would take by descent and relationship, if the testator had survived until the date at which he intended that the remainder should vest. So in the case of *Delaney v. McCormack*, 88 N. Y. 174, where a testator had made a gift over to his next of kin after he had previously given to his son James "a base or determinable fee subject to be divested on his death without having had lawful issue," the court held that the words "next of kin" may be construed as of the time of the death of the son James, and not as of the time of the death of the testator. It is true that in that case there could be no doubt but that the testator did not intend to devise or bequeath a vested remainder, but the reasoning of the court is at least to some extent applicable to the facts before me.

In the present case also, it seems to me quite clear that the testator intended to bequeath no vested remainder to his next of kin. The testator in other provisions of his will used language appropriate to create a present gift, and apparently understood the difference between a present gift and a direction to distribute and pay over. It would seem fairly plain that he did not intend that the life tenant should be regarded as one of his next of kin or heirs within the meaning of the paragraph of the will under consideration, and should as such share in the remainder; yet this would be the result of a construction that the remainder vested at the death of the testator. Since, under the authority of *Delaney v. McCormack*, *supra*, the court would be bound to give the words "next heirs" a secondary meaning, if this remainder is contingent, it seems to me that the court ought not to lay too much stress upon their primary meaning, merely for the purpose of construing the bequest to them as a present vested interest. It follows that the nephews and nieces do not take by representation from their ancestor, but in their own rights.

The sole remaining question is whether the children of the deceased nephew and niece share in the estate. In my opinion there is no serious doubt that they have this right. The statute of distributions in effect at the time of the death of the testator (then section 2732 of the Code of Civil Procedure) was amended by chapter 319 of the Laws of 1898, and so far as concerns the questions before me is substantially unaltered since that time. Previous to the amendment of 1898 the statute provided that "no representation shall be admitted among collaterals after brothers' and sisters' children." The amended statute provided that representation shall be admitted among collaterals in the same manner as provided by law in reference to real estate. The Revised Statutes of 1813 (volume 1, p. 52) placed the law of descents among lineal and collateral relatives upon the same footing, and permitted representation of brothers and sisters even beyond their chil-

dren. See *Pond v. Bergh*, 10 Paige, 140, 148. The effect of the amendment of 1898 has made the same rule applicable to personal property, and the grand nephews and nieces are therefore entitled to share in the estate, receiving the portion which their immediate ancestors would have taken. The nephews and nieces rely for their authority for the exclusion of the grand nephews and nieces, upon the case of *Matter of Davenport*, 172 N. Y. 454, 65 N. E. 275. In that case, however, the court merely held that the law of descents in regard to real estate permitted no representation of the children of deceased uncles and aunts, where descendants of deceased brothers and sisters survived, and has no application to the question before me.

Ordered accordingly.

(189 App. Div. 440)

CITY OF NEW YORK v. FOX et al.

(Supreme Court, Appellate Division, First Department. November 21, 1919.)

1. OFFICERS ~~§~~111—LIABILITY FOR LOSS OF PUBLIC MONEY.

Public officers having the custody of public money are liable for a loss thereof, although occurring without their fault or negligence.

2. MUNICIPAL CORPORATIONS ~~§~~212—RULES OF DEPARTMENT OF CORRECTION.

The rules and regulations of the department of correction have the force and effect of statutes.

3. PRISONS ~~§~~11—LIABILITY OF WORKHOUSE WARDEN FOR FUNDS STOLEN BY PRISON KEEPER; "PUBLIC MONEYS."

Warden of city of New York workhouse, being responsible, under the rules and regulations of the department of correction, which have the force and effect of statutes, "for the proper care and delivery of clothing, money or valuables of inmates committed to his care," is liable on his bond for loss of inmates' money intrusted to care and stolen by prison keeper designated by warden, though warden was not personally negligent; such moneys being "public moneys," within rule making public officers having custody of public money liable for its loss, although occurring without their fault or negligence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Money.]

Merrell and Dowling, JJ., dissenting.

Appeal from Trial Term, New York County.

Action by the City of New York against Frank W. Fox and another. Judgment for plaintiff upon a directed verdict, and defendants appeal. Affirmed.

Argued before CLARKE, P. J., and DOWLING, PAGE, MERRELL, and PHILBIN, JJ.

Gillespie & O'Connor, of New York City (John R. Halsey, of New York City, of counsel, and William F. Delaney, of Newark, N. J., on the brief), for appellant Fox.

Halsey, Kiernan & O'Keeffe, of New York City, for appellant Massachusetts Bonding & Ins. Co.

William P. Burr, Corp. Counsel, of New York City (John F. O'Brien, of New York City, of counsel, and Terence Farley and Walter B. Caughlan, both of New York City, on the brief), for respondent.

~~§~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

CLARKE, P. J. The case was tried upon stipulated facts. The defendant Fox was warden of the city workhouse. He had general supervision over the institution, its officers and inmates. The defendant Bonding Company gave a bond to the city in the sum of \$5,000, conditioned that he should faithfully perform the duties devolved upon him as warden and promptly account for and pay over all moneys by him received or with him deposited as such city warden of the city workhouse in accordance with law.

Each inmate was required, upon his commitment, to deposit his clothing, money, and valuables with the warden, and was entitled to have the same returned upon his discharge, less any disbursements made therefrom upon the requisition of the inmate during his commitment. The rules and regulations of the department of correction specifically provide:

"The head of any institution will be held responsible for the conduct of his subordinate. * * * The head of the institution may, subject to provisions of law, designate any deputy warden, head keeper, matron or other employe under his control to any particular assignment or duty. * * * The warden or officer in charge of any institution is specifically charged with the following duties: * * * 4. *Power of Assignment.* He shall make assignments of all employes under his control to such work and duty as may be necessary for the efficient and proper conduct of his institution. * * * 18. *Responsibility for Fine and Bail.* * * * He shall be responsible for the receipt and custody of all fines or bail paid by or for prisoners, and he shall turn the same over to the proper authority as required by law. * * * 24. *Responsibility for Property of Inmates.* He shall be directly responsible for the proper care and delivery of clothing, money, or valuables of inmates committed to his care. He shall give each inmate a receipt for all such money or valuables."

One Luke T. McEvoy was an employe of the city as a prison keeper and designated by the warden to take charge of the clothing, money, and valuables of the inmates committed to the care of the warden. There was a shortage in the cash account of moneys deposited by inmates of \$4,020.88. Of the amount of the defalcation \$2,221.17 represented moneys deposited by inmates and not returned to them at the time of the discovery of the defalcation, and \$1,799.71 represented the amount of moneys deposited by inmates for which they had received the equivalent in supplies. This money was stolen by McEvoy, and he has been convicted of the larceny. The defendants offered to prove that the warden exercised good faith and reasonable skill and diligence in the discharge of his official duties, and was not guilty of any negligence in his care and custody of the deposits made with him by the inmates. This was objected to, and, being sustained, the defendants excepted. The question is whether, said moneys not being public funds, but belonging to the inmates and deposited with the warden, as required by law, the warden and his surety are responsible. The learned trial court held they were, and directed a verdict for the plaintiff for \$2,221.17, and from the judgment entered thereon the defendants appeal.

[1] It must now be regarded as the settled law in this state that public officers having the custody of public money are liable for a loss thereof, although occurring without their fault or negligence. In Til-

Tillinghast v. Merrill, 151 N. Y. 135, 45 N. E. 375, 34 L. R. A. 678, 56 Am. St. Rep. 612, the court said:

"We must consider and decide this question upon general principles and in the light of public policy. In the case of an officer disbursing the public moneys, much may be said in favor of limiting his liability, where he acts in good faith and without negligence, and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. * * * It is at this point, however, that the question of public policy presents, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents. Without regard to decisions outside of our own jurisdiction, we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability, which requires a public official to assume all risks of loss, and imposes upon him the duty to account as a debtor for the funds in his custody."

In *Yawger v. American Surety Co.*, 212 N. Y. 292, at page 297, 106 N. E. 64, at page 66 (L. R. A. 1915D, 481), Judge Cardozo, writing for a unanimous court, said:

"It is important to bear in mind the nature of a public officer's liability for public moneys received by virtue of his office. His liability does not grow out of negligence. It is absolute, admitting of no excuse, except perhaps the act of God or the public enemy. *Tillinghast v. Merrill*, 151 N. Y. 135-142 [45 N. E. 375, 34 L. R. A. 678, 56 Am. St. Rep. 612]; *Smythe v. U. S.*, 188 U. S. 156 [23 Sup. Ct. 279, 47 L. Ed. 425]. If he puts the money in a safe, and burglars break open the safe and steal the money, he is liable. If he puts it in a bank, and the bank loses it, he is liable."

In *Village of Bath v. McBride*, 219 N. Y. 92, 113 N. E. 789, the court said:

"This court held in *Tillinghast v. Merrill*, 151 N. Y. 135 [45 N. E. 375, 34 L. R. A. 678, 56 Am. St. Rep. 612], that a public officer having the custody of public moneys is liable unqualifiedly for the loss thereof, and that it is no defense to an action on the official bond that the money was lost without fault or neglect on the part of the officer. * * * The rule of strict liability laid down in *Tillinghast v. Merrill*, supra, is a very important one, and it should not be frittered away in seeking to give relief in hard cases."

The appellants concede that the law is as stated, but claim that as the moneys in suit were not public moneys, but belonged to the inmates, the cases are not applicable, and rely upon *People ex rel. Nash v. Faulkner*, 107 N. Y. 477, 14 N. E. 415. In that case a mortgage executed by one Finley was foreclosed, and on the sale there was a surplus, which was paid to the county treasurer. Finley having died, upon the application of his administrators, an order was made directing the treasurer to pay the money over to the surrogate, which was complied with. The surrogate deposited the moneys with a banker, then in good standing and credit, who subsequently failed. The suit was to recover from the surrogate and his bondsmen the amount uncollected from the banker's estate. In holding for the defendants the court said:

"It does not follow, because public policy requires that public officers who receive public money should be held to the rigid responsibility, that the same rule should be applied to public officers who receive the money of individuals, who are stimulated by private interests to some watchfulness over the conduct of the officials and to some scrutiny as to the custody of their funds. The surrogate was not a public officer appointed to receive or disburse public money, and it was not even his main duty to receive, keep, or disburse the money of individuals. * * * There is nothing in the policy of the law which requires that he should be absolutely responsible for such money."

[2, 3] The facts in the case at bar are vastly different. There was no option in the case of these unfortunate inmates. They were required to deposit their moneys with the warden. They had no opportunity, however much they might be "stimulated by private interests," to exercise any "watchfulness over the conduct of the official" and any "scrutiny as to the custody of their funds." They were prisoners, under the control of the warden and his keepers, and were themselves the object of their watchfulness and scrutiny. The rules and regulations, which had the force and effect of statutes, provided that the warden—

"shall be directly responsible for the proper care and delivery of clothing, money, or valuables of inmates committed to his care."

They also provided:

"He shall be responsible for the receipt and custody of all fines, or bail paid by or for prisoners."

Such last-mentioned moneys were undoubtedly public moneys. It seems to me that the warden should be held responsible for the moneys taken from the inmates by virtue of his office and in accordance with law, as he is for the fines or bail taken from or for them. He assigns his keepers and employés to their specific duties. When the law says that he shall be responsible for the money of the inmates committed to his care, and he appoints an employé to perform his work, he adopts all that employé's acts in doing that work and is responsible therefor. I am of the opinion that public policy requires the protection of these helpless unfortunates while in the custody of the public officer, and that their moneys so taken and held become of the nature of public moneys sufficiently to have applied the doctrine of absolute responsibility therefor.

It follows that the judgment appealed from should be affirmed, with costs to the respondent. Order filed.

PAGE and PHILBIN, JJ., concur.

MERRELL, J. (dissenting). It is conceded by the city that the funds deposited with Fox were not public funds. They were at all times the private property of the inmates, being held by the warden during the confinement of the owners. Upon requisition of the inmates, disbursements were made therefrom for their private purposes. At all times the inmates had partial control of such funds, by being able to draw upon such deposits for private purposes; the warden being merely held responsible to turn over to such inmates upon their

discharge any balance remaining after the disbursements asked by the inmates had been made. There is no claim of negligence on the part of the warden, and the case involves the sole question as to whether or not the warden is liable as an insurer for all sums of money so deposited with him for safe-keeping by the inmates.

Upon the trial the learned trial court excluded all evidence respecting the theft, and held that the warden was absolutely liable for all moneys so left with him. The appellants rely upon the case of *People ex rel. Nash v. Faulkner*, 107 N. Y. 477, 14 N. E. 415, as authority for the proposition that, where funds not of a public nature are paid to a public official, such public official is not in such case an insurer. In that case (*People ex rel. Nash v. Faulkner*) certain funds came into the hands of the defendant, who was a surrogate. Such funds were court funds, and were deposited by the defendant with one Cone, a banker. The surrogate had given a bond for the faithful performance of his duties, which seems to be as strong as the one given by the defendant in the instant case. The Court of Appeals held, Judge Earl writing the opinion, that, the money being lost without the fault or negligence of the surrogate, the surrogate could not be held responsible therefor. In referring to an apparently contrary rule, adopted in other jurisdictions, to that stated in the case under consideration, Judge Earl said:

"But whatever the rule may now be in the federal courts, and in many of the other states, it is not the settled law of this state that public officers, who have given bonds for the faithful discharge of their official duties, become debtors for the public moneys which come into their hands in their official capacity, and are absolutely liable for such moneys although lost without their fault or negligence." 107 N. Y. 485, 14 N. E. 418.

"When a case arises against an officer for not paying over and accounting for public moneys intrusted to him in his official capacity, it will be necessary to determine whether his liability, in the absence of statutes specially defining it, shall be governed by the common law, or whether the broad and more rigid rule of responsibility laid down in the cases above referred to shall be enforced in this State." 107 N. Y. 487, 14 N. E. 419.

The *Faulkner* Case is cited in *Bruen v. Gillet*, 115 N. Y. at page 17, 21 N. E. at page 676, 4 L. R. A. 529, 12 Am. St. Rep. 764, and in reference to that case Mr. Justice Peckham said:

"There we held that a surrogate, to whom moneys had been paid belonging to an estate, and which had been by him deposited in good faith with a private banker in good standing and credit, doing a general banking business, pending proceedings to determine the parties entitled to such moneys, was not responsible for the failure of the banker and consequent loss of the funds before the determination of such proceedings, and while the moneys remained with him."

The Court of Appeals has held otherwise in respect to public funds, and the cases are very learnedly reviewed by Mr. Justice Bartlett in *Tillinghast v. Merrill*, 151 N. Y. 138, 45 N. E. 375, 34 L. R. A. 678, 56 Am. St. Rep. 612, which is the leading case, and the one in which the law was finally settled. An early case in this state wherein the question of the liability of a public official for public moneys paid to him was up for review was that of *Supervisors v. Dorr*, 25 Wend. 440.

Dorr was a county treasurer, and received as such official certain public moneys. Such moneys were stolen from his office without any negligence on his part. The question came up on demurrer; Chief Judge Nelson and Justices Bronson and Cowen holding that a public official intrusted with the receipt and disbursement of public money or funds cannot be held responsible for such moneys or funds when actually stolen from his office without any negligence or fault on his part. The case was appealed to the Court of Errors, where the judgment was affirmed by an equally divided court. 7 Hill, 583. While the same question was considered in *Muzzy v. Shattuck*, 1 Denio, 233, the decision in the *Dorr Case* was not overruled, as has often been claimed. The rule, as laid down in the *Dorr Case*, remained unchanged until the decision of the Court of Appeals in *Tillinghast v. Merrill*, supra. In the last-mentioned case, Merrill, who was supervisor of his town, held certain school moneys paid to him by the county treasurer for the purpose of disbursement. He deposited such money with a firm of private bankers to his credit as supervisor. The banking firm failed and the money was lost. Action was brought by *Tillinghast*, as county treasurer of the county of Madison, to recover the moneys thus lost, and judgment was obtained therefor against *Merrill*. On a review of the judgment in the Court of Appeals, Judge Bartlett in his opinion said:

"In the case of an officer disbursing the public moneys, much may be said in favor of limiting his liability, where he acts in good faith and without negligence, and a strong argument can be framed against the great injustice of compelling him to respond for moneys stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. When considering this side of the case, it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law, which exacted proof of misconduct or neglect. It is at this point, however, that the question of public policy presents, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents."

The rule thus, for the first time, adopted by the Court of Appeals, seems to have followed earlier decisions of the United States Supreme Court with reference to the loss of public funds. *U. S. v. Thomas*, 15 Wall. 337, 21 L. Ed. 89; *U. S. v. Prescott*, 3 How. 578, 11 L. Ed. 734. *Tillinghast v. Merrill* was followed by the Court of Appeals in *Village of Bath v. McBride*, 219 N. Y. 92, 113 N. E. 789, and in *Yawger v. American Surety Co.*, 212 N. Y. 292, 106 N. E. 64, L. R. A. 1915D, 481. But in both of said cases public moneys, and not private moneys, were involved.

As to public funds, it seems to be now the well-established rule, both of the courts of this state and of the United States, that a public official having custody of such funds is an insurer thereof and is personally responsible for their loss. In the case at bar, however, the defendant *Fox* was simply the custodian of the funds of private individuals. The funds which came into his hands were not of a public nature, and still remained under the control of the inmates of the in-

stitution, being at all times subject to disbursement upon their requisition. The warden occupied no more confidential relation, nor did he owe any greater duty to the general public, than any court clerk or official, referee, or receiver into whose hands moneys belonging to a litigant are ordered to be paid.

As above stated, Judge Bartlett, in *Tillinghast v. Merrill*, very frankly states that "it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law," and it is apparent that the Court of Appeals adopted the rule above set forth with reference to public funds only as a matter of public policy. We do not think the rule should be extended beyond the point indicated by the court in that case. To hold that a public official is in any case an insurer in respect to private funds left in his care would be extending the rule beyond the point thus far indicated by the Court of Appeals.

In the instant case there is no allegation of negligence or fraud on the part of the defendant Fox, and we think that the doctrine enunciated in *People ex rel. Nash v. Faulkner* should be applied, and that the rule laid down in *Tillinghast v. Merrill* should not be extended.

It follows that the judgment appealed from should be reversed, and the complaint dismissed, with costs.

DOWLING, J., concurs.

(100 Misc. Rep. 24)

STUMPP et al. v. FARMERS' LOAN & TRUST CO.

(Supreme Court, Special Term, New York County. October, 1919.)

1. BANKS AND BANKING ¶148(1)—DEPOSITOR'S RIGHT TO RECOVER MONEY PAID ON FORGED CHECK.

Where name of plaintiff firm on check forged by its confidential bookkeeper, drawn upon defendant bank to order of another bank, and deposited in such other bank to credit of plaintiff and paid by defendant, was a clumsy forgery, which could have been discovered by defendant in exercise of ordinary care, the deposit could not be deemed a payment to plaintiff, where payment of the forged check enabled the bookkeeper to cover up his defalcations.

2. PRINCIPAL AND AGENT ¶166(1)—RATIFICATION REQUIRES KNOWLEDGE OF ACT.

There can ordinarily be no ratification of that of which a party is ignorant, as ratification implies at least a knowledge that there is or may be something to ratify.

3. BANKS AND BANKING ¶148(3)—ESTOPPEL BY NEGLIGENCE OF DEPOSITOR'S RIGHT TO RECOVER AMOUNT PAID ON FORGED CHECK.

In action by firm against its bank to recover amount paid on check forged by firm's bookkeeper on bank to order of another bank, deposited therein to firm's credit, and paid by defendant, proof that firm regularly examined monthly statement rendered to them by such other bank, and was deceived into thinking that accounts were correct, because accounts were usually gone over in presence of bookkeeper, who manipulated examination so as to throw firm off its guard, did not show firm's negligence in checking statements.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action by August Stumpp and Edwin E. Stumpp, copartners doing business under the firm name and style of August Stumpp & Co., against the Farmers' Loan & Trust Company, to recover money paid on a forged check. Judgment for plaintiffs.

Duer, Strong & Whitehead, of New York City (Selden Bacon, of New York City, of counsel), for plaintiffs.

Geller, Rolston & Horan, of New York City (Edward H. Blanc, George S. Mittendorf, and Charles Angulo, all of New York City, of counsel), for defendant.

GREENBAUM, J. The evidence establishes that during the year 1917 plaintiffs had a general deposit account with the defendant, and also a similar account with the Bank of New York; that during the months of May and June, 1916, one Herbert Pratt, a confidential bookkeeper in the employ of the plaintiffs, forged a series of checks on the Bank of New York, aggregating, up to July 1, 1916, the sum of \$5,400; that on July 2, 1917, Pratt forged a check drawn upon the defendant to the order of the Bank of New York in the sum of \$5,000; that this check was deposited in the Bank of New York by the forger to the credit of the plaintiffs' account and paid by the defendant; that subsequently Pratt forged another series of checks drawn upon the Bank of New York, the first of which was dated July 9, 1917, and the last August 31, 1917, aggregating in all \$5,353.44, and that the forgeries were discovered by the plaintiffs on or about September 4, 1917. Defendant seeks to avoid liability for paying the amount of the forged check drawn upon it upon the ground that the proceeds of the check were deposited with the Bank of New York to the credit of the plaintiffs, constituting a payment of that sum to the plaintiffs, and hence that they sustained no damages. Defendant also contends that the plaintiffs ratified the act of the Bank of New York in collecting the \$5,000, and further that the plaintiffs were negligent in failing to observe the ordinary safeguards in auditing and checking up the statements of their accounts rendered monthly to them by the Bank of New York.

[1] It seems to me that these defenses are not well founded. The name of the plaintiffs' firm on the forged check was a clumsy forgery, which could readily have been discovered by the defendant, if it had exercised ordinary care. A deposit made under the circumstances above detailed may not be deemed to be a payment to the plaintiffs. Defendant's payment of the forged check enabled Pratt, not only to cover up his defalcations up to July, 1917, for an indefinite period, but enabled him thereafter to increase his ill-gotten gains by a sum in excess of the \$5,000 check deposited in the Bank of New York. The plaintiffs thus derived no benefit whatever from this deposit, and their damage to the amount of the \$5,000 forged check is conclusively shown.

[2] Nor can it be successfully urged that the facts establish a ratification of payment. As was stated in *Weisser v. Denison*, 10 N. Y. 82, 61 Am. Dec. 731:

"There can, ordinarily, be no ratification of that of which a party is ignorant. Ratification implies at least a knowledge that there is or may be something to ratify."

See, also, *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 228, 63 N. E. 969, 57 L. R. A. 529.

[3] With respect to the point that the plaintiffs failed to exercise ordinary care in checking up the monthly statements delivered to them by the Bank of New York, it suffices to say that, aside from the doubtful legal proposition that the plaintiffs owed the defendant the duty of examining these statements, the proofs indicate that the plaintiffs were not guilty of any negligence in that respect. The evidence is that the plaintiffs regularly examined the monthly statements rendered to them by the Bank of New York, and shows that the reason why plaintiffs were deceived into thinking that the accounts were correct was that the accounts were usually gone over in the presence of the bookkeeper, Pratt, who committed the forgeries, and who so manipulated the examinations as to throw the plaintiffs off their guard in discovering his criminalities. In their salient features the facts are quite similar to those appearing in the case of *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501. There must be judgment for the plaintiffs for the full amount claimed.

Judgment for plaintiffs.

(109 Misc. Rep. 431)

PALMER et al. v. ROTARY REALTY CO., Inc., et al.

(Supreme Court, Special Term, Kings County. December 8, 1919.)

1. MORTGAGES §34—ABSOLUTE DEED AFTER PRIOR PROMISE OF DEFEASANCE.

While a mere oral promise or agreement to give a defeasance, if made at time of giving an absolute deed and not performed, will not make the transaction a mortgage, yet if the grantee gives such promise before the making of the deed, and evades its performance after receiving the deed, equity will relieve against the fraud and enforce the agreement.

2. MORTGAGES §32(3)—ABSOLUTE DEED AS SECURITY ONLY.

A deed, though absolute in form, is to be considered as a mortgage, if it was given under an agreement that it should be security for a debt.

3. MORTGAGES §37(2)—PAROL EVIDENCE TO SHOW ABSOLUTE DEED IS MORTGAGE.

A deed, though absolute in form, may in equity be shown by parol to have been intended as a mortgage.

4. MORTGAGES §38(2)—DEGREE OF PROOF TO SHOW ABSOLUTE DEED TO BE A MORTGAGE.

Evidence to show that an absolute deed was intended as security, and so was a mortgage, must be clear and convincing.

5. MORTGAGES §38(2)—BURDEN OF SHOWING DEED AS MORTGAGE.

One asserting a deed in form to be a mortgage must prove the claim by a clear preponderance of the evidence.

6. MORTGAGES §32(6)—DEED AS MORTGAGE AFFECTED BY NATURE OF CONSIDERATION.

The court is more inclined to treat a deed absolute in form as a mortgage, where given in consideration of an existing mortgage indebtedness, than where given on an original advance.

7. MORTGAGES §38(1)—EVIDENCE ESTABLISHING DEED AS MORTGAGE.

In suit to establish that a deed absolute in form was intended as a mortgage and was obtained by fraudulent representations and promises, evidence held to show the deed was a mortgage.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action by Rose M. Palmer and another, against the Rotary Realty Company and others. Decree for plaintiffs.

See, also, 178 N. Y. Supp. 461; 189 App. Div. 943, 178 N. Y. Supp. 908.

Rose M. Palmer, of Brooklyn (Joseph J. Schwartz, of Brooklyn, of counsel), for plaintiffs.

Bernard H. Arnold, of New York City, for defendants.

BENEDICT, J. In this action it is sought to establish that a certain deed of real property made by the plaintiffs to the defendant Rotary Realty Company, dated on October 16, 1914, was intended as a mortgage, although by its tenor it was an absolute conveyance. The following facts I deem to be established by the evidence:

The real property in question, which consisted of a double apartment house situated on the southerly side of the Eastern Parkway extension in the borough of Brooklyn, being 40 feet in width in front and rear by 110 feet in depth on each side, was in February, 1908, owned by Raphael D. Palmer, the deceased father of the plaintiffs. On February 1, 1908, in order to secure the payment of his bond for \$8,000, with interest at 6 per cent. per annum, to one Joseph Friedkin, he, with his wife, Adeline, executed a second mortgage, dated on that day, to said Friedkin, covering the said premises. The principal of the bond became due on the 1st day of February, 1909.

Raphael D. Palmer died in the year 1913. In his lifetime, by deed dated April 20, 1907, he had conveyed the property to Joseph Friedkin. This deed was recorded August 6, 1908. Joseph Friedkin, by deed dated and recorded October 11, 1909, conveyed the property to Pauline V. Bernstein, and Pauline V. Bernstein, by deed recorded October 23, 1913, conveyed the property to the plaintiffs.

The second mortgage above referred to was assigned by Joseph Friedkin to the defendant Samuel Cohn by assignment recorded February 21, 1908. It was further assigned by the defendant Cohn to the defendant Holman to the extent of \$1,100, by assignment recorded April 21, 1908. Holman's interest in said mortgage was assigned to the Rotary Realty Company by assignment recorded December 3, 1913. The mortgage was further assigned by Samuel Cohn to the Light Machine Company by assignment recorded April 4, 1910. It was further assigned by the Light Machine Company to Rosie Cohn by assignment recorded on April 11, 1910. It was further assigned by Rosie Cohn to the Rotary Realty Company by assignment recorded on April 11, 1910.

By an agreement dated on January 24, 1911, between the Rotary Realty Company and Alexander Holman, of the first part, and Pauline V. Bernstein, of the second part, which recited that there was then owing for principal of the said mortgage the sum of \$6,000, with interest from August 1, 1910, the time for the payment of the principal indebtedness was extended for one year; that is, until February 1, 1912. No further extension of the time for the payment of the principal of said mortgage was given.

After the death of Raphael D. Palmer, and after the title to the real property had become vested in the plaintiffs, the defendants, early in October, 1914, demanded payment from the plaintiffs of the balance

due on the said mortgage. The plaintiffs' contention is that the defendants, in order to have absolute control of the property, insisted upon the execution by them of a deed conveying title to the property to the Rotary Realty Company. This corporation was, at that time, owned by the defendant Cohn, who was its president and treasurer; the defendant Holman being, or having shortly theretofore been, its secretary. The plaintiffs, being unable to pay the principal of the mortgage, acquiesced in the demand of the defendants, upon the condition, as they claim, that the defendants would take control of the property and manage it, collecting the income and paying the carrying charges, and at such time as the net rents should become sufficient to pay off the mortgage, and in any event not beyond five years from that time, would reconvey the property to the plaintiffs upon receipt, either from the net rentals of the property or from the plaintiffs themselves, of a sufficient amount to cancel the said mortgage.

The plaintiffs testify that this arrangement was acceptable to the defendants Cohn and Holman, and that the defendants promised to execute and deliver to them, at the time of the making of the conveyance, a paper which should embody the said arrangement. They further contend that, on October 21, 1914, the defendants obtained a deed from them conveying their title to the premises in question to the Rotary Realty Company, subject to the first mortgage for \$22,000, and to the second mortgage then held by the said Rotary Realty Company. They say, further, at frequent intervals thereafter they asked the defendants to fulfill the agreement which was made, and that finally they were forced to begin the present action.

The defendants deny both the alleged fraud in obtaining the deed, and also deny that there was any agreement, oral or in writing, under which they took the deed of the property in question.

[1] If the plaintiffs are correct in the theory of this action, namely, that prior to the giving of the deed the defendants agreed to give them a defeasance, they are entitled to maintain this action, because it is well settled that, although a mere oral promise or agreement to give a defeasance, if made at the time of the execution of the deed and not performed, will not make the transaction a mortgage, yet if the grantee gives such a promise before the making of the deed, and evades its performance after receiving the deed, equity will relieve against the fraud and enforce the agreement. 27 Cyc. 1001, citing *Peck v. Baldwin*, 1 Root (Conn.) 455.

[2-5] The plaintiffs contend that this was the situation here, and that they have been defrauded out of their property because the defendants induced them, upon the strength of such promise, to part with the title to their property. I may say in passing that, even without any fraud such as the plaintiffs allege, if it were the agreement between the parties that the deed was to be given as security for the debt, and not as an absolute conveyance, it would be considered as a mortgage, with the consequent right in the grantor to redeem, even though the provision for defeasance was not reduced to writing, but rested wholly in their verbal agreement. See 27 Cyc. 1005, and cases cited in notes.

In *Horn v. Keteltas*, 46 N. Y. 605, the Court of Appeals said:

"It is now too late to controvert the proposition that a deed, absolute on its face, may in equity be shown, by parol or other extrinsic evidence, to have been intended as a mortgage; and fraud or mistake in the preparation or as to the form of the instrument is not an essential element in an action for relief, and to give effect to the intention of the parties."

And the same doctrine is recognized in many other cases. See *Morris v. Budlong*, 78 N. Y. 552; *Ensign v. Ensign*, 120 N. Y. 656, 24 N. E. 942; *Kraemer v. Adelsberger*, 122 N. Y. 476, 25 N. E. 859; *Barry v. Colville*, 129 N. Y. 306, 29 N. E. 307; *Macauley v. Smith*, 132 N. Y. 531, 30 N. E. 997; *Burnett v. Wright*, 135 N. Y. 547, 32 N. E. 253; *Mooney v. Byrne*, 163 N. Y. 91, 57 N. E. 163, and *Reich v. Dyer*, 180 N. Y. 113, 72 N. E. 922.

The doctrine is well established by these cases that the real question to be determined in such an action is whether the conveyance was intended to be absolute or whether it was given as security. If the latter, then no matter what form the transaction took, or how binding and formidable were the documents employed to make it appear that the transaction was an absolute conveyance, the court is bound to look beyond the form and ascertain what was the real agreement and true intent of the parties to the transaction. Of course, in any case where it is sought to overthrow the effect of a formal deed, the evidence ought to be very clear and convincing before the court will hold that it does not mean what it says; and the burden naturally rests upon the persons who assert such to be the fact to prove the claim by a clear preponderance of the evidence. If, however, the court, upon conflicting evidence, reaches the conclusion, either that the real agreement of the parties was that the deed should operate as a mortgage and not as an absolute conveyance, or that the grantee obtained the deed through fraud or deceit by promise to give a defeasance, such a finding of fact, if there be any evidence to sustain it, will not be disturbed by the Court of Appeals. *Ensign v. Ensign*, supra.

[8] It has been said, and I think there is force in the statement, that where a deed, absolute in form, is given in consideration of an existing mortgage indebtedness, the court is more inclined to treat it as a mortgage than one given upon an original advance, and when so given the new mortgage will not be regarded as a substitute for the former security, unless the intention to that effect is manifest. See *Bearss v. Ford*, 108 Ill. 16. In the case at bar, no monetary consideration passed from the grantee in the deed to the plaintiffs at the time of the transfer. The grantee did not even satisfy the mortgage upon the record, and apparently it is still outstanding thereon.

The defendants contend that they gave valuable consideration for the deed, and they endeavor to support that contention by proof of the execution and delivery to some person, whose identity was not very clearly shown, of an instrument of release bearing date on the 21st day of October, 1914, whereby they released the estate of Raphael D. Palmer and Pauline V. Bernstein from any liability upon the bond for which the \$8,000 second mortgage was given as security. So far as the plaintiffs are concerned, however, I doubt whether this release, if it were in fact executed, had any force or effect. They were not the

representatives of the estate of their father, nor were they personally liable upon the bond in question. It is not shown that they requested the release by the Rotary Realty Company for the benefit of Pauline V. Bernstein.

So far as their father's estate is concerned, if there be any such entity in the law, I think it is very plain that Palmer and his estate, if he had any, were released from liability on his bond at the time when the Rotary Realty Company and Alexander Holman, on January 24, 1911, gave an extension to Pauline V. Bernstein of one year for the payment of the principal of the mortgage. See *Thomas on Mortgages* (3d Ed.) p. 184, where the following statement is made:

"Where the grantee has not personally covenanted to pay the mortgage, the conveyance being made merely subject to it, the mortgagor has also been held to be discharged by such an extension on the ground that, although no technical relation of principal and surety exists between the mortgagor and his grantee, still, as the land is the primary fund for the payment of the debt, in respect thereto and to the extent of its value the grantee stands in the relation of a principal debtor, and the grantor has an equity similar to that of the surety"—citing *Spencer v. Spencer*, 95 N. Y. 353; *Murray v. Marshall*, 94 N. Y. 611, and other cases.

The defendants also endeavor to show consideration for the conveyance to the Rotary Realty Company by attempting to prove that it had granted an extension for the time of the payment of the principal of a second mortgage upon the property adjoining that which is the subject of this action. But it is not shown that the plaintiffs requested any such extension, nor that it inured to their benefit, nor that they were the owners of such adjacent property.

In support of the claim of the plaintiffs that they were tricked into making the deed conveying their equity in the property in question, we have the positive assertions of both the plaintiffs and also of their mother that the deed was given merely as security for the debt owing to the defendant Rotary Realty Company, and that the defendants had obtained the deed by their previous promise to reconvey the property in the manner hereinbefore mentioned. In addition to their testimony, we have the testimony of Mr. Tager, who appears to have been a disinterested witness, and who made a favorable impression upon the court by his testimony. He had, in one transaction, been a business associate of the plaintiffs' father, and he testified to admissions made to him by the defendant Cohn which tended strongly to support the plaintiffs' contention. There were other circumstances in the case which, taken separately, might not appear to be of importance, but which, taken in connection with the entire evidence, tend to corroborate the plaintiffs.

One such item of evidence is furnished by an exhibit which the defendants produced. This was an income tax return for the fiscal or calendar year ending December 31, 1914. That paper would indicate that the defendant Cohn had received interest upon the mortgage in suit for the entire year 1914. I think the inference may be drawn from this statement that when he made the income tax return he regarded the mortgage for \$6,000 as having borne interest up to December 31, 1914

notwithstanding the grant to the Rotary Realty Company, and that, in addition to having received the full interest for the entire year upon the mortgage, he had received rents from that property amounting to \$477.40.

The plaintiffs' evidence is, it is true, contradicted by the defendants and by their attorney in the original transaction, Mr. Adams; but I am not inclined to give the statements of Mr. Cohn their full face value, in view of his demeanor on the witness stand under cross-examination.

[7] Upon the whole case, therefore, I have reached the conclusion that the plaintiffs have sustained the burden of proof resting upon them, and I find the facts in issue in their favor and decree that an interlocutory judgment be entered declaring that the deed in question was intended as a mortgage; that it was and still is a mortgage; that it was obtained from the plaintiffs by the fraudulent representations and promises of the defendants; that, in order to ascertain what sum is now due upon the mortgage, the defendants shall account before a referee to be appointed in the interlocutory judgment as to all moneys received by them from the property since October 21, 1914, and as to all moneys paid out by them upon the property; and that, upon the coming in of the referee's report, a final judgment be entered which shall provide, unless the plaintiffs shall, within a time to be specified therein, redeem from said mortgage by payment of the principal and interest so found to be then due, the defendant Rotary Realty Company may foreclose the equity of redemption of the plaintiffs in the real property in question by action.

The final decree will also award the plaintiffs, as against the defendant Rotary Realty Company, the costs of this action, to be taxed, together with an additional allowance of 5 per cent. upon the amount found due; such costs and allowance to be credited upon the sum so found due to the defendant Rotary Realty Company.

Submit all requests on or before December 12, 1919.

(189 App. Div. 769)

HARBY S. S. CO., Inc., v. STATEN ISLAND SHIPBUILDING CO.

(Supreme Court, Appellate Division, First Department, December 5, 1919.)

DISCOVERY ¶38—EXAMINATION PRELIMINARY TO PRODUCTION OF BOOKS AND PAPERS.

Code Civ. Proc. § 872, subd. 7, relating to the examination of corporate officers preliminary to production of books and papers, contemplates the examination of witnesses to show that the books contain relevant entries and the inspection of such entries preparatory to offering them in evidence, and does not authorize a general inspection which may be obtained under sections 803-809.

Appeal from Special Term, New York County.

Action by the Harby Steamship Company, incorporated, against the Staten Island Shipbuilding Company. From an order of the Supreme

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Court, modifying an order for the examination of defendant before trial, plaintiff appeals. Affirmed.

Argued before CLARKE, P. J., and DOWLING, SMITH, PAGE, and PHILBIN, JJ.

Duncan & Mount, of New York City (Herman S. Hertwig, of New York City, of counsel), for appellant.

Henry W. Baird, of New York City, for respondent.

PHILBIN, J. Under the provisions of the Code of Civil Procedure (section 872, subd. 7, as amended by Laws 1911, c. 781, and Laws 1913, c. 278), a plaintiff is entitled to examine a defendant corporation by its officers, directors, or managing agents, and to require the production of books and papers, which may be offered and received in evidence in addition to the use thereof for the purpose of refreshing the memory. That is the rule which now pertains in the examination of corporations. *Flamingo Film Co. v. World Film Corporation*, 173 App. Div. 959, 158 N. Y. Supp. 690. The rule does not mean, however, that a party is entitled to a general inspection of books and papers such as may be obtained under the provisions of sections 803-809 of the Code. It merely contemplates the production of books and papers, the examination of the witnesses in connection with them to show that the books contain relevant entries, and then the inspection of such entries preparatory to offering them in evidence. *Strong & Trowbridge Co. v. Defiance Machine Works*, 182 App. Div. 869, 170 N. Y. Supp. 414. A distinction is thus drawn between a general inspection under sections 803-809 of the Code and the limited inspection under section 872.

While the order appealed from might, perhaps, be framed in more precise terms, we think it indicates with sufficient clarity that plaintiff is accorded all the rights above set forth. The order should be affirmed, but without costs.

Order affirmed, without costs; the date for the examination to proceed to be fixed in the order. Settle order on notice. All concur.

(189 App. Div. 662)

BRYANT v. NEW YORK RYS. CO.

(Supreme Court, Appellate Division, First Department. December 5, 1919.)

1. STREET RAILROADS §118(11)—INSTRUCTION ON CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN.

In an action for injuries to a pedestrian, knocked down and rolled along by a street car, in which complaint made no charge of any willful or wanton act, but alleged negligence and gross negligence, it was error to charge that in any phase of the case plaintiff was entitled to recover, without showing freedom from contributory negligence.

2. APPEAL AND ERROR §843(1)—CONSIDERATION OF UNNECESSARY QUESTIONS.

Where a judgment must be reversed and a new trial granted for a specific error, it becomes unnecessary to consider other assignments challenging the judgment.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from Trial Term, New York County.

Action by Alva R. Bryant against the New York Railways Company. From a judgment for plaintiff, rendered upon a verdict, and from an order denying a motion for a new trial, defendant appeals. Judgment and order reversed, and new trial granted.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, MERRELL, and PHILBIN, JJ.

James L. Quackenbush, of New York City (A. H. Cole, of New York City, of counsel), for appellant.

Otto D. Parker, of New York City (H. O. Smith, of Brooklyn, on the brief), for respondent.

SMITH, J. [1] The plaintiff was injured by one of the defendant's trolley cars on Broadway in New York City. There was evidence by one witness in behalf of the plaintiff that, after the plaintiff was knocked over, the plaintiff was rolled along by the defendant's car for about 100 feet. Under these circumstances the trial judge, in charging the jury said:

"Now, I say to you, gentlemen of the jury, that there are two phases to this issue, so far as this plaintiff's complaint is concerned: One is the negligence of the defendant in failing to have its car under control, as a result of which this plaintiff was struck, and upon that theory the plaintiff is obligated to show that the accident was due solely as a result of negligence upon the part of that motorman; that he himself contributed by no act of negligence to the happening of that accident. But the second phase of the accident, or of this complaint, is this: The reckless, wanton, and unlawful act of the motorman of that car in rolling him along the street for a distance of 100 feet before he brought that car to a dead stop. And let me say to you that in the eyes of the law contributory negligence is never a defense to an action for damages as the result of a willful, reckless, and wanton act of the other party."

By reference to the complaint, it there appears to be charged:

"That said injuries were sustained without any fault, carelessness, or negligence on the part of the plaintiff, but solely by reason of the fault, carelessness, recklessness, and negligence of the said defendant, its agents, servants, and employes, and the dangerous, improper, negligent, and reckless manner in which the said car was managed, operated, propelled, and controlled at said time and place, and further by reason of the carelessness of the motorman of said car in failing to bring his car to a stop within a reasonable distance after striking said plaintiff."

This complaint makes no charge of assault, or of any willful or wanton act, but is purely a complaint alleging both the negligence and the gross negligence of the defendant, because recklessness can mean no more than gross negligence. The action, therefore, is purely an action for negligence, and the contributory negligence of the plaintiff in such a case is always a defense to the action. We think, therefore, that the court erred in its charge to the jury that in any phase of this case the plaintiff was entitled to recover without showing his freedom from contributory negligence. An exception was duly taken to this charge:

[2] The judgment is also challenged upon other grounds which it is unnecessary to consider, in view of our conclusion that for this error the judgment and order must be reversed, and a new trial granted, with costs to appellant to abide the event. Order filed. All concur.

(109 Misc. Rep. 453)

In re REYNOLDS' WILL.

(Surrogate's Court, Delaware County. December 4, 1919.)

1. WILLS §440—INTENTION OF TESTATOR TO GOVERN.

All rules of construction of wills are subordinate to the primary canon of construction that the intent, to be collected from the whole will, must prevail.

2. WILLS §449—CONSTRUCTION AGAINST INTESTACY.

It is a presumption in the construction of wills that a testator did not intend to die intestate as to any portion of his property, and that construction is to be preferred which will prevent total or partial intestacy.

3. WILLS §733(1)—BEQUESTS OR DEVISES VEST AT DEATH OF TESTATOR.

No testamentary gift or devise can vest in the beneficiary until the death of the testator.

4. WILLS §495—"HIS HEIRS AND ASSIGNS" ONLY WORDS OF LIMITATION.

The words "his heirs and assigns," when used in wills, are merely words of limitation, used to describe the nature of the estate given to the beneficiary, and not to express an intention that a lapse should be avoided by the substitution of the heirs in place of the predeceased devisee or legatee.

5. WILLS §554—"SUBSTITUTIONAL GIFT."

Gifts are said to be substitutional, when provision is made for some one to take the gift in the event of the death of the original beneficiary before the death of the testator.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Substitutional.]

6. WILLS §552(1)—REPRESENTATIVES OF STEPSON.

Decedent Estate Law, § 29, has no application, so as to prevent the lapse of a devise to a stepson who predeceased the testator; such stepson leaving issue.

7. WILLS §555(1)—INTENT TO SUBSTITUTE HEIRS ON LAPSE.

A will, "I give, devise and bequeath to my stepson, G., an equal," etc., "and to his heirs and assigns forever," held not to intend to substitute a child of the stepson, where the stepson predeceased the testator.

In the matter of the petition of William E. Reynolds for a judicial construction of the first paragraph of the last will and testament of Amanda C. Reynolds, deceased, under Code Civ. Proc. § 2615. Paragraph construed.

The testatrix, Amanda C. Reynolds, died a resident of the town of Roxbury, in the county of Delaware, on or about the 29th day of November, 1914. Her last will and testament was duly admitted to probate by the Surrogate's Court of the county of Delaware on the 15th day of February, 1915. Amanda C. Reynolds was survived by two sons, Charles F. Reynolds and William E. Reynolds, both of whom were named as executors of said last will and testament, and one of whom, William E. Reynolds, is the petitioner herein. The first paragraph of the will of testatrix provided as follows:

"First, I give, devise and bequeath to my stepson, George H. Reynolds, an equal undivided one-third interest in the dwelling-house and lot owned and occupied by me in the Village of Roxbury, Delaware County, New York, and to his heirs and assigns forever."

George H. Reynolds, the beneficiary named in the first paragraph of said will, was a stepson of testatrix, and died on or about the 21st day of March, 1912, prior to the death of the testatrix. The will in question was executed on the 7th day of June, 1911. George H. Reynolds left him surviving a widow and one son Dumond Reynolds, an infant of the age of about 11 years at the time

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of the death of said George H. Reynolds. The sons of the testatrix, Charles F. Reynolds and William E. Reynolds, the Order of the Golden Seal, a party having an interest herein, having succeeded to some of the rights of the said William E. Reynolds and Charles F. Reynolds, Minnie Reynolds, the widow of George H. Reynolds, and Dumond Reynolds, the infant son, are all parties to the proceeding. Upon the return of the citation herein, Hamilton J. Hewitt was duly appointed special guardian for the infant, Dumond Reynolds.

The petitioner contends that, under the first clause of the will of testatrix, the devise to George H. Reynolds lapsed, and as to the property therein mentioned the testatrix died intestate. The special guardian contends that under the first clause of said will the infant son of the devisee therein named succeeded to his rights under the first paragraph of said will.

Ives & Craft, of Roxbury (C. R. O'Connor, of Hobart, of counsel), for petitioner.

Hamilton J. Hewitt, of Delhi, special guardian, for Dumond Reynolds, infant.

McNAUGHT, S. [1] In proceedings involving the construction of wills, certain fundamental principles must always prevail. The manifest intention of the testator, and not any rule of construction, must govern when they come in conflict. *Miller v. Gilbert*, 144 N. Y. 68, 38 N. E. 979; *Matter of James*, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774. All rules are subordinate to the primary canon of construction, that the intent to be collected from the whole will must prevail. *Matter of Brown*, 154 N. Y. 313, 48 N. E. 537; *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464.

[2] It is also a presumption in the construction of wills that the testator did not intend to die intestate as to any portion of his property, and that construction is to be preferred which will prevent total or partial intestacy. *Schult v. Moll*, 132 N. Y. 122, 30 N. E. 377; *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917; *Mills v. Tompkins*, 110 App. Div. 212, 97 N. Y. Supp. 9.

[3] It is a well-established principle of law that no testamentary gift or devise can vest in the beneficiary until the death of the testator. *Matter of Wells*, 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457. Bearing in mind all of these fundamental principles, we pass to a consideration of the construction of the will in question.

[4] The special guardian contends that by the use of the words "and to his heirs and assigns forever," in the first paragraph of the will under consideration, the testatrix intended to and did provide that, in the event of the death of George H. Reynolds, the beneficiary named in such paragraph, the devise and bequest to him should pass to his heirs, and therefore the infant son, Dumond Reynolds, is entitled to the devise and bequest to his father, George H. Reynolds. The words in question do not seem to the court to warrant the construction contended for by the special guardian. The words "his heirs and assigns" are the usual technical words of conveyance granting an estate in fee simple. They are unnecessary, but, when used in wills or deeds, such is their meaning. They are merely words of limitation, used to describe the nature of the estate given to the beneficiary, and not to express an intention that a lapse should be avoided by the substitution of

the heirs in place of the predeceased devisee or legatee. *Matter of Wells*, 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457; *Horton v. Earle*, 162 Mass. 448, 38 N. E. 1135; *Matter of Tamargo*, 220 N. Y. 225, 230, 115 N. E. 462. In *Matter of Wells*, supra, the Court of Appeals said:

"In *Corbyn v. French*, 4 Ves. 418, 435, the Master of the Rolls. (Lord Alvanley) said: 'A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear.' Such an intention cannot be said to be made clear by the addition of the word 'heirs,' for that is a word of limitation, used to describe the nature and duration of the estate given, and, as Mr. Jarman observes in his valuable work (volume 1, c. 11), the doctrine of lapse 'applies indiscriminately to gifts with and without words of limitation.'"

It can hardly be said that the intention is made clear by the addition of the words in question here. It has been a long-established rule of construction that the word "heirs," as used by the testatrix, is a word of limitation, and that it and kindred words can serve no purpose other than to describe the nature and extent of the estate given, and the doctrine of lapse applies indiscriminately to gifts with or without words of limitation.

Under the rule in *Shelley's Case*, it is clear the words "heir," "heirs," and "lawful heirs," and similar expressions, may be used in two senses: First, to describe the estate or interest given; second, the persons who are to take. When used in the first sense, they are words of limitation, describing the estate given, and not the persons who are to take; for instance, a gift to "A. and his heirs" is simply a gift of the fee to A., for, if A. dies before the testator, the heirs of A. do not take.

[5] An illustration of the second sense in which the words may be used is a gift to "A., and, if he should die, then to his heirs"; the word "heirs" clearly describing the persons who take in case A. dies before the testator. A certain method to prevent lapse is thus made plain. It is known as substitution, and gifts are said to be substitutional when provision is made for some one to take the gift in the event of the death of the original beneficiary before the death of the testator.

In the clause under consideration, it cannot be successfully contended that such a provision was made, for the language used, taken as a whole, "was an expression consistent with the gift of an absolute ownership, but in no wise indicative of a direction to transfer the part given to a legatee to his heirs or personal representatives, in the event of his failing to survive the testatrix." *Matter of Wells*, supra.

[6] Section 29 of the Decedent Estate Law (Consol. Laws, c. 13) has no application, as the devisee, George H. Reynolds, was not a child or other descendant of the testator, or a brother or sister of the testator; so the devise in the first paragraph was not saved from lapsation by the provisions of such section.

[7] The use of the word "assigns" in the clause in question does not signify substitution. To hold that the clause was substitutional, and that the heirs of George H. Reynolds took thereunder in his place, the court would have to disregard the word "assigns" as meaningless.

The Court of Appeals has so held in *Matter of Tamargo*, 220 N. Y. 225, 229, 115 N. E. 462, 463, in which the court said:

"The use of the word 'assigns' makes it clear that the gift was absolute and not alternative. *Kendall v. Clapp*, 163 Mass. 69 [39 N. E. 773]; *McKiernan v. Beardslee*, 72 N. J. Eq. 283 [73 Atl. 815]; *Jackson, Executor, v. Alsop*, 67 Conn. 249 [34 Atl. 1108]; *Keniston v. Adams*, 80 Me. 290 [14 Atl. 203]; *Kimball v. Story*, 108 Mass. 382. In the *Keniston Case*, Chief Justice Peters, writing for the unanimous court, said: 'The language here is to assigns as well as to heirs, and the power of assigning implies an absolute title [citing authorities]. Even where the gift is to specified persons, "or their heirs or assigns," it is clear that the words are words of limitation only. No cases are found which maintain a different doctrine' [citing authorities]. In the *Jackson, Executor, Case*, the court said: 'Where the word "assigns" is added to the word "heirs," it is almost impossible to read the whole phrase otherwise than as words of limitation, and not as intended to create an estate in any other person' [citing authorities]. In the *Kimball Case* the court said: 'When the word "assigns" is also used, any other construction (than as taking by representation only) would make the bequest inconsistent and uncertain, inasmuch as "assigns" could only be those to whom the legatee had conveyed in his lifetime.'

In *Matter of Olds*, 100 Misc. Rep. 388, 116 N. Y. Supp. 713, cited by the special guardian, the provision there under construction was very clear, and it was manifest, from the language used, that the heirs of the beneficiaries were to take; such language, after providing for a life estate, reading as follows:

"And upon the death of both of them I give and devise the remainder in all my said real estate to my said nieces, Jessie Olds and Mollie Olds, and to their heirs, the said heirs to take per stirpes and not per capita, to be divided equally between them, share and share alike."

It was the manifest intention in the *Olds Case*, from the language used, that the heirs were to take. Such is not the case, as the court views it, in the will under consideration.

It is therefore the opinion of the court that by the first paragraph of the last will and testament of the testatrix, Amanda C. Reynolds, the devise therein to George H. Reynolds lapsed by reason of his death prior to the death of the testatrix, and the heirs at law of said George H. Reynolds as such are not entitled to any portion of such devise. The testatrix died intestate as to the property included in the devise in the first paragraph of her will, and the same passes under the statute of descent to her heirs at law.

A decree in accordance with this opinion may be prepared, and, if not agreed upon, may be settled before the surrogate upon two days' notice.

(108 Misc. Rep. 590)

In re EATON'S ESTATE.

(Surrogate's Court, Madison County. September, 1919.)

EXECUTORS AND ADMINISTRATORS §—521—FOREIGN ADMINISTRATION; ALLOWANCE OF EXPENSES BY PROBATE COURT OF SISTER STATE INEFFECTUAL IN NEW YORK.

A decree entered in accounting proceedings in a probate court in a sister state allowing certain accounts against estate of testatrix wherever situated as expenses in due administration is ineffectual against New York administrators with will annexed, as no state can exercise direct jurisdiction over persons or property without its territory, and application for payment by New York administrators will be denied.

Application on behalf of Ralph Phelps, Jr., and others for an order directing the Madison County Trust & Deposit Company and Emma Storms as administrators with the will annexed of Elizabeth S. Eaton, deceased, in Madison county, to pay from funds in their hands certain judgments and awards of the probate court of the county of Washtenaw, Mich. Application denied.

See, also, 102 Misc. Rep. 370, 169 N. Y. Supp. 871.

J. A. Johnson, of Morrisville (A. F. Freeman, of Ann Arbor, Mich., of counsel), for petitioner.

Carlos J. Coleman, of Hamilton, for administrators c. t. a.

Frank E. Jones, pro se.

SENN, S. A petition has been filed in this court on behalf of Ralph Phelps, Jr., of Detroit, Mich., and others, for an order directing the payment by the administrators with the will annexed in this county, out of any funds in their hands, of certain judgments and awards of the probate court of the county of Washtenaw, Mich., as affirmed on appeal by the circuit court of that county, against the estate and property of Elizabeth S. Eaton, deceased, wherever the same may be. The facts on which the application is based are, briefly, as follows:

Elizabeth S. Eaton, of Ann Arbor, Mich., died at her said home about May 17, 1906, leaving a last will and testament and codicil, in which her brother in law, Hervey E. Eaton, of Madison county, was named as executor. When she died testatrix had household furniture in Michigan worth about \$575 and her remaining estate of about \$50,000, consisting of stock certificates, bonds and other securities, was in the hands and custody of her said executor, and had been for some time. Her will and codicil were likewise in his possession. The will and codicil were probated in this court, and letters testamentary were duly issued to said Hervey E. Eaton, who acted as executor until his decease. The will and codicil are still in force in this county.

The proceedings for the probate of the will and codicil in Madison county were contested, and during their pendency a proceeding was instituted in the probate court of Washtenaw county, Mich., to have the will probated, but to have probate denied to the codicil, which materially affected and changed the rights of certain legatees. Such proceed-

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ings were had in that court that the will was admitted to probate, and probate of the codicil was denied, and letters of administration with the will annexed were thereupon granted to Willis L. Watkins. After the decease of Hervey E. Eaton, the New York state executor, and the settlement of his accounts as such, letters of administration with the will annexed were by this court granted to the Madison County Trust & Deposit Company and to Emma Storms, who duly qualified and are still acting under said letters, and the remaining assets in this state are still in their hands. Thus there were, and are, two conflicting administrations, one of the will and codicil in this county, and one of the will only in the state of Michigan, in effect the same as though two different wills of the testatrix had been probated, one in Michigan and one here.

After the decease of Hervey E. Eaton and at about the time of the appointment in this county of the administrators with the will annexed, Willis L. Watkins, the Michigan administrator, applied to this court under section 2629 of the Code of Civil Procedure, for ancillary letters of administration to be issued to him pursuant to his appointment by the Michigan court, as above set forth. He urged his right to such appointment, not only upon the plain language of the section of the Code, but on the further ground that, under the law of the domicile, the administration in Michigan must be regarded and held to be the superior and dominant administration. The application was denied, on the ground that ancillary letters would be inconsistent with will and codicil in force in this state, as well as previously adjudicated in regard to this estate. From that determination an appeal was taken to the Appellate Division of the Supreme Court, in which the decree appealed from was affirmed (159 App. Div. 7, 144 N. Y. Supp. 254) and is now in force. The facts in that proceeding, which are more or less applicable in this, are quite fully set forth in my opinion in *Matter of Eaton*, 102 Misc. Rep. 370, 169 N. Y. Supp. 871, to which I refer for a more detailed statement, and to avoid repetition here.

From the papers on file in this court, it appears that, before the term of office of the present surrogate, efforts were made in the Madison County Surrogate's Court to procure the transfer of the assets, papers, and securities in the hands of the Madison county executor to the administrator in Michigan, and quite strenuous efforts were made in this and other courts, federal and state, to have the administration in Michigan held to be superior or dominant, all of which efforts have failed. See *Matter of Eaton*, 159 App. Div. 7, 144 N. Y. Supp. 254; *Watkins v. Eaton* (C. C.) 173 Fed. 133; *Higgins v. Eaton* (C. C.) 178 Fed. 153; *Watkins v. Eaton*, 183 Fed. 384, 105 C. C. A. 604; *Higgins v. Eaton*, 183 Fed. 388, 105 C. C. A. 608; *Higgins v. Eaton* (C. C.) 188 Fed. 938; *Id.*, 202 Fed. 75, 122 C. C. A. 1. Indeed, the petition now before me asks for the transfer of the funds and securities to the hands of said Willis L. Watkins, administrator, and the same relief has been asked during the incumbency of my predecessors:

After the determination of the proceedings for the probate of the will in Washtenaw county probate court, upon an accounting in that court, certain accounts against the estate were by the final decree al-

lowed and held to be just charges, liens, and obligations against the estate of said deceased testatrix, "wherever such estate and property of the decedent is situate, as duly made and expended in the proper and necessary administration of such estate." The decree recites, "and it duly appearing that all persons interested in said estate have been also duly cited to appear at such hearing," and that all who appeared had been heard. On appeal to the circuit court of Washtenaw county the decree was more or less modified, and some of the amounts reduced. As finally fixed by the court, in its decree made December 6, 1915, they were as follows: To Ralph Phelps, Jr., \$354.95; B. M. Thompson, \$1,836.25; Orla B. Taylor, \$187.50; A. F. Freeman, \$2,814.55; John A. Johnson, \$218.85; the joint account of A. F. Freeman, B. M. Thompson, Ralph Phelps, Jr., and Orla B. Taylor, \$2,431.44 and interest thereon at 5 per cent. from December 1, 1914, to the date of the judgment, \$121.57; Willis L. Watkins, administrator, etc., \$553.94; the sum of \$50 each to said Freeman, Thompson, and Jones; to E. P. Goodrich \$40—making a total of \$8,709.05, aside from interest from the date of the decree.

All the persons whose claims are so allowed, except Mr. Watkins, Mr. Taylor, and Mr. Goodrich, have appeared more or less as attorneys in the proceedings in this state, and I think it may properly be assumed that the allowances were for services and disbursements in the probate proceeding, although it does not definitely appear what they were for. It seems that \$500 was allowed to Willis L. Watkins as "an extraordinary service charge, under the statute." Whether the allowances included any services in contesting the probate in this state, and in the various proceedings instituted in the attempt to secure the control of the estate to the Michigan administration, or whether they only included services in the Washtenaw county probate court and circuit court, does not appear, unless by inference from the amounts. There is nothing in the files here to indicate that the proceeding to probate the will without the codicil in the Washtenaw county probate court was seriously contested, if at all.

The petition now before me recites the facts as to the allowances by the Michigan courts as above set forth, and is accompanied by duly authenticated copies of the decrees and records of the proceedings of those courts in regard to said allowances. There being no funds in the hands of the administrator in Michigan available for that purpose, I am asked to "allow in this court the said judgments and awards of the said circuit court for the county of Washtenaw," and direct their payment from the funds and assets of the estate within the jurisdiction of this court.

Petitioners call my attention to section 1, article 4, of the Constitution of the United States, that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." It is insisted that this means that this court is bound by the action of the Michigan court; that it is final and conclusive upon all officers and courts in the United States having or assuming jurisdiction or control over any of the assets of the estate of the deceased,

and as a necessary consequence that it is my plain duty to make an order granting the prayer of the petition.

If I am bound by the adjudication of the Michigan court, then my duty is simply to make an order accordingly. If I am not so bound, then I may still consider whether the allowances in question are a proper charge against this estate—whether they represent services and expenses incurred in aid of and beneficial to the probate and other proceedings in this estate. If they are for attorneys and other services in the probate of the will in the Michigan court, or services in aid of the attempted transfer of the control of the estate to the latter court, or in opposing the probate here, or in aid of any of the attempted proceedings in this court which have failed, then I cannot allow them in whole or in part, because our Appellate Division has already held in this matter that I cannot allow for services of attorneys (especially foreign attorneys) in matters where they were not successful. At any rate, if I am to pass on the accounts (see 185 App. Div. 901, 171 N. Y. Supp. 1084) independent of the amounts allowed by the court in Michigan, I would require proofs as to the nature and character of the services and expenses claimed.

It may be claimed that the proceedings for the probate of the will in Michigan were successful. So they were from that viewpoint, but they produced a result at variance with and in hostility to all that has been established here, and hence the services in that behalf cannot from our point of view be said to have been rendered for the benefit of the estate. It follows that, as the matter now stands, I cannot allow for the services and expenses claimed, unless, as stated, I am bound by the judgment and decree of the Washtenaw county circuit court.

Although the petitioners have made quite an extensive argument and submitted a brief upon this point, still no adjudicated case has been cited, holding or even bearing upon this contention. Many cases have been cited in favor of the alleged dominancy of the Michigan administration, upon the law of the domicile as applied to administration; but, as that proposition has long since been settled against the petitioners, I do not see that it has any bearing on the present question. On the other hand, the Supreme Court of the United States has held (*Pennoyer v. Neff*, 95 U. S. 722, 24 L. Ed. 565, cited in *Brown v. Fletcher's Estate*, 210 U. S. 90, 28 Sup. Ct. 702, 52 L. Ed. 966) that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory and that no state can exercise direct jurisdiction and authority over persons or property without its territory.

"The several states are of equal dignity and authority, and the independence of one implies the exclusion of powers from all others. And so it is laid down by jurists as an elementary principle that the laws of one state have no operation outside of its territory, except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory, so as to subject either persons or property to its decisions. Any exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, *Conf. Laws*, § 539.

Brown v. Fletcher's Estate, *supra*, was a case where the executor resided in Michigan, holding his appointment and acting under the courts

of that state, where the principal estate was, and there was an administrator with the will annexed in Massachusetts, acting under appointment of a court of that state, where some of the property was situated. A judgment of the Massachusetts court against the executor in Michigan was held to be a nullity; the court among other things holding that there was no such relation between an executor and an administrator with the will annexed, appointed in another state, as will make a decree against the latter binding upon the former or the estate in his possession. It is true that the court in this case commented on the fact that there was no valid or binding service of process on the executor, but the decision was based on the broader ground that the Massachusetts court could not by its judgment or decree bind or control property in the control of an executor in another state, acting under the authority of the courts of that state. The court quoted quite extensively from *Low v. Bartlett*, 8 Allen (Mass.) 259, where a judgment had been rendered in Vermont against an ancillary administrator appointed in that state, whose appointment had been made at the request of the executor under the will probated in Massachusetts, and it was held that the administrator was not in privity with the executor, because the two were administering two separate and distinct estates. The court in the Massachusetts case, among other things, said:

"If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. The executor derives his authority from the letters testamentary issued by the probate court here; he gives bond to that court, is accountable to it for all his proceedings, makes his final settlement in it, and is discharged by it, in conformity with the statutes of this commonwealth. The administrator derives his authority from the probate court in Vermont, and is accountable to it in the same manner in which the executor is accountable to our court. The authority of the executor does not extend to the property there, nor to the doings of the administrator. Nor does the authority of the administrator extend to the property here, or to the doings of the executor. When the plaintiff commenced his suit against the administrator, the executor had no right to go there and defend it. If he had been found in Vermont, he could not have been sued there. The judgment rendered in the suit was not against him, or against the testator's goods in his hands, but was simply against the administrator and the testator's goods in his hands. The courts of Vermont had no jurisdiction of the executor or of the goods in his hands, any more than our courts would have over the administrator and the goods in his hands. It is this limitation of state jurisdiction that creates a necessity for an administration in every state where a deceased person leaves property, and each state regulates for itself exclusively the manner in which the estate found within its limits shall be settled."

All of which might be said of and is applicable to the question raised by the petition herein. If the Michigan court can make a decree binding upon this court and the administrator here or the property in his hands here, then this court can make decrees binding upon the probate court in Michigan, and the administrator there and the property in his hands in that state. In which case, as we are admonished by the history of this estate, the conflict of laws, decisions, and decrees might furnish a modern counterpart to the story of the confusion of tongues at the building of the Tower of Babel.

While the decree of the probate court of Washtenaw county recites

due citation of all persons interested in the estate to appear at the hearing, it does not appear in what manner they were cited, and in view of the authorities I do not think it is material. But, if material, I should require proof of the manner of service and where the citation was served on the executor. He was a resident of this state, and in the absence of proof I should at least suspect that he was served in this state, if he was personally served. If served in this state, or if the service was by publication, or other method of substituted service, then I should on that ground alone hold the decree in question to be a nullity with respect to any person or property in this state.

The point is raised by the petitioners that the property in the hands of the administrators here, being in a sense intangible property, viz. stock certificates, bonds, and paper securities and evidence of value, with perhaps some money, the same is to be deemed to have been in the hands of the testatrix at Ann Arbor at the time of her decease; that it should for that reason be regarded and treated as being in the city of Ann Arbor, and consequently in the county of Washtenaw, and in the jurisdiction of the probate court of that county.

In *State of Iowa v. Slimmer*, 248 U. S. 115, 39 Sup. Ct. 33, 63 L. Ed. 158, decided by the Supreme Court of the United States on December 9, 1918, a case where a resident of the state of Iowa had prior to his decease, and for the purpose of defrauding the state of Iowa of transfer taxes, placed his property, consisting of promissory notes and a few liberty bonds, aggregating in value \$550,000, in the hands of his son in Minnesota, the court held, citing *Overby v. Gordon*, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741, that the same was property located in the state of Minnesota, and that the probate courts of that state had jurisdiction to determine the domicile and to distribute the property according to the terms of the will.

Therefore, being satisfied that the decree of the Washtenaw circuit court is ineffectual as to property in the jurisdiction of this court, it not appearing that the claims allowed in that court are claims against the estate of Elizabeth S. Eaton, or that they represent services or expenses rendered and incurred for the benefit of the estate or in aid of its administration, the prayer of the petition for an order directing the payment of the amounts as allowed by the Michigan court must be denied, and the petition as a whole is dismissed.

Decreed accordingly.

In re BROWN'S ESTATE.

(Surrogate's Court, New York County. December 5, 1919.)

TRUSTS ¶362—CESTUI QUE TRUST WHO HAS MISAPPLIED FUNDS NOT ENTITLED TO INCOME.

Where cestui que trust, after his removal as executor, has filed objections to account of surviving trustee, which account states that cestui que trust, while acting as executor, misapplied certain funds of the estate of deceased, *held*, cestui que trust's application to compel surviving trustee to pay him certain income from the trust fund will be denied, with leave to renew, if issues raised by objections are not brought on for hearing.

In the Matter of the Estate of John J. Brown, deceased. On application by Willie L. Brown, cestui que trust, to compel surviving testamentary trustee to pay him certain income from the trust fund. Application denied, with leave to renew within 30 days.

Robert B. Livingston, of New York City, for petitioner.

Dean, King, Tracy & Smith, of New York City, for respondent.

FWLER, S. This is an application by a cestui que trust to compel the surviving testamentary trustee under the will of the deceased to pay him certain income from the trust fund. The trustee alleges in her answer that the cestui que trust was removed as executor of the estate of the deceased by an order of this court, that he has failed to account for his acts as such executor, and that he has filed objections to the account filed by the surviving trustee on behalf of herself and the cestui que trust as executors and trustees.

In the account filed by the trustee it is stated that the cestui que trust, while acting as executor, misapplied certain funds of the estate of the deceased. The cestui que trust objected to that part of the account containing the allegations of misapplication of funds, but the issues raised by the objections have not been brought on for hearing. If the objections to the account should be dismissed, the cestui que trust, as executor, would be surcharged with certain funds of the estate. Until, therefore, the objections are disposed of, the surviving trustee should protect the other legatees by refusing to pay the income to the cestui que trust. It is the duty of the surviving trustee, however, to bring the objections on for hearing and have the issues raised by them decided by this court.

The application is therefore denied, but with leave to renew in 30 days, if the issues raised by the objections to the account of the trustee have not been brought on for hearing. Settle order on notice.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In re CHANCELLOR'S ESTATE.

(Surrogate's Court, New York County. December 9, 1919.)

DEATH §2(1)—No PRESUMPTION FROM SIX MONTHS' ABSENCE.**Six months' absence does not raise a presumption of death, justifying temporary administration.**

In the matter of the estate of Henry Chancellor. On a creditor's application for letters of temporary administration. Denied.

Daniel T. Kimball, of New York City, for petitioner.

FOWLER, S. This is an application by an alleged creditor, to the extent of \$5, for letters of temporary administration upon the estate of an alleged absentee. There does not appear to be any estate beyond two insurance policies, one for \$88 and the other for \$13. It appears that the alleged absentee went away on his vacation on the 3d day of June, 1919, and has not been seen by this petitioner, the alleged creditor, since that day; that he has inquired for him, and cannot find him; and the petitioner believes that Chancellor has met with foul play or is dead.

Upon the facts stated in the petition there is no sufficient ground shown for a presumption of death and administration upon the estate. There does not appear to be any reason why Chancellor should communicate with the petitioner. Unless Chancellor is dead there is no estate, for there is no allegation in the papers that he was possessed of any personal property, and the insurance policies will not be payable until after his death. Chancellor has been absent only since the 3d day of June, this year, and that is too short a time to raise any presumption of death. The facts shown by the petition in this matter are insufficient to warrant the issuance of letters of administration upon the estate of this alleged absentee.

The application is therefore denied.

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

GUTMANN v. GUTMANN.

(Supreme Court, Special Term, Albany County. December 15, 1919.)

1. HUSBAND AND WIFE §279(6)—DEFAULT IN MONTHLY PAYMENTS UNDER SEPARATION AGREEMENT.

Where monthly sum agreed to be paid by husband in separation agreement was regularly paid until the person to whom payment was to be made refused to receive payment, husband was not in default; no demand having been made on him for payment of alimony since said refusal.

2. HUSBAND AND WIFE §279(1)—EFFECT OF SEPARATION AGREEMENT.

Where there is a valid existing separation agreement between a husband and wife, under which provision is made for her support, she has no cause of action against the husband for separation and alimony in excess of the amount provided for in the agreement.

3. HUSBAND AND WIFE §279(6)—SEPARATION AGREEMENT A BAR TO ALLOWANCE OF ALIMONY PENDING SUIT.

Where separation agreement fixes monthly amount to which defendant wife is entitled, and plaintiff husband is not in default under such agreement as to payment, defendant's motion for alimony during pendency of action will be denied.

4. DIVORCE §227(1)—AMOUNT OF COUNSEL FEES PENDING SUIT.

The court not being impressed that defendant wife will establish her defense, an allowance of only \$250 counsel fees will be made.

Action by John H. Gutmann against Winifred Benjamin Gutmann. On motion for an order directing the payment by plaintiff to defendant of alimony and counsel fees. Motion for alimony denied, but counsel fees allowed.

Frost, Watson & Sharp, of Albany, for plaintiff.

Carlin & Gillett, of Albany, for defendant.

RUDD, J. The defendant moves for an order directing the payment by plaintiff to the defendant of alimony and counsel fees. The affidavit of one of the attorneys for the defendant asks that the counsel fees be fixed at approximately the sum of \$2,000, and that a reasonable sum be fixed for the support and maintenance of the defendant during the pendency of the action.

The action is brought for absolute divorce. The defendant denies the allegation in the complaint of adultery, and sets up a counterclaim, asking for a judgment of separation, because of the alleged cruel and inhuman conduct on the part of the plaintiff. The issues framed in the divorce action were tried at the November Trial Term; the jury disagreeing.

[1] The parties entered into an agreement of separation on the 24th day of September, 1915, since which time they have been living apart. By the terms of this agreement the plaintiff had the custody of their son and the defendant of their daughter. The plaintiff agreed to pay to his wife \$100 a month. This sum was regularly paid up to the 20th day of May, 1919. Amasa J. Parker, Jr., was named in the agreement of separation to receive the \$100 monthly payments. In the month of June, 1919, the plaintiff called upon Mr. Parker, at his office, named as

the place of payment, and said that he had called for the purpose of making payment, and Mr. Parker replied that he desired to be relieved from any further responsibility under the agreement, and refused to receive the money, since which time no demand has been made upon the plaintiff for the payment of alimony. The plaintiff is therefore not now in default.

[2] The application for alimony seems to be made under what the defendant assumes to be her right as defendant in the divorce action, and also her right in the action which she brings against the plaintiff in her counterclaim for separation. The demand cannot thus be confused.

"Where there is a valid existing separation agreement between a husband and wife, under which provision is made for her support, she has no cause of action against the husband for separation and alimony in excess of the amount provided for in the agreement." *Benesch v. Benesch*, 182 App. Div. 221, 169 N. Y. Supp. 561.

All of the acts which the defendant alleges of cruel treatment by her husband, the plaintiff, were prior to the agreement of separation, save one.

The application for counsel fees in the divorce action was made just as the trial of the action was about to begin. It had been noticed for a previous date, but was set down for hearing at that time by consent, with the understanding that it would not be taken under consideration by the court until after the conclusion of the action.

As above stated, the trial resulted in a disagreement. The writer of this memorandum presided at the trial, and therefore has knowledge of the situation and of the proof offered on the part of the plaintiff and the defendant, which generally does not come to a court called upon to pass upon the question of counsel fees.

Having in mind the rule that the likelihood or the probability of the success of the wife in prosecuting or defending an action of this nature is a factor for consideration, the court, relying upon the knowledge obtained from the trial, is not impressed that the wife, the defendant here, will in all probability succeed in establishing her defense.

[3] The agreement of separation fixed the alimony to which the defendant is entitled, and the plaintiff is not in default to the defendant. The motion for alimony is therefore denied.

[4] Under the issues framed in the divorce action there must be another trial. Giving to the defendant the benefit of the doubt, and in order that she may be enabled to have funds with which to protect her interests on the second trial, an order may be entered providing for the payment by the plaintiff to the defendant, or to her attorneys, of the sum of \$250 as counsel fees.

(189 App. Div. 647)

VAN SENDEN v. PRATT.

Appeal of BENJAMIN.

(Supreme Court, Appellate Division, First Department. December 5, 1919.)

EXECUTION § 387—SUFFICIENCY OF AFFIDAVIT FOR EXAMINATION OF THIRD PARTY.

Affidavit of judgment creditor's attorney for examination of third party as to his indebtedness to judgment debtor, stating merely that third party had personal property of and was indebted to judgment debtor, and that "the sources of deponent's knowledge and the grounds of his belief" as to such property were a statement signed by judgment debtor "now in deponent's possession," but not setting out the statement, *held* insufficient as basis for order of examination, under Code Civ. Proc. § 2441, requiring proof by affidavit or other competent written evidence that third person had property of or was indebted to judgment debtor.

Appeal from Special Term, New York County.

In the matter of proceedings supplementary to execution under a judgment in favor of Herman W. Van Senden, judgment creditor, against Beatrice M. Pratt, judgment debtor, to examine a third party, William E. Benjamin. From an order denying a motion to vacate an order for the examination of said third party, said third party appeals. Reversed, and motion granted.

Argued before CLARKE, P. J., and DOWLING, SMITH, PAGE, and PHILBIN, JJ.

Larkin & Perry, of New York City (Albert Stickney, of New York City, of counsel), for appellant.

Max D. Steuer, of New York City (Jerome A. Strauss, of New York City, of counsel), for respondent.

DOWLING, J. An order was made for the examination of William E. Benjamin as a third party, requiring him to appear and be examined concerning certain property claimed to be in his possession, belonging to the judgment debtor, Beatrice M. Pratt. This order was granted on the affidavit of Max D. Steuer, attorney for the judgment creditor, wherein the only statement referring to Benjamin is as follows:

"That William E. Benjamin has personal property of the said judgment debtor exceeding \$10 in value, consisting of stocks, bonds, and moneys, and is indebted to said judgment debtor in a sum exceeding \$10; that the sources of deponent's knowledge and the grounds of his belief as to the said judgment debtor's property and the said possession thereof by said third party are as follows: A statement signed by said Beatrice M. Pratt, now in deponent's possession."

Counsel for Benjamin asked that this alleged statement of Beatrice M. Pratt be shown him, but the request was refused.

We are of the opinion that the affidavit was insufficient to furnish a basis for the order for Benjamin's examination. The application for the order was made under section 2441, Code of Civil Procedure, providing as follows:

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"Upon proof, by affidavit, or other competent written evidence, to the satisfaction of the judge, * * * that any person or corporation has personal property of the judgment debtor, exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars, the judgment debtor is entitled to an order, requiring that person or corporation to attend and be examined concerning the debt, or other property, at a time and place specified in the order."

The affidavit of Mr. Steuer does not satisfy this requirement of the Code. There was no proof of any kind offered to the court that Benjamin had any property belonging to the judgment debtor, nor any written evidence thereof. All that is set forth is the attorney's conclusion, based on an undisclosed statement by the judgment debtor. The attorney might be satisfied that Benjamin had property on Beatrice Pratt's statement; but, if disclosed, it might fall far short of satisfying the court that such was the fact. If there is no direct proof, nor any written evidence, that a third party has property belonging to a judgment debtor, but merely an allegation of information and belief that such is the fact, based on a statement by some other person, that statement must be submitted to the court, before any foundation can be laid for an order to examine a third party.

The order appealed from will therefore be reversed, with \$10 costs and disbursements, and the motion to vacate the order for the examination of William E. Benjamin granted, with \$10 costs. Order filed. All concur.

LEWIS v. SMITH et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1919.)

SCHOOLS AND SCHOOL DISTRICTS — 71 — VALIDITY OF ELECTION DETERMINABLE BY COMMISSIONER OF EDUCATION.

In view of Education Law, §§ 804, 890, questions as to the validity of an election concerning the construction of a new school building and issuance of bonds are peculiarly for the determination of the commissioner of education, and involve matters which the law commits to him for determination, in the first instance at least, and the courts cannot interfere and assume to pass upon the questions on the merits.

Appeal from Special Term, Schenectady County.

Action by Edward Lewis against George Smith and others. From an order of the Supreme Court, granting defendants' motion for judgment on the pleadings, and from a judgment made upon said order, directing judgment for the defendants upon the pleadings, and also from an order vacating an injunction granted, plaintiff appeals. Judgment and orders unanimously affirmed.

The following is the opinion of Whitmyer, J., at Special Term:

Plaintiff is a taxpayer of common school district No. 11, of the town of Rotterdam, Schenectady county, N. Y., and has brought this action against the defendants George Smith, John Boscia, and Daniel Black, as trustees, Arthur Chase, as clerk, and John Campbell, as collector thereof, to restrain them from issuing any bonds upon the faith and credit of the district, and selling the same, for the purpose of purchasing a site and erecting a new school building thereon, under resolutions passed at a special school district meeting held

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on September 28, 1918. He claims that notice of the meeting was not given in the manner required by law, that the proceedings were irregular, in that persons not qualified or entitled to a vote were permitted to vote thereat, and that the said resolutions are illegal and invalid. He is moving for an injunction pending the action, and defendants are moving for judgment upon the pleadings.

Section 304 of the Education Law (Consol. Laws, c. 16) provides: "All disputes concerning the validity of any district election or of any of the acts of the officers of such election shall be referred to the commissioner of education for determination and his decision in the matter shall be final and not subject to review. The commissioner may in his discretion order a new election." And section 890 of said law provides: "Any person conceiving himself aggrieved may appeal or petition to the commissioner of education, who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this act and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action: (1) By any school district meeting; * * * (7) by any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

The question of the site is the real question in the case, and connected with it are the questions relating to the validity of the meeting and the qualifications of the voters. These are questions peculiarly for the determination of the commissioner of education, and involve matters which the law commits to him for determination, in the first instance at least. People ex rel. Board of Education v. Finley, 211 N. Y. 51, 56-60, 105 N. E. 109; People ex rel. Light v. Skinner, 159 N. Y. 162, 168, 53 N. E. 806; People ex rel. Underhill v. Skinner, 74 App. Div. 58, 77 N. Y. Supp. 36; People ex rel. Merrill v. Cooley, 75 Misc. Rep. 188, 191, 132 N. Y. Supp. 625; People ex rel. Board of Education v. Draper, 78 Misc. Rep. 329, 336, 138 N. Y. Supp. 351. The vote was very close in any case, and it may be that votes were cast by persons who were not qualified to vote; but the law provides the method to be followed to obtain relief or to review the matter, so that this court may not interfere and assume to pass upon the questions on the merits.

Therefore the motion to continue the injunction is denied, and the motion for judgment on the pleadings is granted, with \$10 costs of each motion. Orders accordingly.

Argued before JOHN M. KELLOGG, P. J., and LYON, WOODWARD, COCHRANE, and HENRY T. KELLOGG, JJ.

H. A. Gordon, of Schenectady, for appellant.

Burritt B. Johnson, of Schenectady, for respondents.

PER CURIAM. Judgment and orders unanimously affirmed, with costs, on the opinion of Whitmyer, J., at Special Term.

(109 Misc. Rep. 440)

D'ELISA v. RITTONDO.

(Supreme Court, Special Term, Nassau County. December 6, 1919.)

1. HUSBAND AND WIFE $\S$ 14(2)—TENANCY BY ENTIRETY.

Where deed to husband and wife does not otherwise provide, the grantees become seised in fee as tenants by the entirety, and the survivor takes the whole.

2. WILLS $\S$ 627(5)—ESTATE BY ENTIRETY NOT CONVERTED INTO LIFE ESTATE BY JOINT WILL.

Joint will of husband and wife, providing that survivor should enjoy realty for life and after death of survivor "it is to be equally divided amongst our surviving children," did not convert an estate by the entirety into an estate in the survivor of them for life, with remainder to surviving children.

3. HUSBAND AND WIFE $\S$ 14(2)—MORTGAGES $\S$ 11—BY SURVIVOR OF ESTATE BY ENTIRETY.

Though joint will of husband and wife provided that survivor should enjoy realty for life, and that upon survivor's death it should be equally divided among children, *held*, that wife, on death of husband, became sole owner of realty held by the entirety, so that a mortgage given thereon by her to a daughter as a wedding gift was valid.

4. INFANTS $\S$ 87—CURE OF ERROR IN SUING WHEN NOT OF AGE.

That plaintiff in action for foreclosure of mortgage was not of age when action was begun *held*, at most, an irregularity, which lapse of time has cured.

5. APPEAL AND ERROR $\S$ 1194(1)—DIRECTION THAT JUDGMENT STAND AS SECURITY.

Order of Appellate Division that judgment of foreclosure and sale "stand until the final determination of the issues raised by the answer of the appellant" *held* equivalent to the direction sometimes given, in opening a default in an action for the recovery of money only, that the judgment shall stand as security.

6. JUDGMENT $\S$ 150—ORDER OPENING DEFAULT.

Order of Appellate Division, providing for the service of an answer and the trial of the issues arising thereon, must be construed as one actually opening the default.

Action by Mollie Stamile D'Elisa against Mary Louisa Rittondo. Decision in accordance with opinion.

See, also, 188 App. Div. 925, 176 N. Y. Supp. 895.

Davison & Underhill, of Brooklyn (Arthur P. Hilton, of Jamaica, of counsel), for plaintiff.

Frederick L. Gilbert, of Cedarhurst, for defendant Santora.

Henry L. Maxson, of Hempstead, guardian ad litem, for infant defendants.

BENEDICT, J. In this action for foreclosure of a mortgage, a decree was had by the plaintiff in November, 1915, under which the mortgaged property was sold to the plaintiff in January, 1916. In August, 1918, an order to show cause was obtained by the defendant Maria Gata Santoro, one of the children of Natale and Carlotta Stamile, hereinafter mentioned, why the judgment should not be set aside, as well as the sale which had taken place under it. The motion was denied by the court, Mr. Justice Cropsey presiding; but upon appeal

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by the said defendant the order was reversed in May, 1919, and the defendant was permitted to interpose an answer to the complaint, and the issues thereby raised were directed to be tried at Special Term; the judgment to stand, and the plaintiff and her husband meanwhile being enjoined from disposing of the real property in question.

[1] Upon the trial, the following facts, among others, appeared: Upon October 25, 1905, a deed was made by Charlotte A. Hagner and another to Natale Stamile and Carlotta Stamile, his wife, of certain real property of which the lands in question were a part. As this deed did not otherwise provide or qualify, the grantees by it became seised in fee of the property as tenants of the entirety. They were not joint tenants, for they were but one person in the law, and could not take by moieties. Both were seised of the entirety, and the survivor would take the whole. *Stelz v. Shreck*, 128 N. Y. 263, 28 N. E. 510, 13 L. R. A. 325, 26 Am. St. Rep. 475.

[2] During their joint lives, the husband and wife sold some portions of the lands conveyed to them and improved other portions. On July 7, 1907, they executed a paper of testamentary character, and by reason thereof the defendant Santoro asserts in this action that the title of her parents as tenants by the entirety was converted into an estate in the survivor of them for life, with remainder over at the death of the survivor to the surviving children of the joint tenants. This paper, which was duly executed as a will, read as follows, viz.:

"Be it remembered that we, Natale Stamile and Carlotta Stamile, his wife, of Inwood, in the town of Hempstead, county of Nassau, and state of New York, being of sound and disposing mind, memory and understanding, and considering the uncertainty of life, do therefore make, publish and declare this to be our last will and testament, in manner and form following, to wit:

"I, Natale Stamile, in the event of my death I give and devise all real estate that I may possess and give and bequeath all personal property that I may possess at the time of my death to my lawful wife Carlotta Stamile. The personal property she may dispose as she sees fit but the real estate she will enjoy during her natural life and after her death it is to be equally divided amongst our surviving children.

"And I, Carlotta Stamile, in the event of my death and my lawful husband Natale Stamile survives me I give and devise all interest that I may have in any real estate at the time of my death to my said husband and give and bequeath any and all personal property that I may possess at the time of my death to said Natale Stamile my husband.

"He is to dispose of the personal property as he sees fit, but the real estate he can only enjoy during his natural life and after his death it is to be equally divided amongst our surviving children.

"We declare this to be our last will and testament.

"In witness whereof," etc.

Natale Stamile died on April 22, 1910, without making any other will, and the paper in question was offered for probate by Carlotta Stamile.

On September 23, 1910, Carlotta Stamile gave to her daughter Mollie, the plaintiff herein, a mortgage for \$5,000, which is the mortgage foreclosed in this action. This mortgage was given without any consideration, other than love and affection, and as a wedding present, unless it was given in pursuance of a marriage settlement between the parents of the contracting parties.

Carlotta Stamile died on November 17, 1912, leaving five children her surviving, and thereafter a further petition for the probate of the paper writing above referred to was made, and two decrees of the Surrogate's Court of Nassau County were entered on August 27, 1918—one admitting the paper as the last will of Natale Stamile; the other admitting it to probate as the last will of Carlotta Stamile.

[3] The question which is presented here is whether the mortgage for \$5,000 thus executed by Carlotta Stamile, after the death of her husband, was a valid lien against the real property in question, as far as it operated against the interest in such property of the four other children of Natale and Carlotta Stamile. The plaintiff contends that it was valid, because given by the survivor of the tenants by the entirety of the property in question. The defendants contend otherwise, upon the theory that the only title which Carlotta had after the death of her husband was that of tenant for life under the joint will, and with remainder to the surviving children of the two testators. The Appellate Division, in its memorandum of reversal said:

"The wife received no interest in the property under foreclosure through the will of her husband. The death of the husband extinguished his interest and left her the sole owner through her tenancy by the entirety. Whether the two wills made by the husband and the wife upon the same piece of paper were made pursuant to a contract to make reciprocal or mutual wills is a question of fact. *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265; *Rastetter v. Hoenninger*, 214 N. Y. 71, 108 N. E. 210; *Herman v. Ludwig*, 186 App. Div. 287, 174 N. Y. Supp. 469. If there was such a contract, and the wife received property from the husband under it, she was bound to carry it out. This contract did not deprive her of the power and right to dispose of her property in any way except by testamentary disposition, or by gift in the nature or in lieu of a testamentary disposition or with intent to defeat the purpose of such agreement. *Rastetter v. Hoenninger*, supra. Whether the mortgage was such a gift is a question of fact." *D'Elisa v. Rittondo*, 188 App. Div. 925, 176 N. Y. Supp. 895.

Both of these questions must be answered in the negative. As to the first question, there was no direct evidence, aliunde the will, of any contract between the two testators to make mutual wills, and I am constrained to hold that the document itself does not contain intrinsic evidence sufficient to support the conclusion that it was made as the result of a contract between the two testators to make mutual wills, which would be irrevocable and would operate upon the title to the property, so as to turn the absolute estate of the survivor into an estate for his or her life, with remainder at the survivor's death to their surviving children. The language employed in the will here plainly distinguishes it from the wills under consideration in the *Rastetter* and *Herman* Cases, and it certainly falls far short of the requirements which Judge Gray, in the *Edson* Case, stated to be necessary to establish an agreement for mutual wills.

Hence I have, without any difficulty, reached the conclusion that there was no agreement between these testators to change the quality of their ownership in the property in question, so as to defeat the absolute ownership of the survivor by force of the original tenancy by the entirety therein. Therefore, when Natale Stamile died, Carlotta

gained no estate in the property which she did not already possess, but his interest in it was extinguished. Being thereafter the sole owner of the property in fee simple absolute, Carlotta gave to her daughter, the plaintiff herein, the mortgage for \$5,000 as a wedding present. This I find was done as a free gift, and not with intent to frustrate or defeat any agreement on Carlotta's part as to the ultimate disposition of the real property. The mortgage was hence valid, and the foreclosure action and sale under it vested the title to the mortgaged property in the plaintiff.

The plaintiff is therefore entitled to judgment in this action as prayed for in the complaint, but the defendants may redeem from the sale, if so advised, within 10 days from service of notice of entry of judgment herein, upon paying four-fifths of the principal of said mortgage into court, with interest thereon for the period from the date of the death of Carlotta Stamile until the date of such payment. Out of such deposit, the mortgage held by the defendant Johnston shall first be paid, unless a satisfaction piece thereof be submitted and filed by the plaintiff, and the balance of such deposit, or the whole thereof, if such satisfaction be submitted, shall be paid to the plaintiff, upon her giving a satisfaction of the said mortgage for \$5,000 and a deed from her husband to her and her sisters as tenants in common of the real property described in the mortgage.

[4] I have considered, but have not found important, the point raised by the defendants that the plaintiff was not of age when this action was originally begun. Under the authorities cited, this is at most an irregularity, which the lapse of time has cured. *Treadwell v. Bruder*, 3 E. D. Smith, 596; *Rutter v. Puckhofer*, 22 N. Y. Super. Ct. 638.

[5] A question as to the form of the judgment to be entered hereon is presented by the provision of the order of the Appellate Division directing that the judgment of foreclosure and sale of November 2, 1915, "stand until the final determination of the issues raised by the answer of the appellant." That direction I deem to be in effect equivalent to the direction, sometimes given in opening a default in an action for the recovery of money only, that the judgment shall stand as security. In such cases it has been held that the judgment remains only as security, taking the place of any other security which might have been required, and that it is superseded by the judgment entered after the trial of the issues. In *Pomeroy v. Hocking Valley Ry. Co.*, 187 App. Div. 158, 163, 175 N. Y. Supp. 484, 488, the court, by Mr. Justice Laughlin, said that—

"In such cases it is well settled that the judgment thus permitted to stand is neither appealable nor enforceable as such, but is in effect a substitute for other security, and is superseded by the final judgment in the action."

In *MacDougall v. Hoes*, 27 Misc. Rep. 590, 58 N. Y. Supp. 209, Mr. Justice McAdam said:

"The order permitting the defendant to come in and defend, though it permitted the judgment to stand as security, deprived it of all validity for any other purpose. It was left standing as a mere security for whatever amount the plaintiff might subsequently establish by further proceedings in that action. No execution could be issued on it after the making of that order, and none can be issued on it now."

And the same justice, in *Negley v. Counting Room Co.*, 2 How. Prac. (N. S.) 237, 238, had this to say on the same subject:

"If the plaintiff fails in his action, the security is returned by canceling the collateral judgment, which loses its vitality and effect when the action fails. But if the plaintiff finally succeeds in the action the orderly practice is to issue an execution upon the final judgment, which is the real judgment in the case, and if that proves unproductive then to pursue whatever lien the collateral judgment gives, or if a levy has already been made on the collateral judgment, or a proceeding has been founded thereon, and either has been preserved by the order opening the default, it will not be impaired, but may be enforced, if the plaintiff finally recovers in the action. But the court, in controlling the execution of its own process, may no doubt, on application, direct the manner of its enforcement, so that the rights of all parties may be preserved and enforced without injury or oppression to either. It is clear, therefore, that the security judgment is to remain of record unimpaired until the judgment entered upon the verdict has been paid, reversed, or in some legal form removed from the judgment docket."

[6] The order of the Appellate Division must be construed as one actually opening the default; for it provides for the service of an answer and the trial of the issues arising thereon. See *Pomeroy v. Hocking Valley Ry. Co.*, supra, 187 App. Div. at p. 162, 175 N. Y. Supp. 484. Therefore the authorities above quoted apply.

It is evident, therefore, that a new judgment of foreclosure must be entered, and I think there should be a resale, so that the defendants, some of whom are infants, may have the benefit of any advance in the value of the property. It would be highly inequitable, in my opinion, after the Appellate Division has allowed the other children to defend the action, to allow the plaintiff, who gave no monetary consideration, to absorb so considerable a share of the patrimony of these children as would be the case if the former sale be allowed to stand, without giving them an opportunity to protect their interest.

Plaintiff will present a decision and a judgment of foreclosure and sale in conformity herewith, and cause the same to be settled on notice. Requests to find may be submitted on the return day of the notice of settlement.

(180 App. Div. 700)

FIELD v. MOORE.

(Supreme Court, Appellate Division, First Department. December 5, 1919.)

1. ATTORNEY AND CLIENT ⇐130—ATTORNEY RENDERING SERVICES TO DEFENDANT WAS NOT REPRESENTING ADVERSE INTERESTS.

Interests of defendant, who sought to be relieved from contracts for her services as an actress, and interest of film company, desiring to engage her services, were not adverse, and the fact that plaintiff was an attorney for said company at the time he rendered services to defendant in securing her release from said contracts, and in securing for her a more advantageous contract at an increased salary with her old employer, did not bar right of recovery for services rendered.

2. ATTORNEY AND CLIENT ⇐130—ATTORNEY REPRESENTING ADVERSE INTEREST NOT ENTITLED TO RECOVER.

An attorney may not serve two masters, and may not represent adverse interests or undertake to discharge conflicting duties, and, if he attempts to do so, he is not entitled to compensation from either party.

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. APPEAL AND ERROR ¶866(1)—THEORY ON WHICH COMPLAINT WAS DISMISSED ONLY QUESTION PRESENTED.

On appeal from judgment dismissing complaint on theory that plaintiff attorney, at time of his alleged employment by defendant, represented a company whose interests were adverse to those of defendant, questions as to whether contract of employment was ever entered into, and whether plaintiff rendered legal services of the value claimed, are not involved.

Appeal from Trial Term, New York County.

Action by Samuel M. Field against Gladys M. Moore, otherwise known as Mary Pickford. From a judgment dismissing plaintiff's complaint, and granting judgment to defendant, after trial at Trial Term, plaintiff appeals. Reversed, and new trial granted.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, MERRELL, and PHILBIN, JJ.

J. Hampden Dougherty, Jr., of New York City, for appellant.

O'Brien, Malevinsky & Driscoll, of New York City (M. L. Malevinsky, of New York City, of counsel, and Dennis F. O'Brien, of New York City, on the brief), for respondent.

MERRELL, J. This action is brought by the plaintiff, an attorney and counselor at law, to recover for alleged legal services which he claims he rendered to the defendant, pursuant to employment by her, and which legal services he alleges were of the value of \$5,000.

The defendant, Gladys Mary Moore, or Mary Pickford, as she is popularly known, is a moving picture actress of prominence. In 1915 the defendant was under contract with a corporation known as the Mary Pickford Famous Players' Company, whereby she displayed her talents as an actress in posing for and in the manufacture and production of moving pictures. Under her contract, which expired in December, 1915, she received a salary of \$2,000 per week. The corporation with whom defendant was thus under contract was managed by one Adolph Zukor. Under an oral arrangement, which appears from the evidence to have been somewhat indefinite, the defendant continued in the employ of the corporation managed by Zukor during the early part of the year 1916 at a salary of \$4,000 per week. However, it appears from the evidence that in March of that year the defendant had been the recipient of propositions and offers for her services of compensation in excess of the \$4,000 per week which she was then receiving from the Zukor corporation. The defendant claimed the right to terminate the oral arrangement under which she was then acting and to enter into other contracts for her services. On March 18th she made a tentative agreement in writing with one Hampton, whereby she was to receive a salary for her services of \$7,000 per week; but, owing to the failure of Hampton to furnish security for performance on his part, such contract never appears to have materialized.

It is claimed by the plaintiff that in such situation the defendant, first through her mother, who acted as her business manager, and after-

wards personally, sought to employ the plaintiff as her counsel, with a view of avoiding any obligation upon the oral contract with the Zukor corporation, with whom she had been under contract, and also with a view of avoiding any obligation under the tentative offer which she had made to Hampton, which had not been consummated. These negotiations, whereby plaintiff claims his services were sought and obtained by the defendant, occurred in March, 1916, according to plaintiff's testimony. At that time plaintiff had recently been admitted to practice as an attorney and counselor at law in the courts of this state. Formerly he had been a member of the Wisconsin bar, and had moved to New York early in the year 1915, under a retainer by the Mutual Film Corporation, whereby he acted as the counsel of said corporation at an annual salary.

It is claimed by the plaintiff that at the time his services were sought defendant was anxious to be freed from contractual obligations to the corporation managed by Zukor and to Hampton, with whom she had been negotiating, and that at that time there were several concerns and persons interested in the production of moving pictures who were anxious to negotiate with defendant for her services as a moving picture actress; that among others a Mr. Freuler, president of the Mutual Film Corporation, whose attorney plaintiff was at that time, was anxious to make some arrangement and contract with the defendant for her services. The plaintiff alleges that with the express consent of the Mutual Film Corporation and Mr. Freuler, its president, he undertook to assist the defendant as her counsel, and that he furnished her with counsel and advice, and rendered legal services, the result of which was that she was able to be relieved from obligations under the two contracts with the Zukor corporation and with Hampton, and that, being released therefrom, she was thereafter enabled to and did enter into a very favorable contract with the corporation managed by Mr. Zukor, with which she had theretofore been under contract, and under which new arrangement she was to receive the sum of \$10,000 a week for her services.

It is claimed that at that time Freuler, representing the Mutual Film Company, was particularly anxious to obtain the services of the defendant, and had made a bid therefor of \$15,000 a week; but the contract was finally made between defendant and her old employer, managed by Zukor. Plaintiff testifies that defendant's mother and business manager brought to him a proposed contract, which was finally entered into between defendant and the Zukor corporation, and that he carefully examined the same, made suggestions with reference to its provisions, and safeguarded the interests of the defendant with reference thereto. For his services in all these matters, to which he testifies in great detail, the plaintiff alleges he has earned as the value of such services the sum of \$5,000, for which he demands judgment. Upon the trial evidence was given showing that such services were worth the amount charged.

[1] At the close of the plaintiff's case the learned trial court dismissed plaintiff's complaint upon the theory that plaintiff, at the time of his alleged employment by defendant, represented the Mutual Film

Corporation, whose interests, as the court apprehended, were adverse to those of the defendant, and that, therefore, the plaintiff was in no position ethically to serve the defendant and act as her counsel in matters where he was under employment by those adversely interested.

[2] The law seems to be well settled that an attorney may not serve two masters, and may not represent adverse interests, or undertake to discharge conflicting duties, and that if he attempts to do so he is not entitled to compensation from either party. It was upon the assumption that the evidence presented by plaintiff in support of his cause of action showed that he was attempting to serve adverse interests that the learned trial court dismissed plaintiff's complaint. The court, in reaching its determination in this respect, said, in part:

"It is my view that the testimony shows it is quite obvious that Mr. Field, while purporting to represent the defendant, Mrs. Moore, was in fact, tied to Mr. Freuler and his company, the Mutual Film Company, by ties so close as to prevent him from giving disinterested advice, the advice that an attorney ought to give to his client, Mrs. Moore. Of course, the mere fact that at one and the same time he represented two different clients would not make it improper for him to act for both. It is only where the nature of his work or advice is such that he would find himself in the equivocal, anomalous position of aiding one as against the other, or of being compelled to choose between them, that the dual service would be improper. In other words, there must be a conflict of interest before it becomes unethical for a lawyer to represent both. But the moment that conflict, or probability of conflict, arises or is seen, he must cleave to one, and give him the best that is in him, which, of course, means that he must abandon the other, giving the other suitable opportunity to employ a new attorney."

The law, as thus stated by the learned trial court, was undoubtedly correct. *Eisemann v. Hazard*, 218 N. Y. 159, 112 N. E. 722. The difficulty with this case is, from an examination of the evidence, I am unable to discover any adverse interests between the defendant and the Mutual Film Company, for which plaintiff was serving as counsel, or Freuler, its president. Indeed, the interests of the defendant and plaintiff's other client seem to have been in entire consonance. Defendant was anxious to be rid of embarrassing contracts which might prevent her from obtaining other more advantageous contracts and higher compensation for her services. The only possible interest that plaintiff's client, the Mutual Film Company, or Freuler, could have had in defendant, was its or his desire to engage her services, and so long as she was bound by other contracts they could not take steps to procure a contract with her. In other words, any possible interest they could have would be in line with that of the defendant to first rid herself of the entanglement of other contracts.

The consent of Freuler that the plaintiff render the defendant legal services and furnish her counsel with reference to these contracts was freely given before plaintiff made any arrangement with the defendant. Freuler understood that there was no chance for him to make an arrangement with the defendant until she succeeded in relieving herself from possible obligations under other existing contracts. Hence, in serving the defendant, plaintiff was not acting adversely to the interests of his regular employer. When the final consummation came upon the execution of a new contract by the defendant, it was

not with plaintiff's client, the Mutual Film Company, or Freuler, that said contract was made, but with Zukor's corporation, at a less figure than that offered by the Mutual Film Corporation represented by Freuler. Therefore it cannot be said that there was ever any conflict of interest between the defendant and the Mutual Film Corporation, by whom plaintiff was employed under an annual retainer. If the case had been presented of plaintiff accepting employment as counsel for the defendant, when he was serving as attorney and counsel for the Zukor corporation, or for Hampton, from whose contracts defendant was seeking to be relieved, a different situation would be presented, as there the plaintiff would be precluded from serving parties whose interests were antagonistic.

{3} The defendant's answer puts in issue, and it is insisted upon this appeal, that no contract of employment was ever entered into whereby plaintiff was retained by the defendant, and it is denied that plaintiff rendered the defendant legal services of the value claimed. These questions are not before us on this appeal, and are issues properly to be determined upon a new trial.

The judgment appealed from should be reversed, and a new trial granted, with costs to the appellant to abide event. Order filed. All concur.

(189 App. Div. 685)

BRENEN v. DAHLSTROM METALLIC DOOR CO.

(Supreme Court, Appellate Division, First Department. December 5, 1919.)

1. BANKRUPTCY § 433(7)—DISCHARGE FREES BANKRUPT'S SALARY FROM EXECUTION.

Bankruptcy Act, § 67f (U. S. Comp. St. § 9651), applies to executions issued under Code Civ. Proc. N. Y. § 1391, as to execution against wages being a lien and continuing levy upon wages due or to become due, and the debtor's discharge in bankruptcy, judgment having been duly proven and allowed, frees the bankrupt's salary from the effects of such execution in so far as payments subsequent to the date of adjudication are concerned.

2. BANKRUPTCY § 4—COURTS § 97(5)—FEDERAL DECISIONS CONSTRUING BANKRUPTCY ACT FOLLOWED BY STATE COURTS.

The provisions of the federal Bankruptcy Act (U. S. Comp. St. §§ 9585-9656) are paramount to any state statute, and the courts of New York have always recognized and followed decisions of federal courts construing it, dealing with questions arising under that act, even if in conflict with New York decisions.

Appeal from Appellate Term, First Department.

Action by Edward W. Brenen against the Dahlstrom Metallic Door Company. From the determination of the Appellate Term, First Department (167 N. Y. Supp. 860), affirming order of the City Court of the City of New York, granting plaintiff's motion for judgment on the pleadings, defendant appeals. Determination reversed, judgment and order of the City Court reversed, and plaintiff's motion denied.

Argued before CLARKE, P. J., and DOWLING, SMITH, and PAGE, JJ.

§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Charles A. Ogren, of New York City (Louis W. Severy, of New York City, of counsel), for appellant.

PAGE, J. Prior to February 15, 1912, Howard E. Van Orden was in the employ of the defendant at a weekly salary of \$45, and continued therein at all the times hereinafter mentioned. On February 15, 1912, an execution against Van Orden's salary was issued to the sheriff and by him presented to the defendant, pursuant to section 1391 of the Code of Civil Procedure. The judgment upon which the execution was issued was recovered in the Supreme Court in Richmond County, December 28, 1911. It appears from the answer that on June 19, 1912 (more than four months after the issuance of the execution), Van Orden was duly adjudicated a bankrupt in the United States District Court for the Southern District of New York; that such proceedings were had therein that a discharge in bankruptcy was granted to him on October 3, 1912; that the plaintiff's judgment was duly proved and allowed in the bankruptcy proceedings, and was one of the debts from which Van Orden was discharged; that on January 25, 1915, after due notice to the plaintiff, an order was made by the Supreme Court discharging said judgment, and directing that the same be discharged of record, and that the judgment was so discharged and canceled.

The defendant failed to pay 10 per cent. of Van Orden's salary to the sheriff for a period of 59 weeks, from January 2, 1915, to and including February 12, 1916. Plaintiff brought an action in the City Court to recover the sum of \$265.50, pursuant to the provisions of section 1391 of the Code of Civil Procedure. Upon the complaint and answer the plaintiff moved for judgment, which motion was granted by the City Court, upon the ground that the plaintiff, by the issuance and service of the execution, had obtained a continuing lien upon Van Orden's salary to be earned, which survived the cancellation and discharge of the judgment, and that such execution was valid and enforceable until modified pursuant to section 1391. On appeal the Appellate Term affirmed the order and judgment on the authority of *Ulnner v. Doran*, 167 App. Div. 259, 152 N. Y. Supp. 655, although the justices thereof intimated that they did not agree with the decision in that case.

In *Ulnner v. Doran*, supra, the judgment debtor moved, under section 1391, for a modification of the order for an execution against his salary, by vacating the same as to all payments and deductions made subsequent to the date of the filing of his petition in bankruptcy; he having been discharged in such proceeding, the judgment upon which the execution was issued having been duly scheduled, and the plaintiff having had notice thereof. The court at Special Term decided that as, under section 1268 of the Code of Civil Procedure (now section 150 of the Debtor and Creditor Law [Consol. Laws, c. 12]), a judgment against a discharged bankrupt could not be canceled until one year from the discharge in bankruptcy, the execution against the salary issued thereupon would be valid and a continuing lien upon the salary during such period. We held, on appeal therefrom, that this conten-

tion was unfounded; that the provision in section 1391 that "said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits due or to become due to said judgment debtor, * * * and said levy shall be continuing levy until said execution and the expenses thereof are fully satisfied, * * *" was not susceptible of such construction, and said:

"It certainly was not intended to create a specific lien upon income or earnings not yet due and which do not become due until after the discharge and satisfaction of the debt upon which the execution issued. Salary earned after the discharge in bankruptcy stands in a position analogous to that of other property acquired after a discharge, as to which a judgment included in the discharge is specifically declared not to become a lien"—citing section 1268 of the Code and section 150 of the Debtor and Creditor Law.

We, however, further held that the execution remained valid and enforceable until modified as contemplated by section 1391.

[1, 2] That decision was based upon the statutes of this state. No decision of the United States courts construing the effect of the national Bankruptcy Act was cited by counsel or considered by the court. It has been distinctly held by the federal courts that section 67f of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. § 9651]) applies to executions issued under section 1391 of the Code of Civil Procedure, and that the debtor's discharge in bankruptcy frees the bankrupt's salary from the effects of such execution, in so far as payments subsequent to the date of the adjudication are concerned. *Matter of Ludeke* (D. C.) 22 Am. Bankr. Rep. 467, 171 Fed. 292; *Matter of Sims* (D. C.) 23 Am. Bankr. Rep. 899, 176 Fed. 645; *Matter of Harrington* (D. C.) 29 Am. Bankr. Rep. 666, 200 Fed. 1010; *Matter of Obergfoll*, 38 Am. Bankr. Rep. 645, 239 Fed. 850, 152 C. C. A. 636; *Matter of Beck* (D. C.) 38 Am. Bankr. Rep. 797, 238 Fed. 653.

The Bankruptcy Act, having been passed by Congress pursuant to the power delegated to it by the federal Constitution, is the supreme law of the land. Its provisions are paramount to any state statute, and we have always recognized and followed the decisions of the federal courts construing it, dealing with questions arising under that act, even if they are in conflict with our decisions. Cf. *Hyde Park Flint Bottle Co. v. Miller*, 179 App. Div. 73, 166 N. Y. Supp. 110; *Manheim v. Loewe*, 185 App. Div. 601, 607, 173 N. Y. Supp. 260. Therefore this case should be decided in the light of the decisions of the federal courts, supra, and we hold that the answer states a good defense.

The determination of the Appellate Term and the order of the City Court are therefore reversed, with costs in this court and the Appellate Term, the judgment and order of the City Court reversed, with costs, and the plaintiff's motion denied, with \$10 costs. Order filed. All concur.

(189 App. Div. 384)

BUSACCA v. McLOUGHLIN SUPPLY CO.

(Supreme Court, Appellate Division, First Department. December 5, 1919.)

MUNICIPAL CORPORATIONS — 706(5) — SUFFICIENCY OF EVIDENCE TO SHOW NEGLIGENCE OF AUTOMOBILE DRIVER.

In action for injuries to pedestrian, struck by automobile at street intersection while crossing street, after having waited for street car to pass, involving question of negligence of defendant's chauffeur, driving in opposite direction from that in which car was traveling, in view of possible danger to persons who would naturally cross street after car had passed, evidence *held* to sustain verdict for plaintiff.

Appeal from Special Term, New York County.

Action by Sady Busacca, an infant, etc., against the McLoughlin Supply Company. From an order setting aside a verdict in plaintiff's favor as against the weight of evidence, and directing a new trial, plaintiff appeals. Order reversed, verdict reinstated, and judgment entered thereon.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, and MERRELL, JJ.

J. Arthur Seidman, of New York City (Louis Oppenheim, of New York City, of counsel), for appellant.

Nadal, Jones & Mowton, of New York City (Edward P. Mowton, of New York City, of counsel), for respondent.

PER CURIAM. If the evidence of plaintiff's witnesses be believed, there was abundant evidence to sustain this verdict. The plaintiff stood upon the northeast corner of Oliver street and Madison street. A car going west on Madison street had stopped to let off passengers. After the car had started up, the plaintiff started to cross the street, and was struck by the defendant's automobile.

The plaintiff's evidence is to the effect that the automobile came down Oliver street from the north and swung around into Madison street, and was passing along Madison street between the east-bound car track and the southern curb. There was a space there of 7 feet only. The evidence is to the effect that plaintiff was struck about 3 feet from the south line of the east-bound track.

The only evidence in behalf of the defendant is the evidence of the chauffeur himself. He swears that he did not come from Oliver street, but came from the west on Madison street. He saw the standing car, and saw the car start up. He might naturally assume that people from the northeast corner would then be coming behind the car, in order to make the crossing which had been held up by this south-bound car. The plaintiff was required to walk from 10 to 12 feet after she had gotten beyond the line of the west-bound car, which had stopped and was passing on. In view of the possible danger to persons who would naturally cross the street after that car had passed, we are of opinion that the jury was fully justified in saying that the defendant's chauffeur should have had his car under control sufficiently to have avoided this accident.

The chauffeur swears that the plaintiff ran out from behind the car. Every other witness swears that she walked across the street. There clearly is not such preponderance of evidence in the defendant's favor as to justify the court in disregarding the verdict of the jury, and we are of opinion that the order setting aside the verdict should be reversed, with costs, the verdict reinstated, and judgment entered thereupon, with costs. Order filed.

(109 Misc. Rep. 505)

GIBSON v. VILLAGE OF MASSENA.

(Supreme Court, Trial Term, St. Lawrence County. September, 1919.)

1. MUNICIPAL CORPORATIONS §221—POWER OF VILLAGE TO BUY LAND FOR DUMPING GROUND.

Under Village Law, § 89, subd. 23, authorizing village to purchase lands for dumping grounds "in any such village," village had no power to purchase land outside of the village for use as dumping ground.

2. SPECIFIC PERFORMANCE §25—UNAUTHORIZED VILLAGE CONTRACT WILL NOT BE ENFORCED.

Contract by trustees of village to purchase land outside the village for a dumping ground will not be specifically enforced; village having no power to make such contract, under Village Law, § 89, subd. 23.

Action by Edward Gibson against the Village of Massena. Judgment for defendant.

Frank L. Cubley, of Potsdam, for plaintiff.

Andrew J. Hanmer, of Massena, for defendant.

WHITMYER, J. The action is for specific performance. Defendant is a municipal corporation, a village, in the town of Massena, St. Lawrence county, N. Y. On June 5, 1918, plaintiff signed a writing by which he agreed to sell about 2 acres of his wife's lands, situate in the town of Norfolk, in said county, and a right of way thereto from the highway, to defendant, for use as a public dumping ground. The purchase price was to be the sum of \$500, and was to be paid at the time of the delivery, which was not fixed, of a warranty deed thereof, free from liens. Defendant did not sign. The village attorney prepared the writing, and the village president brought it to plaintiff for his signature. After he signed, the president took it and delivered it to the village clerk at the next regular meeting of the board of trustees of the village, and it has been in the possession of the clerk ever since. The morning after plaintiff signed the village president directed the licensed truckmen of the village to carry their refuse to and to dump same upon the land, and he showed one or more of them where to dump. They did so, and they continued to do so for about four weeks, and during that time dumped about 200 loads. Within a few days after they commenced, an adjoining owner complained to the village board. As a consequence, the trustees refused to take the land, and one of them attempted to effect a settlement; but plaintiff insisted upon

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performance, and tendered a deed, signed by his wife and by himself. He then commenced this action.

[1, 2] Village Law (Consol. Laws, c. 64) § 89, subd. 23, provides that the board of trustees of a village "may, whenever in its judgment the interests of the village require it, purchase or acquire by condemnation proceedings lands for the establishment of a public dump or dumping ground in any such village, and may prohibit the use of any other lands within the village for such purpose." The section defines, and at the same time limits, the powers of a village board. It authorizes only the purchase of lands "in the village" for the establishment of a public dump, and the power to purchase outside of the village for that purpose may not be implied. *Riley v. Rochester*, 9 N. Y. 64; *Deyo v. Newburgh*, 138 App. Div. 465, 122 N. Y. Supp. 835; *Dillon on Municipal Corporations* (5th Ed.) vol. 3, § 980; 28 Cyc. p. 604. Being prohibited from purchasing, and therefore from contracting to purchase, land outside of the village for the purpose stated, specific performance may not be enforced.

Judgment accordingly.

(109 Misc. Rep. 448)

PEOPLE ex rel. WOHL v. LEO et al., Board of Appeals of City of New York.

(Supreme Court, Special Term, Queens County. December 1, 1919.)

1. MUNICIPAL CORPORATIONS ~~§~~621—REVIEW OF DECISION ON BUILDING ZONE RESOLUTION ON CERTIORARI.

Although an owner's application to the board of appeals to review a decision of the superintendent of buildings, which denied him permission to extend the business use to the upper story of a building, was based upon Building Zone Resolution, § 7, giving the board discretionary power to modify section 6, on which the superintendent based his decision, yet such application does not preclude the owner from having the board of appeals decision reviewed upon certiorari, on the ground that section 6 did not authorize the order entered by the superintendent and affirmed by the board of appeals.

2. MUNICIPAL CORPORATIONS ~~§~~601—APPLICATION OF BUILDING ZONE RESOLUTION TO EXISTING BUILDINGS; "USE."

Under New York City Building Zone Resolution, § 6, providing that any use existing in any building at the date of the resolution's passage may be changed or extended throughout the building, if no structural alterations are made, etc., *held*, that a two-story structure designed throughout for a dyeing and cleaning establishment, but the top floor of which had been temporarily partitioned to make dwelling rooms, may be changed by moving the partitions and using the entire building for dyeing and cleaning purposes, since the word "use" is not confined to the act of using, but may be also employed to describe that property or thing which renders it suitable for a purpose, and building designed for business purposes remains available for that purpose despite temporary use for another purpose.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Use.]

Certiorari by the People of the State of New York, on relation of Ignatz Wohl, against John P. Leo and others, constituting the Board

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of Appeals of the City of New York. Decision of the Board of Appeals reversed, and application granted.

William Good, of Brooklyn, for plaintiff.

William P. Burr, Corp. Counsel, of New York City, for defendants.

SCUDDER, J. This certiorari proceeding was instituted by the relator under section 719a of the Greater New York Charter (Laws 1901, c. 466), as added by Laws 1916, c. 503, § 6. The material facts, as shown by the return to the writ and the evidence adduced before this court, are as follows:

In 1915 the relator constructed a building of two stories, which was planned and constructed throughout for a dyeing and cleaning establishment. The top floor thereafter was partitioned off with light plaster board sectional partitions, held up with light wooden stud trim, to make dwelling rooms. Relator lived in these rooms, using the first floor only for factory purposes. This was the situation in 1916, when the residence district which included relator's property was created, and the building zone resolution went into effect. In March, 1919, relator, having acquired an adjoining house in which to live, filed with the superintendent of buildings an application to remove the plaster board partitions, and to extend to the second floor the business which he carried on in the first floor. The superintendent of buildings disapproved his application for the following reason:

"This proposed change would be contrary to section 6 of the zone resolution."

Relator's application to the board of appeals to review the decision of the superintendent of buildings was in form an application to that board for a modification of section 6 of the building zone resolution, in the exercise of the discretionary power vested in the board by section 7 of the resolution. Upon this application the board of appeals decided as follows:

"Resolved, that the decision of the superintendent of buildings be and it is hereby affirmed, and that the application be and it hereby is denied."

[1] It seems to me that the relator is not precluded by the form of his application to the board of appeals from contending here that section 6 of the building zone resolution, under the circumstances presented, did not forbid the alteration of the second floor of relator's building, and its use for factory purposes, and that the determination of the superintendent to the contrary was therefore erroneous.

The superintendent of buildings could not exercise discretion. He had none. His determination that the proposed alteration was forbidden by section 6 of the building zone resolution was purely a determination of law. The board of appeals had jurisdiction to review the superintendent's decision under section 719 of the Greater New York Charter. In affirming the superintendent's decision the board exercised its appellate jurisdiction, and passed on the question of law involved. It seems to me, also, that the facts presented and the discussion which took place, at the hearing before the board, were sufficient to apprise it of the dispute as to the law.

[2] The portions of section 6 of the building zone resolution which are relevant to the state of facts presented in this case are as follows:

"Sec. 6. *Existing Buildings and Premises.*—(a) Any use existing in any building or premises at the time of the passage of this resolution and not conforming to the regulations of the use district in which it is maintained may be continued therein. No existing building designed, arranged, intended or devoted to a use not permitted by this article in the district in which such use is located shall be enlarged, extended, reconstructed or structurally altered unless such use is changed to a use permitted by this article in the district in which such building is located. Such building may, however, be reconstructed or structurally altered to an extent not greater than 50 per cent. of the value of the building, exclusive of foundations, provided that no use of such building is changed or extended, except as authorized in paragraph (b) of this section. * * *

"(b) Any use existing in any building or premises at the time of the passage of this resolution and not conforming to the regulations of the use district in which it is maintained may be changed, and such use may be extended throughout the building: Provided, that in either case:

"(1) No structural alterations shall be made in the building, except as authorized in paragraph (a) of this section, and

"(2) In a residence district no portion of a building devoted to a use included in subdivision 1 of section 3 shall be changed to any use prohibited in a residence district. * * *

The meaning of the word "use" is not confined to describing the act of using, but may also be employed to describe that property of a thing which renders it suitable for a purpose. It seems to me that it is in this latter meaning that the word "use" is employed in section 6 of the resolution.

The use of a building designed and constructed for business is for business, and its use for business exists, where the plan of the building is not structurally changed, although it may be actually occupied as a dwelling. In such a case the building remains available for business, notwithstanding its temporary use for a purpose for which it was not designed.

The plaster board partitioning of the second floor of relator's building was temporary in its character, and it was constructed so as to admit of its easy removal. The inherent plan and structure of the second floor was not altered, and its availability for business remained. The floor could be readily rendered available for business purposes without structural changes in the building, by simply knocking down the light partitions.

Decision of the board of appeals, affirming the decision of the superintendent of buildings and denying relator's application, reversed, and application granted. No costs. Settle order on notice.

(189 App. Div. 579)

CHIAPPONE v. GREENEBAUM.

(Supreme Court, Appellate Division, First Department. December 5, 1919.)

1. MUNICIPAL CORPORATIONS $\S$ 705(10)—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN CROSSING STREET.

Pedestrian, who in crossing street failed to look to the north in passing the line of south-bound traffic, was negligent.

2. MUNICIPAL CORPORATIONS $\S$ 706(5)—EVIDENCE INSUFFICIENT TO SHOW CHAUFFEUR NEGLIGENT.

In action for death of pedestrian, struck while crossing street by automobile, the chauffeur of which at time had been unable to see pedestrian, because of standing automobiles, until pedestrian was within a very few feet of automobile's path, evidence held insufficient to show negligence of chauffeur.

Appeal from Trial Term, New York County.

Action by Antonio Chiappone, Sr., as administrator, etc., against Fred H. Greenebaum. From an order setting aside a verdict for defendant in a negligence action, for death caused by defendant's automobile, defendant appeals. Reversed, verdict reinstated, and judgment ordered thereon.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, MERRILL, and PHILBIN, JJ.

William Dike Reed, of New York City (Murray G. Jenkins, of New York City, of counsel, and William B. Shelton, of New York City, on the brief), for appellant.

Hobart S. Bird, of New York City, for respondent.

PER CURIAM. [1] We are of opinion that the order granting a new trial should be reversed, and the verdict reinstated. Upon the evidence of the plaintiff's principal witness, the plaintiff's intestate could well be found guilty of contributory negligence, in looking to the south, and failing to look to the north, from which direction the automobile was coming at a reasonable speed. After plaintiff's intestate had passed the car in front, he could by looking have seen this automobile coming from the north, and have avoided the injury. There was nothing between him and the approaching car. It was his duty to look to the north, because he was passing the line of the south-bound traffic.

[2] Further, we are of opinion that plaintiff failed to show negligence on the part of the defendant's chauffeur. The street is narrow. There were automobiles standing upon the west side. A car driving towards the south must necessarily go very near to these automobiles, and the evidence was that the chauffeur was proceeding to the south within three feet of these standing automobiles. Plaintiff's intestate suddenly came from in front of the standing car, from which place he could not be seen by the chauffeur until he was within a very few feet of the path in which the automobile was properly driven. Whether walking or running, the plaintiff's intestate stepped into this pathway when the defendant's car was right upon him, so that the chauffeur

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feur had not time to avoid the accident. The blowing of the horn would have been too late, and, instead of taking time to blow the horn, the chauffeur at once put his hands upon the wheel and endeavored to go around the boy, and his right mud guard struck the boy, and he was thrown under the wheels. Without proof of improper speed it cannot be said in this sudden emergency that the chauffeur was guilty of negligence causing the death of the boy. X

Under these circumstances, both for the boy's contributory negligence, and for lack of proof of the defendant's negligence, if the plaintiff had recovered a verdict, such a verdict would have been set aside as against the weight of evidence. It follows, then, that the verdict of the jury, finding in behalf of the defendant, was based upon abundant evidence, and should stand.

Order reversed, with costs, and the verdict reinstated, and judgment ordered thereupon, with costs. Order filed.

(189 App. Div. 696)

FOSDICK v. GLOBE INDEMNITY CO.

(Supreme Court, Appellate Division, First Department. December 5, 1919.)

1. COSTS $\S$ 226, 236—ON APPEAL FROM JUDGMENT AND ORDER GRANTING MOTION FOR JUDGMENT.

The defendant, on reversal, was entitled to the costs of an appeal from a final judgment in favor of plaintiff as a matter of right, and the court had no discretion to allow or disallow them, and the allowance of costs on an appeal from an order allowing plaintiff's motion for judgment on the pleadings was discretionary; but such allowance on that appeal cannot be held a limitation to the right to costs on appeal from the judgment which was reversed.

2. COSTS $\S$ 174(3)—SHERIFF'S FEES ON LEVY UNDER JUDGMENT SUBSEQUENTLY REVERSED.

In view of Code Civ. Proc. $\S$ 3256, a party may include in his cost bill his necessary disbursements, including those to the sheriff for levy under a valid execution on a judgment reversed on appeal, for such amount as the sheriff was entitled to under section 3307, subd. 23, and defendant was entitled to costs which he had to pay the sheriff to get him out of his place of business.

3. CONTEMPT $\S$ 22—PROCURING EXECUTION AFTER STAY ON APPEAL.

Where defendant appealed from an order on plaintiff's motion for judgment on the pleadings, counsel's having execution issued subsequent to the granting of the stay was an attempt to enforce the order, and clearly violated the stay, and was an attempt to impair, impede, or prejudice the right of the defendant, and renders plaintiff's attorney subject to proceedings for contempt.

Appeal from Appellate Term, First Department.

Action by William I. T. Fosdick against the Globe Indemnity Company. From a determination of the Appellate Term, First Department, affirming an order of the City Court, which denied a motion to require the clerk to retax costs, the defendant appeals. Reversed, and motion for retaxation of costs granted.

See, also, 172 N. Y. Supp. 725.

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Argued before CLARKE, P. J., and DOWLING, SMITH, PAGE, and PHILBIN, JJ.

Carroll G. Walter, of New York City, for appellant.

PAGE, J. On July 19, 1918, the City Court granted an order on plaintiff's motion for judgment on the pleadings. The defendant served a notice of appeal therefrom on July 20, 1918. On July 20th the plaintiff caused to be entered a final judgment for the relief demanded in the complaint and on October 10, 1918, issued execution to the sheriff and the sheriff put a keeper in possession of the defendant's premises. Thereafter the defendant appealed from this judgment. A motion was made in the Appellate Term to dismiss the appeal from the order, on the ground that the same had been taken after final judgment was entered, and should have been brought up for review on the appeal from the final judgment. This motion was denied. Thus it appears that there were two appeals pending in the Appellate Term, one from the order, and the other from the judgment. Thereafter the Appellate Term entered the following order:

"Ordered, that the order and judgment so appealed from be and the same are hereby reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs, with leave to plaintiff to serve an amended complaint within six days after service of a copy of this order, with notice of entry thereof in the court below, upon payment of costs in this court and in the city court."

[1] On December 18, 1918, the defendant proceeded to tax his costs under said order. The clerk disallowed the following items:

"Appeal to Appellate Term from final judgment:

Before argument.....	\$20.00
For argument.....	40.00
Sheriff's fees on execution.....	96.17"

The appellant was entitled to the costs of the appeal from the final judgment as of right. It did not rest in the discretion of the court to allow or disallow them. The allowance of costs on the appeal from the order was discretionary. The allowance of \$10 costs and disbursements on that appeal cannot be held to be a limitation on the right to costs upon the appeal from the judgment.

[2] The disbursement made by the defendant to the sheriff for his fees upon execution should have been allowed. Section 3256 of the Code of Civil Procedure provides that—

"A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements as follows: The legal fees of witnesses and of referees and other officers. * * *

The sheriff made his levy under a valid execution. By the reversal of the judgment the execution was vacated; nevertheless, under section 3307, subdivision 23, the sheriff was entitled to his poundage. The only doubt would be as to the person liable to pay it. The defendant, in order to get the sheriff's keepers out of its place of business, was compelled to pay. The most that the plaintiff could claim was that he and not the defendant should have paid it. There could be no question but that it was a legal charge by the sheriff. Under those

circumstances the defendant should be entitled to tax the same as a part of his bill of costs and thus be reimbursed. This would dispose of the matter.

[3] We feel, however, that the conduct of the plaintiff's attorney calls for comment. As we have seen, there appeared to be some confusion arising out of the appeal from the order as well as the judgment. After the entry of judgment, and after service of both notices of appeal, the Appellate Term granted an order that all proceedings upon the plaintiff's part toward the enforcement of the order for judgment be stayed until hearing and determination of the appeal from said order. It may be that the language used was unfortunate. The intent and purpose of the order of the Appellate Term was clear, and the plaintiff's attorney could not intelligently misunderstand it. It was to preserve the status quo until the hearing and determination of the appeal. The order appealed from was for judgment. The issuing of an execution subsequent to the granting of the stay was an attempt to enforce the order, and clearly violated the stay. The issuing of the execution was an attempt to impair, impede, or prejudice a right or remedy of the defendant whereby it was damaged. There is no proceeding before us based upon this contempt of the orders of the court; therefore no action can be taken by us, except to express our disapproval of the attorney's action.

The determination of the Appellate Term and the order of the City Court are reversed, with \$10 costs and disbursements, and the motion for a retaxation of costs granted. Order filed. All concur.

(189 App. Div. 681)

IN re LIEBERGALL

(Supreme Court, Appellate Division, First Department. December 5, 1919.)

1. ATTORNEY AND CLIENT ⇨75(1)—RIGHT OF CLIENT TO CHANGE ATTORNEY.

A client has the absolute right to change his attorney at any time, and unless there is some action or proceeding pending in the courts no order of the court substituting one attorney for another is necessary or proper.

2. ATTORNEY AND CLIENT ⇨147—RIGHT TO CONTRACT FOR CONTINGENT FEE.

An attorney has a right to enter into a contract fixing the amount of his compensation at a percentage of the amount to be recovered in the action or proceeding, and the court will recognize and protect the right to such compensation, unless the attorney has forfeited it by misconduct, or the agreement was induced by fraud, or the attorney has taken some unconscionable advantage.

3. ATTORNEY AND CLIENT ⇨158—NO RELEGATION TO QUANTUM MERUIT IN ABSENCE OF DISMISSAL.

Where an attorney has not been dismissed during the pendency of the proceeding, he will not be relegated to a quantum meruit for recovery of his fee.

4. ATTORNEY AND CLIENT ⇨192(2)—EVIDENCE NOT SHOWING IMPROPER CONDUCT.

In proceedings to fix the lien of applicant's attorney, employed to secure his reinstatement as a clerk in the park department of the city of New

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

York, evidence held insufficient to sustain the court's determination that the attorney's conduct had been such as would vitiate his contract for half the back pay recovered by him.

Appeal from Special Term, Bronx County.

In the matter of the application of Max Liebergall to fix the lien of Alexander Karlin, his attorney. From an order substituting an attorney, and fixing the compensation of the discharged attorney, the latter appeals. Order reversed, and matter referred to a referee, to take testimony and report, with his opinion, to the Special Term.

Argued before CLARKE, P. J., and DOWLING, SMITH, PAGE, and PHILBIN, JJ.

Alexander Karlin, of New York City, in pro. per.

Nathan Kelmenson, of New York City, for respondent.

PAGE, J. Max Liebergall, who held a civil service position as second grade clerk in the park department, city of New York, borough of the Bronx, volunteered and became a private in the Chemical Warfare Division of the United States government. He was thereupon discharged from his position without a hearing. In seeking reinstatement he consulted Alexander Karlin, retained his services, and executed the following agreement, as appears from the respondent's brief:

"I, Max Liebergall, do hereby retain Alexander Karlin as my attorney to commence suitable proceedings on my behalf, for the purpose of obtaining my reinstatement as second grade clerk in the department of parks, borough of the Bronx, city of New York, and do further authorize the said Alexander Karlin to commence suitable proceedings to collect back pay due to me from the city of New York, and I do hereby agree to pay the said Alexander Karlin for his professional services fifty per cent. (50%) of whatever amount shall be paid herein for back pay, whether by suit, judgment, compromise, or otherwise."

Karlin thereupon instituted a proceeding for a peremptory writ of mandamus. The matter was adjourned several times at the request of the corporation counsel, and during the pendency of proceedings the assistant corporation counsel in charge of the matter informed Karlin that he had advised the commissioner of parks to reinstate petitioner in his position. The matter came on for a hearing at Special Term, the corporation counsel filed an affidavit in which he set forth that he had recommended that the petitioner be reinstated in his position, and that the petitioner was entitled to back pay. The justice stated that he had no power in that proceeding to order the city to pay to the petitioner his back pay. Thereupon the proceeding was discontinued. In the meantime Karlin had filed a notice of his lien with the comptroller of the city of New York. Liebergall thereafter filed a petition in this proceeding, in which he states that by reason of the fact that Karlin has filed a notice of lien with the comptroller of the city of New York he cannot get his back pay, and further states:

"That before the amount of his back pay will be determined, deponent is informed some hearings will have to be had, and that the deponent would like to be represented by counsel, but, owing to the friction of your petitioner and

said Alexander Karlin, deponent would like to employ other counsel, but has no means of doing so."

The court ordered:

"That Nathan Kelmenson, Esq., is hereby substituted, instead of Alexander Karlin, Esq., upon the payment of \$150 by the petitioner to said Alexander Karlin as the attorney's compensation, which is hereby fixed at that amount."

[1, 2] The client has the absolute right to change his attorney at any time. Unless there be some action or proceeding pending in the courts, no order of the court is necessary or proper substituting one attorney for another. The right of an attorney to enter into a contract fixing the amount of his compensation upon a percentage of the amount to be recovered in the action or proceeding is well settled, and the court will recognize and protect the attorney's right to such compensation, unless he has forfeited his right by some misconduct on his part, or unless the agreement was induced by fraud, or the attorney has taken some unconscionable advantage of the client. As was said in the Matter of Fitzsimons, 174 N. Y. 15, 23, 66 N. E. 554, 557:

"In view of the fact that by express statute the right is conferred upon an attorney or counselor to regulate the amount of his compensation by agreement with his client, which is unrestrained and unlimited by law, we cannot see how such an agreement can be interfered with and held illegal until the question has been fully and fairly investigated and the facts relating to the transaction plainly established by a trial. The statute conferred upon the parties the right to make the contract, and conferred upon the court no authority to make it for them. If, however, upon a proper examination of the appellant's claim, it shall be found that the agreement between himself and his client was induced by fraud, or that the compensation provided for was so excessive as to evince a purpose to obtain improper or undue advantage, the court may correct any such abuse."

[3, 4] The attorney was not dismissed during the pendency of the proceeding, but apparently was dismissed merely because he had filed a notice of his lien with the comptroller of the city of New York, which prevented the client, without satisfaction of the attorney's lien, from drawing his back pay. It does not appear from the petition that any further legal proceedings would be necessary to secure the petitioner's back pay. Where an attorney has not been dismissed during the pendency of the proceeding, he will not be relegated to a quantum meruit. *Morehouse v. Brooklyn Heights R. R. Co.*, 123 App. Div. 680, 108 N. Y. Supp. 152. Liebergall, in his petition, states that Karlin, after the statement of facts to him, said that the questions of law involved in the proceeding were very intricate and of a mooted nature; that the proceedings would undoubtedly have to be started in the Supreme Court and carried to the appellate tribunal; that the matter would require his attention and skill for a period of at least one year. This is denied by Karlin, who is supported in his denial by the affidavit of Joseph S. Israel, who was present at the interview at which the agreement of retainer was made. The court should not have determined on these conflicting facts that Karlin's conduct had been such as would vitiate his contract.

The matters in controversy between the attorney and client should be adjudicated after the taking of testimony upon the allegations of

fraud. The order, therefore, will be reversed, with \$10 costs and disbursements, and the matter referred to Hon. John W. Goff, official referee, to take testimony and report the same, with his opinion, to the Special Term of the Supreme Court, Bronx County. Order filed. All concur.

(189 App. Div. 692)

MURPHY v. BROADWAY IMPROVEMENT CO.

(Supreme Court, Appellate Division, First Department. December 5, 1919.)

1. NEGLIGENCE §32(1)—DUTY TOWARD LICENSEE ON PREMISES WITHOUT INVITATION.

The owner of private premises owes no duty of active vigilance to a mere licensee without invitation express or implied, and does not owe him the duty of even ordinary care with respect to the condition of the premises.

2. NEGLIGENCE §32(1)—DUTY TOWARD INVITEE ON PREMISES.

The owner or occupant of premises, who induces others to come on premises by invitation, express or implied, owes to them the duty of using reasonable care to keep the premises in a safe condition, so they will not be unnecessarily and unreasonably exposed to danger.

3. LANDLORD AND TENANT §167(2)—LANDLORD'S DUTY TO TENANT'S INVITEE.

Where show window extended into building entrance, in which there was a stairway leading down to subway station, owner having rented store with show window to storekeeper, who displayed goods in window, had duty as storekeeper's landlord of maintaining entrance and passageway in reasonably safe condition, so as not to subject persons passing by and entering building for purpose of examining window display to unnecessary risk of injury; such persons being storekeeper's invitees.

4. LANDLORD AND TENANT §169(11)—NEGLIGENCE CAUSING INJURY TO INVITEE JURY QUESTION.

In action for injuries to person from fall down stairway in building entrance, while examining window display of defendant's tenant, question whether defendant failed to maintain and light premises as a reasonably prudent person would have done held for jury, under the evidence.

5. LANDLORD AND TENANT §169(11)—INJURIES TO INVITEE; CONTRIBUTORY NEGLIGENCE OF INVITEE ON PREMISES JURY QUESTION.

In action for injuries to plaintiff, who fell down stairway in building entrance while examining display window of defendant's tenant, which extended into entrance, question of plaintiff's contributory negligence held under the evidence for the jury.

Clarke, P. J., dissenting.

Action by Matilda Murphy against the Broadway Improvement Company. On exceptions ordered by the Supreme Court to be heard in the first instance in the Appellate Division. Exceptions sustained, and motion for new trial granted.

Argued before CLARKE, P. J., and DOWLING, SMITH, PAGE, and PHILBIN, JJ.

Philip J. Dunn, of New York City (Sumner B. Stiles, of New York City, of counsel), for plaintiff.

Nadal, Jones & Mowton, of New York City (Edward P. Mowton, of New York City, of counsel), for defendant.

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PAGE, J. The action was to recover for injuries sustained by the plaintiff by falling down a stairway on the defendant's premises. The defendant is the owner and in control of the building on the southwest corner of Broadway and Fourteenth street in the borough of Manhattan. The corner store is occupied by one Hilton as a clothing store. On the Fourteenth street and Broadway fronts there are show windows. On the Broadway front one show window extends from the corner to the entrance to the store. Another show window extends from the store entrance to the entrance to the building, and extends back along the building entrance about 9 feet. The entrance to the building has a stairway leading down to the subway station, which was not then in general use, because the underground railway was not completed and in operation. This stairway commenced about 18 inches inside the building line; the northerly side being formed by a wall which was in the same plane as the show window. On the southerly side of the stairway opening was a substantial railing, guarding the opening from the entrance to the upper floors of the building which extended along that side. The floor of the entrance to the building is level with the sidewalk, and for a distance consists of the same material as the sidewalk. On the evening of October 27, 1917, the plaintiff joined her husband at Hearn's store on Fourteenth street, where he was employed. They had supper at a restaurant and started for a theater. The defendant testified that her husband was thinking of buying a suit of clothes. As they reached Hilton's store they commenced examining the suits exhibited in the show windows; commencing with the Fourteenth street side, they proceeded around the Broadway side. On reaching the last window, the plaintiff saw a suit that struck her fancy, and desiring to get a better view, and also to see the suits in the rear, she stepped into the entrance to the building and started to walk forward, looking in the show window, fell down the stairs, and was injured. At the conclusion of the plaintiff's case, on motion of the defendant, the complaint was dismissed.

✓ [1] The first question to be determined is whether the plaintiff was upon these premises as a licensee or an invitee of the defendant. If a mere licensee, the complaint was properly dismissed, for the law is well settled in this jurisdiction that the owner of private premises owes no duty of active vigilance to a mere licensee upon his premises, without invitation, express or implied, and does not owe to him the duty of even ordinary care with respect to the condition of the premises or other buildings or machinery thereon. *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525; *Sutton v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 243; *Victory v. Baker*, 67 N. Y. 366; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718; *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594; *Cusick v. Adams*, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772; *Heskell v. Auburn L. H. & P. Co.*, 209 N. Y. 86, 102 N. E. 540, L. R. A. 1915B, 1127; *Vaughan v. Transit Development Co.*, 222 N. Y. 79, 118 N. E. 219.

"Where there is no invitation, express or implied, and the one who uses the private property does so by bare permission, the well settled rule is that he

must use the property as he finds it, and the owner is held to no greater degree of care than to abstain from affirmative negligence." *Englehardt v. Central N. E. R. Co.*, 139 App. Div. 786, 124 N. Y. Supp. 494.

[2] On the other hand, the owner or occupant of premises, who induces others to come upon the premises by invitation, express or implied, owes to them the duty of using reasonable care to keep the premises in a safe and suitable condition, so that they will not be unnecessarily and unreasonably exposed to danger. *Beck v. Carter*, 68 N. Y. 283, 292, 23 Am. Rep. 175; *Camp v. Wood*, 76 N. Y. 92, 96, 32 Am. Rep. 282; *Davis v. Ferris*, 29 App. Div. 623, 53 N. Y. Supp. 571; *Ford v. Wanamaker*, 165 App. Div. 284, 150 N. Y. Supp. 795; *Id.*, 172 App. Div. 908, 157 N. Y. Supp. 1125; *Id.*, 224 N. Y. 655, 121 N. E. 868; *Heskell v. Auburn L. H. & P. Co.*, *supra*, 209 N. Y. 91, 102 N. E. 540, L. R. A. 1915B, 1127; *Constantino v. Watson Contracting Co.*, 219 N. Y. 443, 446, 114 N. E. 802. X

The defendant owned and maintained the building in the condition in which it was on the date of the injury to plaintiff. It was responsible for constructing the stairway under the show window. It rented the store, with the show window, to Hilton. The purpose of the show window was to display the goods that Hilton had for sale—to advertise his stock and invite an examination thereof by the passing public. It was not expected that all who stopped to look would become immediate purchasers. ✓ All were invited that some might become purchasers. *Leighton v. Dean*, 117 Me. 40, 102 Atl. 565, L. R. A. 1918B, 922. Therefore, certainly with respect to Hilton, the plaintiff was upon the premises as his invitee.

[3] The defendant, as Hilton's landlord, owed the duty, in respect to the entrance to the building, passageway, and lights, which remained in its control, to so maintain them that they were reasonably safe and suitable at all times, for all persons who were lawfully using the premises and themselves using due care, so far as it should have anticipated such use as was involved in and necessarily arose out of the purpose and business for which the store was rented. *Marwedel v. Cook*, 154 Mass. 235, 28 N. E. 140. The use of the show window, for the purpose of attracting attention and inviting inspection of the goods that the occupant of the store had for sale, was contemplated when the show window was constructed. That the window would be closely approached by such invitee was reasonably to have been expected. It was the duty of the defendant to so maintain the premises in relation to the show window that such invitee should not be subjected to unnecessary risk of injury. The plaintiff was lawfully on the premises as an invitee.

[4, 5] Whether the defendant exercised such care in regard to maintaining and lighting the premises as a reasonably prudent person would exercise under such circumstances, and whether the plaintiff used such care herself as a reasonably prudent person should under the circumstances, were questions of fact which should have been submitted to the jury upon all the evidence in the case.

In the case of *Friedman v. Welwood*, 185 App. Div. 268, 172 N. Y. Supp. 842, relied upon by the respondent, the questions involved in

this case were not present. That case considered the liability of the owner, who maintained a stairway adjacent to a sidewalk, to a pedestrian who slipped and fell upon the sidewalk and in some manner also fell down the stairs. No question of the duty of the owner of property to a licensee or invitee was considered.

Exceptions sustained, and the motion for a new trial granted, with costs to plaintiff to abide the event. Settle order on notice.

DOWLING, SMITH, and PHILBIN, JJ., concur.
CLARKE, P. J., dissents.

(189 App. Div. 582)

In re SHEEDY.

SHEEDY v. RILEY.

(Supreme Court, Appellate Division, First Department. December 5, 1919.)

MARRIAGE §13—COMMON-LAW MARRIAGE AFTER DIVORCE.

Where wife, having secured divorce by constructive service without knowledge of husband, subsequently returned to husband, who, on hearing of divorce, had refused to recognize its validity, her living with him thereafter in the acknowledged relation of husband and wife constituted a common-law remarriage, as effective as a ceremonial remarriage.

Appeal from Surrogate's Court, New York County.

In the matter of Thomas F. Sheedy, deceased. On petition of Minerva L. Sheedy for letters of administration, in which Mary Jane Riley intervened. From a decree denying the petition, upon the ground that petitioner was not the widow of deceased (107 Misc. Rep. 204, 175 N. Y. Supp. 891), petitioner appeals. Reversed, with directions.

Argued before CLARKE, P. J., and LAUGHLIN, SMITH, MERRELL, and PHILBIN, JJ.

Armstrong & Keith, of New York City (Joseph W. Murphy, of New York City, of counsel, and John S. Keith, of New York City, on the brief), for appellant.

John J. Dwyer, of New York City, for respondent.

PER CURIAM. This appellant and Thomas F. Sheedy were duly married by a Catholic priest in 1885. They lived together until about 1890, at which time they had a quarrel and separated. The appellant went to Chicago, and there obtained a decree of divorce on the ground of his cruel and inhuman treatment. This decree of divorce was obtained upon service of the summons by publication. The parties had a child, which was about four years old in 1890. Thomas F. Sheedy had no notice of the proceeding, and was first informed of the decree by letter from the appellant. He refused to recognize the validity of the divorce, and wrote to the appellant several letters, asking her to come back to him and remain his

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wife, recognizing his faults, and claiming that he was not alone at fault. In one letter, dated November 23, 1890, he says:

"I have written this letter, and want you to answer me at once, if you are willing to remain my wife."

Another letter was written upon November 26th, in which he says:

"I want you to be to me what you have been this past five years, my wife. Can a man say fairer?"

In response to these letters the appellant came back to Sheedy and lived with him in New York state for three years as his wife. In these letters Sheedy showed great affection for the child, and also great affection for the appellant. During the three years, not only did they live as husband and wife, but they acknowledged themselves as such, visiting his relatives and others in that acknowledged relation. During the three years the child died, and some time later, after another quarrel between the parties, the appellant again left Sheedy and went to Chicago. In 1906 she had not heard from Sheedy for many years, and, meeting a friend of Sheedy's upon the street, was told that Sheedy was dead. After this she married one Doyle, and lived with him as his wife until 1916, at which time she discovered that Sheedy was still alive. She immediately applied for an annulment of her marriage with Doyle, and the decree was granted. Thereafter she saw more or less of Sheedy, living with him part of the time, living four months with him at the Hotel Breslin, New York, as his wife, living with him in Washington, and going South with him. Sheedy was a sick man for a couple of years prior to his death. He died in a hospital in New York, at which time the appellant was not with him, nor had she lived with him after they left Washington, and she had gone back to Chicago, as the nurse says, for the expressed purpose of selling her furniture.

Upon these facts we are of opinion it must be held that the appellant is the widow of Sheedy. The divorce in Chicago in 1890 was obtained without personal service of the summons upon Sheedy. He had consistently refused to recognize that as a divorce. Even if the appellant herself would otherwise be held estopped from claiming that the court was without jurisdiction, her living with Sheedy thereafter for three years in the acknowledged relation of husband and wife would constitute at common law a remarriage within this state, which would be as effective as a ceremonial remarriage. There is no evidence that she at any time after 1893 made any claim under her decree of divorce made in 1890. Whatever her life may have been, there is nothing in the evidence to impair the effect of her living with Sheedy in this state as his wife from 1890 to 1893, constituting, if necessary so to hold, a remarriage of the parties.

The decree, therefore, should be reversed, and the surrogate directed to issue to her letters of administration, if she be otherwise found competent to act. Costs of appeal to appellant. Order filed.

(109 Misc. Rep. 411)

ROSENSTEIN et al. v. FARISH CO., Inc.

(City Court of New York, Trial Term. November 3, 1919.)

1. SALES ⇐85(2)—CONTRACT EXCUSING DELIVERIES FOR "SHORTAGE OF LABOR" CONSTRUED.

A sale contract provision that, if the production of a certain mill should be curtailed during the time for delivery by "strikes, lockouts to counteract strikes, shortage of labor," etc., "deliveries shall be made proportionate to the production," construed as meaning that the "shortage of labor" excusing performance must result from strikes under the rule of *ejusdem generis*, that, where an enumeration of specific things is followed by some more general word or phrase, the latter will be held to refer to things of the same kind.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Shortage.]

2. SALES ⇐54—CONTRACT CONSTRUED MOST STRONGLY AGAINST DRAWER.

Where a sale agreement was prepared in defendant's language and accepted by plaintiff, relying upon assurance that merchandise would be delivered at time fixed, if the meaning is doubtful, it must be construed most favorably to plaintiff, and words must be given the meaning which defendant ought to have reasonably understood plaintiff would put upon them.

Action by Morris Rosenstein and another, doing business under the firm name of Morris Rosenstein & Bro., against the Farish Company, Incorporated, a corporation. Directed verdict for plaintiffs, and defendant moves for new trial. Motion for new trial denied.

I. Gainsburg, of New York City, for the motion.

Olcott, Bonyng, McManus & Ernst, of New York City (Terence J. McManus, of New York City, of counsel), opposed.

FINELITE, J. At the close of the entire case the plaintiffs moved for a direction of a verdict in their favor, which was granted. The defendant thereupon moved for a new trial upon the ground that the defendant was precluded from offering evidence in reference to what was intended to be conveyed by certain agreements mentioned in the contract, in so far as it applied to the interpretation of the conditions mentioned in the agreement entered into between the respective parties.

[1] The agreement, in so far as it applies to the question involved, reads as follows:

"Memorandum of Sale. The Farish Company, Commission Merchants, 110 Worth Street, New York. Telephone Worth 5334. March 1, 1918. Order No. 48 ERV. Sold to Morris Rosenstein & Bro., 65 Bleecker St., New York City. Quantity, about 60,000 yds. lawns. Count, 56x52. Width, 39". Weight, not lighter than 8.00. Quality, first quality D/C as far as practicable. Price, 9½ cents. Terms, net 10 days. Delivery, half each September and October, equal weekly. At mill door with freight Allee. to N. Y., not exceeding 45 cents. CWT. Shipping Directions, later. Goods on this order to be billed when ready for shipment, which will then be tendered to transportation company, and if refused will be held at mill or in storage subject to your instructions. If the production of the Gaston mill should be curtailed *during the time above named by strikes, lockouts to counteract strikes, shortage of labor, or any*

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casualty or accident or bankruptcy or insolvency of the mill, deliveries shall be made proportionate to the production. The Farish Company, Selling Agent, per [Signed] J. W. Valentine. HMS." (The italics are mine.)

On the trial hereof it appeared from the facts herein that the defendant breached and violated said agreement by failing and omitting to make the deliveries in said agreement specified at the times therein named, and had delivered of said 60,000 yards only 20,366 yards thereof, leaving undelivered 39,634 yards of said merchandise, which they have omitted and refused to deliver though delivery thereof had been demanded. It appears further that the current market place of said merchandise at the place and respective times at which by the terms of said agreement it should have been delivered was 15 cents per yard. Thereupon the plaintiffs demanded an affirmative judgment in the sum of \$2,000, which the court directed in their favor.

The defendant contends that it was entitled to introduce testimony which it sought to introduce with respect to the labor conditions at the mill, and that it was error to exclude such testimony. The court refused to allow such testimony to be offered, holding that the language, "shortage of labor or any casualty or accident," was controlled in its meaning by the language which preceded it, namely, "if the production of the Gaston mill should be curtailed * * * by strikes, lockouts to counteract strikes." As a phrase standing in connection with other expressions, "shortage of labor" modifies the provision for strikes as used parenthetically in relation to it, meaning thereby that shortage of labor resulting from strikes was to operate as an excuse for delay. Any other construction would be doing violence to the language used and to the intention of the parties as evidenced by the instrument. As this provision even contains no stipulation limiting shortage of labor as an excuse only when not within defendant's control, it is therefore manifest that the parties could not be imputed with having had in mind any such definition or interpretation of the words "shortage of labor" as applicable to this contract. The parties provided against strikes and lockouts to counteract strikes, and nothing else, and could have meant but that shortage of labor resulting from strikes should excuse non-performance. This interpretation may be given to the provision of the contract, even without invoking the rule of ejusdem generis. As we must construe this provision in the agreement as to the words used first, it is general in terms and should be construed under the rule of ejusdem generis. The doctrine under this rule is that, where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind. This rule ordinarily limits the meaning of general words to things of the same class as those enumerated under them.

By the application of this maxim, which is only an illustration or specific application of the broader maxim, "noscitur a sociis," general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general. But it has never been supposed that the rule required the rejection of the general terms entirely, but only that they should be restricted to cases

of the same kind as those expressly enumerated. But in statutory construction it must yield to another salutary rule of construction, viz. that every part of a statute should, if possible, be upheld and given its appropriate force. This rule in statutory construction is by no means a rule of universal application, and its use is to carry out, not to defeat, the legislative intent. When it can be seen that the particular word by which the general word is followed was inserted, not to give a coloring to the general word, but for a distinct object, and then to carry out the purpose of the statute, the general word ought to govern. It is a mistake to allow the "ejusdem generis" rule to pervert the construction. It has further been held in 13 C. J. p. 537, § 501, as follows:

"The court will restrict the meaning of general words by more specific and particular descriptions of the subject-matter to which they are to apply. Thus general words following particular or specific terms are restricted in meaning to those things or matters which are the same kind as those first mentioned. And in like manner general expressions will be restricted by particular descriptions or additions following them."

In a note to the aforementioned section the reason for the rule is given as follows:

"The rule 'that particularization followed by general expression will ordinarily be restricted to the former is based on the fact in human experience that usually the minds of parties, are addressed, specially to the particularization, and that the generalities, though broad enough to comprehend other fields if they stood alone, are used in contemplation of that upon which the minds of the parties are centered.' To the same effect see *Hoffman v. Eastern Wis. R. R., etc., Co.*, 134 Wis. 603, 607 [115 N. W. 383]."

In *Thaddeus Davids Co. v. Hoffman-La Roche Chemical Works*, 178 App. Div. 855, 166 N. Y. Supp. 179, in construing the following clause in a contract for the sale of carbolic acid, in said clause it was stated by the court: "Contingencies beyond our control, fire, strikes, accidents to our works or to our stock or change in tariff, will allow us to cancel this contract or any part of the same at our option"—does not relieve said company from liability on the ground that foreign countries from which it obtained its supply of carbolic acid have placed an embargo on its exportation since the outbreak of the war, especially where the purchaser offers to accept the domestic carbolic acid. The reasonable construction of the contract is to be found in applying to it the rule ejusdem generis, and the words "fire, strike, accidents to our works or to our stock or change in tariff" must be held to limit and qualify the "contingencies beyond our control," and to confine the happening which would justify the cancellation of the contract to those of a like nature to the one enumerated, which do not include an embargo.

In *Haber v. S. A. Jacobson Co.*, 185 App. Div. 650, 173 N. Y. Supp. 524, Blackmar, J., writing for the court, said it was held that the essential elements of executory contracts for the sale of goods are an obligation on the part of the vendor to deliver goods of a certain description to the vendee at some future time, and on the part of the vendee to accept and pay for the same. Such contracts should not be interpreted to give the seller control over those obligations, providing it may rea-

sonably be interpreted as giving him protection against contingencies over which he has no control. Where a broker's memorandum of an executory contract for the sale of goods contained no condition except the words "subject to being unsold," and the written confirmation by the seller, after acknowledging the receipt of a wire from their Western house to the effect that the order had been booked and that prompt shipment would be made, was followed by the words, "subject to safe and sound arrival," and it appeared that the goods were to come from Wisconsin, and at the time there was great demoralization in the transportation service, which led to the government's taking over control of the railroads, it should be held that the quoted words were inserted to protect the seller against risk of transportation, and that it is *prima facie* bound to complete the contract. In order to discharge itself from the obligation the seller must show a failure of sound and safe arrival; "no arrival, no sale," also renders the seller *prima facie* bound to complete the same. The intent that the seller shall ship the goods in question is as strongly indicated in the contract by the statement that it was instructing its Western house to make prompt shipment as it would have been had the contract read, "goods to be shipped promptly to our Western house." In determining whether cases in which the words "to arrive" or "on arrival" are held to import into the contract a condition precedent, so that the obligation of the vendor is dependent on arrival, should be applied to modern business contracts, the changed conditions should be considered.

"Held, further, that defendant was bound in good faith to the fulfillment of the contract. The intent of the parties was that it should be relieved if through fault of the carrier the goods did not arrive safe and sound. The evidence on this subject was in defendant's own possession. It has failed to show that the nonarrival of the goods was due to causes other than its own act, neglect, or fault; therefore the judgment was right, and the order upon the judgment in favor of the plaintiff was affirmed."

[2] The agreement involved herein has been prepared by the defendant and was accepted by the plaintiff, relying upon the assurance that the merchandise would be delivered at the time as fixed in said agreement, and since the agreement is in the language of the defendant, if the meaning thereof is doubtful, must be construed favorably to the plaintiff. *Gillet v. Bank of America*, 160 N. Y. 549, 555, 55 N. E. 292; *Marshall v. Comm'l Tr. Mut. Acc. Ass'n*, 170 N. Y. 434, 63 N. E. 446. We must also give its words the meaning which the defendant ought reasonably to have understood that the plaintiff would put upon them. *White v. Hoyt*, 73 N. Y. 505, 511; *Nellis v. Western Life Indemnity Co.*, 207 N. Y. 320, 332, 334, 100 N. E. 1119; *Moran v. Standard*, 211 N. Y. 187, 196, 105 N. E. 1090. The defendant by its agreement created a duty upon itself, which by fair construction it was bound to perform, and it cannot be relieved from its performance by applying different constructions to what was intended by its meaning. Thereupon the court was justified in excluding such proof as the defendant desired to offer in reference to the contingencies that may or may not arise, or did arise, which prevented the defendant from carrying out its agreement with the plaintiff by making the deliveries of the mer-

chandise as called for in said agreement. *Cameron v. City of Albany*, 207 N. Y. 377, 382, 101 N. E. 162, 49 L. R. A. (N. S.) 922; *Town of North Hempstead v. Public Service Corp'n*, 107 Misc. Rep. 19, 176 N. Y. Supp. 621; *Cannistraci v. James Chieves & Co.*, 165 N. Y. Supp. 933; *Mawhinny v. Millbrook Woolen Mills, Inc.*, 105 Misc. Rep. 99, 172 N. Y. Supp. 461, aff'd in 188 App. Div. 971, 176 N. Y. Supp. 910; *Cooper et al. v. Mundial Trading Co., Inc.*, 105 Misc. Rep. 58, 172 N. Y. Supp. 378; *B. P. Ducas Co. v. Bayer Co.*, 163 N. Y. Supp. 32.

There was no objection as to the evidence offered by the plaintiff as to the market value of the goods and also as to its nondelivery. It follows, therefore, that the evidence sought to be adduced upon the trial on behalf of the defendant, such as the shortage of labor due to those causes mentioned, were not conditions against which the defendant is protected by this agreement, and that such evidence, therefore, was properly excluded. I have carefully read the authorities cited by the defendant, and from the recent construction by our courts of agreements somewhat similar I fail to see wherein the authorities relied upon by the defendant can be made applicable to the question involved herein.

The motion for a new trial must therefore be denied, to which the defendant is entitled to an exception, with a stay of 10 days, and 30 days to make a case, if he so desires, after service of the order entered herein. Settle order on one day's notice.

(109 Misc. Rep. 469)

In re BEACOM'S ESTATE.

(Surrogate's Court, New York County. December 8, 1919.)

WILLS §820(3)—LEGACIES AS CHARGE ON REALTY NOT SPECIFICALLY DEVISED.

Where testator, who owned only realty and had money in bank only to run his business of renting and selling real estate, gave legacies aggregating \$5,100 to children and grandchildren, and the residuary estate to his widow, the general legacies to children and grandchildren were a charge on realty not specifically devised, and the executor, expressly given a power of sale of realty conditioned on a written consent being obtained, had power of sale over the realty not specifically devised.

In the matter of the estate of Edward A. Beacom. Proceeding to settle the account of the executor. Executor determined to have power of sale over realty.

Arthur Knox, of New York City, for executor.

Henry Hogeboom, of New York City (Lilian Herbert Andrews, of New York City, of counsel), for contestants.

Charles M. Bleecker, of New York City, special guardian.

FOWLER, S. In the accounting proceeding herein the only question to be decided is whether certain pecuniary legacies provided for by the will of testator were intended by him to be charged on and payable out of the proceeds of his real estate. The will provides for legacies aggregating \$5,100, and his residuary estate is given to his widow. The

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will does not specifically direct that these legacies be charged on the real estate, but it contains a power of sale in the following terms:

"Fourteenthly. I hereby nominate, constitute and appoint my friends Arthur Knox and Roderick Stephens executors of this my will, giving and granting to them or such of them as shall qualify, full power of sale over the whole or any part of my property, real or personal, wheresoever situate, with full power to make, execute and deliver good and sufficient deeds or conveyances thereof or any part thereof. They shall have power of sale over any of my real estate, including premises 608 Mott avenue, which may be sold, however, only provided the said Rebecca M. Schaeffer individually shall give her written consent to the said sale."

The will of the testator was made in July, 1907, and he died in March, 1913. The widow of the testator died after the testator. Evidence was given that at the time the testator made his will he was engaged in the business of renting and selling real estate; that he had no kind of personal property, bonds or stocks; that whatever money he had in bank was to run his business, the income of which was near \$1,000 a year; and that he was simply able to carry things along.

It appears by the account of the executor that the personal estate amounted to \$1,184.80, his debts amounted to \$781.22, and the expenses of administration, so far as shown by the account amounted to \$217.20. As a result there will be no personal estate out of which to pay the legacies.

Decedent also left four one-family houses; one on Mott avenue, which was devised to a daughter and her husband for life, with remainder over. The other three were on Walton avenue, and were not specifically devised.

The principal legacies were as follows: \$2,000 for the benefit of four grandchildren; \$500 for the mother of the grandchildren; \$1,000 for his daughter, in addition to \$600 he regarded he was indebted to her for advances to him; \$1,000 for an infant granddaughter, not yet named.

As I said in *Matter of Lummis*, 101 Misc. Rep. 258, at page 269, 166 N. Y. Supp. 936, at page 944:

"The real question in each case of construction seems to be whether or not the will, when construed in the light of extrinsic circumstances, evinces an intention that the legatees should be paid at all events. It is for that reason that throughout this case before me so much stress has been placed upon the amount of personalty owned by the testator at the time of his testament. Where the personalty is grossly out of proportion to the legacies the courts are inclined to impose a charge upon the land; otherwise, the will would be a vain and a useless act on the part of the testator. See *McGoldrick v. Bodkin*, 140 App. Div. 196 [125 N. Y. Supp. 101]."

Under the circumstances in this case the testator must have known that the legacies to his children and grandchildren could not be paid without resort to the real estate and I am of the opinion that that was his intention. See also *Ely v. Megie*, 219 N. Y. 112, 113 N. E. 800, and *Carley v. Harper*, 219 N. Y. 295, 114 N. E. 351.

I decide, therefore, that the general legacies are a charge on the Walton avenue property, and that the executor has power of sale over the same.

(100 Misc. Rep. 465)

In re YUILL'S ESTATE.

(Surrogate's Court, New York County. December 9, 1919.)

1. EXECUTORS AND ADMINISTRATORS §=469(1)—SURROGATE HAS JURISDICTION TO SETTLE ACCOUNT OF RESIDENT EXECUTOR UNDER FOREIGN WILL.
Where the will of a nonresident was probated within the county, and one of the executors resides in the county, the Surrogate's Court has jurisdiction to settle accounts of such executor, under Code Civ. Proc. § 2510, subd. 3.
2. TRUSTS §=159—QUALIFICATIONS OF TESTAMENTARY TRUSTEES AS TO RESIDENCE.
In view of Code Civ. Proc. former section 2820 and present section 2641, section 2564, making nonresident aliens incompetent to act as testamentary trustees, is inapplicable to testamentary trustees appointed under the will of a nonresident probated within the county.
3. TRUSTS §=161—QUALIFICATIONS OF TRUSTEES UNDER WILL OF NONRESIDENT.
Code Civ. Proc. §§ 2472-2771, requiring testamentary trustees to give bonds and file oaths of office, etc., is inapplicable to trustees appointed under the wills of nonresidents.
4. WILLS §=2—LAW OF DOMICILE GOVERNS DISPOSITION OF PERSONAL PROPERTY OF NONRESIDENT.
Where a testator, domiciled in Australia, left personal property in this country, the ultimate disposition of that property is governed by the law of Australia.

In the matter of the estate of George Skelton Yuill. Proceeding to settle the accounts of an executor. Accounts to be approved and decree signed upon submitting proof of Australian law.

White & Case, of New York City (Fitzhugh McGrew, of New York City, of counsel), for executor.

Daniel J. Mooney, of New York City, special guardian.

FOWLER, S. The testator was a resident of Australia, and he executed a will at Sydney, New South Wales, on April 13, 1917. The will nominated four persons as executors and trustees. One of them, a Mr. Lethbridge has probated the will in this county on January 2, 1919, and qualified as executor thereunder. He is now accounting for his acts as such executor. The other three executors and trustees are nonresident aliens, as are all of the beneficiaries of the trusts created under the will of testator. Mr. Lethbridge's residence is given as the Waldorf-Astoria Hotel, this city. The bulk of the estate consisted of United Kingdom of Great Britain and Ireland bonds, which were on deposit with Messrs. J. P. Morgan & Co., in this city. The accounting executor has transferred \$1,529,578.29 to the trustees named in the will jointly, to provide trusts for Winifreda, Countess of Portarlington, for Annie Turrell, and for Viscount Carlow, an infant.

The special guardian for the infant, Lord Carlow, has filed objections to the account of the executor, claiming (1) that the court has not jurisdiction of the subject-matter of this proceeding; (2) that the payments to the testamentary trustees named in the will should not be approved, as the trustees are aliens, not residents of this state, and incompetent under section 2564 of the Code of Civil Procedure to act as testamentary trustees; (3) that if the trustees be qualified to act that

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they should give a bond and file their oaths of office as required by the Code of Civil Procedure.

Subdivision 3 of section 2510, C. C. P., provides that the surrogate has jurisdiction to direct and control the conduct and settle the accounts of executors, administrators and testamentary trustees. The matter now before me does not come within my judgment in *Matter of Hoyt*, 103 Misc. Rep. 614, 170 N. Y. Supp. 846, which was an accounting by nonresident trustees, so that the rule laid down in that case cannot apply. Besides *Matter of Hoyt* was distinguished in *People ex rel. Saford v. Washburn*, 105 Misc. Rep. 415, 173 N. Y. Supp. 157, affirmed 188 App. Div. 951, 176 N. Y. Supp. 833. *Matter of Hoyt* has not yet been passed on by the Court of Appeals, and, until it is the law, cannot be regarded as settled.

[1] This is an accounting by an executor to whom letters testamentary issued upon the probate of a will in the Surrogate's Court of this county. The probate proceeding was original and not ancillary. The authority of the Surrogate to settle the accounts of an executor under a will probated here seems to be a part of his control of the executor whom he appoints. The jurisdiction of the surrogate to probate the will of a nonresident and to settle his estate does not include the taking charge of the testamentary trusts created in his will, but the accounting of the executor under the will of a nonresident probated in this county is properly before me. The first objection is overruled.

[2] Prior to the revision of the Code of Civil Procedure in 1914 nonresident aliens were competent to serve as trustees. *Matter of Ripley*, 101 Misc. Rep. 465, 167 N. Y. Supp. 162. Under the old Code (section 2612) a nonresident alien became incompetent to serve as an executor. Under the new Code (section 2564) an alien not an inhabitant of this state is not competent to serve either as an executor, administrator, testamentary trustee, or guardian. Former section 2820 provided that the provisions of the title in reference to trustees (title 6, c. 18) applied to a trust created by the will of a resident of the state. Present section 2641 of the Code makes the provisions of the whole of chapter 18 applicable to a trust created by the will of a resident of the state. It may be observed that, upon the revision of the Code provisions relative to trustees, the word "title" was changed to the word "chapter," but there seems to be no provision in the present Surrogate's Code relative to trustees appointed by the will of a nonresident. It follows that the words "testamentary trustee," in section 2564, C. C. P., do not apply to testamentary trustees appointed under the will of a nonresident probated in this county. In other words, the new act would seem to apply only to trusts created by the wills of residents of the state. While the provisions of section 2564, C. C. P., are general in character, these provisions are limited by section 2641, C. C. P., which follows, and which, as noted above, included only trustees appointed in the will of a resident. Formerly the surrogate had no jurisdiction over the trusts created in the will of a nonresident, and, in the absence of affirmative legislation to the contrary, the new act cannot be held

to have changed the law in that respect. For the above reasons the second objection must be overruled.

[3] As to the third objection, I also hold that the provisions of chapter 18 of the Code of Civil Procedure respecting the qualification of trustees apply only to trustees appointed under the will of a resident, and do not apply to trustees appointed under the wills of nonresidents.

The third objection is consequently overruled.

Trustees derive their authority from the will. *Matter of Kennedy*, 106 Misc. Rep. at page 219, 174 N. Y. Supp. 429; *Matter of Ripley*, 101 Misc. Rep. 468, 167 N. Y. Supp. 162; *In re Shonts' Will*, 178 N. Y. Supp. 762. The executor has paid over the trust funds to the trustees appointed by the will of testator as directed therein.

[4] The will does not appear to have been probated in Australia, which was the domicile of testator. The laws of that country, the domicile of the testator, govern the ultimate disposition of the property of the testator, all of which is personalty. Proof should be submitted at once of the law of Australia respecting the payment by the executor of the trust funds to the trustees. Upon the submission of that proof, and proof of the compliance therewith by the accounting executor, the accounts will be approved and the decree signed.

(100 Misc. Rep. 507)

TRIPP v. STATE.

(Court of Claims of New York. December 3, 1919.)

1. LICENSES $\S$ 50—CONSTRUCTION OF LICENSE TO DEPOSIT SPOIL.

A release granting and conveying to the state and its contractors the right to enter upon releasor's lands and to deposit thereon dirt, etc., upon condition "that the top surface of the spoil to be deposited as aforesaid shall not extend above the elevation of the natural ground contiguous with the limit line of the deposited material," did not require the state to so fill and grade releasor's lands as that, when completed, there would be a gradual slope from the upper limit to the water surface of river being dredged.

2. LICENSES $\S$ 50—CONSTRUCTION OF LICENSE TO DEPOSIT SPOIL.

A release of damages, granting the state the right to deposit dirt upon releasor's land, on condition "that the spoil when deposited shall be leveled and trimmed to substantially even and continuous planes," did not require that the state make a lawn upon the spoil area, and it was sufficient that the spoil was substantially level, even, and smooth.

Claim by Sylvester B. Tripp against the State. Claim dismissed on the merits.

Frank H. Cronkhite, of Ft. Edward, for claimant.

Edward M. Brown, Deputy Atty. Gen., for the State.

SMITH, J. I think the evidence in this case fairly shows a substantial compliance by the state with the conditions upon which the state and its contractors were permitted by claimant to deposit spoil on his land, as expressed in the release dated August 6, 1918. That instrument in terms granted and conveyed to the state and its con-

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tractors the right to enter upon the claimant's lands and to deposit thereon dirt and other materials to be excavated from the Hudson river, and released and discharged the state and its contractors of and from any and all liability and damages and claims for damages or compensation growing directly or indirectly out of the use or occupancy of said lands for the purposes aforesaid, or out of the deposit thereon of spoil or materials excavated in the course of the construction of the Barge Canal terminal.

The grant and release is stated to be given upon the following terms and conditions, viz.:

"(1) That the top surface of the spoil to be deposited as aforesaid shall not extend above elevation of the natural ground contiguous with the limit line of the deposited material.

"(2) That the spoil when deposited shall be leveled and trimmed to substantially even and continuous planes."

[1] Claimant contends that the language above quoted required the state and its contractors to so fill and grade claimant's land as that, when completed, there would be a gradual slope from the highway to the water surface of the river, and it is conceded that this has not been done. This contention of claimant cannot be sustained. No condition is imposed by the release for filling to any particular elevation at any part of claimant's property or for any particular slope.

[2] There is no evidence that the spoil at any point extends above the elevation of the natural ground contiguous with it, and it does appear that the spoil as deposited lies in substantially even and continuous planes and substantially level. The state and its contractors were not required to make a lawn upon this spoil area. The lands upon which the spoil was to be placed were lowlands, frequently overflowed by the waters of the river. It was manifestly to the advantage of claimant to have them filled in and raised up, so as to make them available of some practical use. Claimant consented that this be done by the state's contractors by dredging from the river soil and other material with the character of which he was familiar.

The filling has been accomplished and the surface of the lands raised to an elevation of about 13 feet above low-water level. It would seem that this must necessarily have made his lands more valuable. Claimant lived on lands adjacent to the parcel in question while the work was going on, and made no complaint to any state authority that the work was being left in an unfinished state until the spring following the completion of the work. He now complains that the fill was not smoothed off to his satisfaction, and speaks of "holes" and "hummocks"; but the cross-section drawing made by the engineer for the state indicates that the fill is substantially smooth, even, and level, and the engineer has testified that that is the condition in which the fill was left. We so find upon all the evidence.

The claim should be dismissed upon the merits.

ACKERSON, P. J., concurs.

MEMORANDUM DECISIONS

Robert ADAMSON, as Fire Com'r, etc. Respt., v. Edward H. PRENTICE et al., as Ex'rs, etc., App'ts. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

A. D. GRANGER COMPANY, respondent, v. UNIVERSAL MACHINERY CORPORATION, Ltd., appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) The contract was not closed by the marconigram sent by defendant to plaintiff on November 8, 1915. That read: "We accept your proposal two hundred Fairbanks type eighteen-inch swing nine-foot bed. Official order follows." The official order was therefore part of the communication. This by its terms proposed several changes as conditions to the contract. It amounted therefore to a counter proposal. The letters and messages that followed resulted in a final agreement, and the contract is found in the letters, cables, and marconigrams that passed between the parties, being Plaintiff's Exhibits 1 to 44, inclusive. The official order was for 100 lathes only, and contained the following clause, which became an element of the contract: "This order is to be followed by a similar order for 100 lathes equipped as above, when 50 of the first order have been delivered, according to contract." The interpretation of the contract is that it is for 200 lathes, but that the obligation to give the order for the second 100 is conditioned on 50 of the first order being delivered according to contract. There is, therefore, in the case a question of fact whether the 50 delivered were according to contract. The acceptance of them by defendant is evidenced by way of admission that they were according to contract, but is not conclusive. It was error, therefore, to reject the evidence on this point contained in the deposition of the witness Selbach and offered by defendant. The invalid reason given by defendant for terminating the contract—i. e., that it was optional with it to order the second 100—did not estop it from showing other facts justifying its action. The evidence contained in the deposition, that specifications were mailed by defendant to plaintiff, was sufficient to require their admission as evidence, if they were material and relevant to the issue raised by the pleading; but, as they are not contained in the case, we cannot pass on their relevancy. This must be determined on the new trial granted, and if they are admitted a question of fact will be presented whether they were received by plaintiff. The third, fourth, fifth, sixth, and eighth findings of fact are reversed, and in their place this court makes the following finding of fact: "The contract between the parties is contained in Plaintiff's Exhibits 1 to 44, inclusive, which are made a part of this finding as if

written at length herein." The interpretation of the contract and the admissibility of the excluded evidence thereupon becomes a question of law. Judgment reversed, and new trial granted, costs to abide the event. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur. Settle order before Mr. Justice Blackmar. See, also, 179 App. Div. 853, 165 N. Y. Supp. 820.

A. D. GRANGER COMPANY, respondent, v. UNIVERSAL MACHINERY CORPORATION, Ltd., appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion for reargument, upon the question whether defendant waived the defense that the first 50 machines did not comply with the contract, granted, and case set down for Tuesday, December 2, 1919.

Andrew W. AHERN, respondent, v. Howard B. WHEELER, appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment and order of the County Court of Kings County affirmed, with costs. No opinion. Mills, Rich, and Kelly, JJ., concur. Jenks, P. J., and Jaycox, J., vote to reverse, upon the ground of the indivisibility of the account.

Amedeo AJELLO, App't., v. Larry J. MAR-GULIES, Respt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Girolamo ALESI and Rosaria Alesi, respondents, v. Ignazio LA SALA and Maria La Sala, appellants. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motion to dismiss appeal granted, for failure of appellants to comply with rule 12 of this court, with \$10 costs, with leave, however, to apply to reinstate the appeal on compliance with said rule, by showing that the same is meritorious.

William F. ALLEN, as Receiver, etc., Respt., v. Peter T. WATT, App't. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Dominick ANGIULO v. Jacob BRUCK et al. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

ANTONIO REALTY CORPORATION, Applt., v. **CITY OF NEW YORK**, Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order modified, by allowing amended answer to be served within 5 days, upon payment of all costs to date. Plaintiff is given leave to discontinue the action within 5 days from service of the order to be entered hereon, without costs. No opinion. Philbin, J., dissents. Settle order on notice.

Eva APPEL, respondent, v. **Isaac APPEL**, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Judgment affirmed, with costs. No opinion. Mills, Rich, Blackmar, Kelly, and Jaycox, JJ., concur.

Eva APPEL, respondent, v. **Isaac APPEL**, appellant. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motion denied, with \$10 costs.

In the matter of the claim for compensation under the Workmen's Compensation Law, made by **Louis ARAHOVITIS**, claimant, respt., v. **DOEHLE DIE CASTING CO., Inc.**, employer and **Aetna Life Insurance Company**, insurance carrier, appls. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award modified by allowing compensation for 12½ weeks, and, as so modified, unanimously affirmed.

PER CURIAM. This is an appeal from an award of the State Industrial Commission, June 3, 1919, allowing the claimant \$20 per week for 42½ weeks for the loss of one-third of the use of an eye. The evidence for the claimant shows that there was a loss of only one-tenth of the vision of the eye. The court modifies the award by allowing compensation for 12½ weeks, on the ground that the most favorable view of the evidence permits no other conclusion.

In the matter of the claim of **Guiseppe ARCIERI**, claimant, respt., for compensation under the Workmen's Compensation Law, v. **BOOTH & FLINN, Ltd.**, employer and self-insurer, applt. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

ATLANTIC TERRA COTTA COMPANY, appellant, v. **Eugene J. GRANT** and another, respondents. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

In the matter of the application of **Thomas Dillon AUSTIN** for admission to the bar. (Su-

preme Court, Appellate Division, Second Department. November 6, 1919.) Application granted.

Lewis C. AUWELL, respondent, v. **S. H. Jardyne STEWART**, appellant, impleaded with others, defendants. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Emma G. BADGELEY, Respt., v. **Bernhard BLUMENTHAL**, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Frederick Steelman BAIN, Respt., v. **Jacob GINSBERG**, Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment affirmed, with costs, with leave to defendant to answer, with leave to answer on payment of costs in this court and in the court below. No opinion. Order filed.

Howard D. BAIRD, Respt., v. **Frank S. DOUGLASS**, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

In the Matter of the intermediate settlement of the accounts of **Anson BALDWIN**, as trustee of the trusts created by and under the last will and testament of **Abijah CURTISS**, deceased. (Supreme Court, Appellate Division, Second Department. October 17, 1919.) Motion granted, without costs.

Marie BALL, as ex'x, etc., applt., v. **George B. BROOKS et al.**, respts. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for leave to appeal to the Court of Appeals denied.

Marie BALL, as ex'x, etc., applt., v. **Geo. B. BROOKS et al.**, respts. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for leave to appeal to the Court of Appeals denied, with \$10 costs.

John R. BANKS v. Louis LEIBMAN et al. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion to dismiss appeal granted, without costs. Order filed.

In the matter of the claim for compensation under the Workmen's Compensation Law to

the dependents of Michael BARATH, deceased, respts., v. ARNOLD PAINT COMPANY, employer, and Standard Accident Insurance Company, appls. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

William E. BARLOW and George H. Barlow, as executors, etc., of William H. Barlow, deceased, respondents, v. PRESIDENT AND TRUSTEES OF THE VILLAGE OF OSSINING, appellants. (Supreme Court, Appellate Division, Second Department. October 17, 1919.) Judgment unanimously affirmed, with costs. No opinion.

Peter BARMANN, individually and as trustee under the last will and testament of Peter Barmann, deceased, respt., v. Susan BARMANN, as trustee under the last will and testament of Peter Barmann, deceased, applt., and Catherine Dixon, Balthasar Barmann, Susan Sweeney, Lillian Barmann, and Charles Barmann, defendants. (No. 1.) (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs, on the ground that this is not a proper case for a court of equity to take jurisdiction and appoint temporary receivers to manage property committed by testamentary provisions to the control and management of executors and trustees. All concur.

Peter BARMANN, individually and as trustee under the last will and testament of Peter Barmann, deceased, respt., v. Susan BARMANN, as trustee under the last will and testament of Peter Barmann, deceased, applt., and Catherine Dixon, Balthasar Barmann, Susan Sweeney, Lillian Barmann, and Charles Barmann, defendants. (No. 2.) (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs. All concur.

In the matter of Anna E. BARNABY, dec'd. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Order (104 Misc. Rep. 362, 171 N. Y. Supp. 989) affirmed, with \$10 costs and disbursements, on the opinion of Fowler, S. Order filed.

David BARON, Respt., v. FRANK GENS & CO., Inc., et al., Appls. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Harry BARON, Applt.-Respt., v. MON-SANTE CHEMICAL WORKS, Respt.-Applt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Appeal from Special Term, New York County. Action by Harry Baron against the Monsanto Chemical Works. From an order, so far as it denies plaintiff's motion for a bill of particulars with respect to certain affirmative defense set forth in the answer, plaintiff appeals; and from each and every part of such order, defendant appeals. Affirmed, as modified.

PER CURIAM. The defendant should be required to furnish the particulars called for by all the items of the order appealed from, except items 33 and 34, and should also be required to furnish particulars as to all the items set forth in plaintiff's notice of appeal, except the information called for by the first sentence of item 15. As so modified, the order should be affirmed, without costs.

Max BARTH v. AUDUBON BOAT CLUB, Inc., impled., etc. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Vincent BARTH, respondent, v. Hyman EPSTEIN, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Edward BASSETT v. Joseph T. MacLEAN. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Josephine BASSO and Morris Ruffino, as administrators, etc., of Salvatore Basso, deceased, respondents, v. JOHN T. CLARK & SON, Inc., appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Order (106 Misc. Rep. 78, 177 N. Y. Supp. 484) reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs, upon authority of Nulle v. Hardman, Peck & Co., 185 App. Div. 351, 173 N. Y. Supp. 236, with leave to plaintiffs to serve an amended complaint within 20 days upon payment of said costs. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

Kahl C. BATES, as trustee in bankruptcy, etc., appellant and respondent, v. Francis M. McQUENNEY and Loretta V. Donigan, respondents and appellants. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and order affirmed without costs to either party. No opinion. Jenks, P. J., and Mills, Rich, Putnam, and Blackmar, JJ., concur.

In the Matter of Charles A. BAUDOUINE, deceased. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Order modified, to the extent stated in order, and, as so modified, affirmed, with costs to the trustees, respondents, payable out of the estate. No opinion. Order filed.

Harry BAUMAN v. NORFOLK & WESTERN RAILWAY CO. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion to dismiss appeal denied, without costs, and without prejudice to renewal, if service of the record on appeal be unreasonably delayed. Order filed.

Minnie BAYER, Applt., v. William O. ROSS, Respt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment (173 N. Y. Supp. 770) affirmed, with costs. No opinion. Smith, J., dissents. Order filed.

William BEAMAN, respondent, v. William HOEHLE and others, defendants; William Hoehle, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

William J. BEAULEY, Applt., v. Harriet W. BEAULEY, Respt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order granting motion to frame issues modified, as stated in order, and, as so modified, affirmed, without costs. No opinion. Order filed.

William J. BEAULEY, applt., v. Harriet W. BEAULEY, respt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

George W. BECKEL, as executor and trustee, etc., respondent, v. Arthur K. SALOMON et al., copartners, etc., appellants. (Appeal No. 2.) (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

In the matter of the claim of William Charles BECKER, Myrna Becker, Willie Becker, Ruth Becker, Earl Becker, and Arthur Becker, claimants, respts., for compensation for the death of Lester C. Becker, deceased, under the Workmen's Compensation Law, v. ACHESON GRAPHITE COMPANY, employer, and Utica Mutual Insurance Company, insurance carrier, appls. (Supreme Court, Ap-

pellate Division, Third Department. November 21, 1919.) Award reversed, and matter remitted to the commission for consideration of claim filed. All concur.

BENJAMIN MOORE & CO., respondent, v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order (106 Misc. Rep. 58, 174 N. Y. Supp. 60) affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Rich, Putnam, and Kelly, JJ., concur.

In the matter of the claim for compensation under the Workmen's Compensation Law, made by Elizabeth BENKERT, dependent mother, on behalf of herself and on behalf of the dependent sisters and dependent brother of Peter Benkert, deceased, for the death of Peter Benkert, respt., v. CORNELL STEAMBOAT COMPANY, employer and self-insurer, applt. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) The evidence not being satisfactory as to the facts relating to the terms and conditions of the employment, and the place where the services were to be rendered, the award is reversed, and the matter remitted to the commission to take further evidence and make further findings upon those subjects. All concur.

George H. BENSON, Respt., v. George W. FANNING et al., Appls. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

William BERENSMANN v. Peter WEBER. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal denied. Order filed.

William BERENSMANN, Respt., v. Peter WEBER, Applt. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Morris BERGER, respondent, v. Sarah WEXLER and others, appellants. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motion granted, on condition that appellants perfect the appeal, place the case on the December calendar, and be ready for argument when reached; otherwise motion denied, with \$10 costs.

Samuel BERNSTEIN, Respt., v. ESSEKAY WAIST CO., et al., Appls. (Supreme Court,

Appellate Division, First Department. October 17, 1919.) Order modified, so as to provide that the order for examination before trial of officers of defendant be amended, by striking therefrom the names and titles of the officers of the defendant corporation, and inserting instead thereof, after the words "ordered that," the following: "the defendant Esskay Waist Company, by Samuel Krohnberg, its treasurer, and Louis Krohnberg, its vice president, be examined, and that they," and, as so modified, affirmed, with \$10 costs and disbursements to the appellants. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

Samuel BERNSTEIN v. ESSKAY WAIST CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

Samuel BERNSTEIN, Resp., v. ESSKAY WAIST CO. et al., Applts. (Supreme Court Appellate Division, First Department. November 21, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed. See, also, 176 N. Y. Supp. 94.

Louis BERNSTEIN v. Mendel GREENWALD et al. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Motion granted. Order filed.

Isidore BERTHET et al., Respts., v. JOHN SCHUBERT COTTON CO., Inc., Applt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Lena BESNER, as Adm'r, etc., Resp., v. CENTRAL TRUST CO. OF NEW YORK et al., as Ex'rs, etc., of Augustus D. Juilliard et al., impleaded, etc., Applts. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Clarke, P. J., and Smith, J., dissent as to the defendants Central Trust Co. et al., as executors. Order filed.

Lena BESNER v. Augustus D. JUILLIARD et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion granted. Order filed.

BETSY ROSS FLAG COMPANY, respondent, v. Louis L. BUCKLER, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and orders unanimously affirmed, with costs. No opinion.

Sullivan J. BILLINGTON, resp., v. Mildred R. BARNES et al., applts. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion to dismiss appeal granted, unless appellants file and serve printed papers within 60 days.

Louis J. BIMBERG v. TEXAS CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) (Motion denied, with \$10 costs. Order filed.

In the matter of the application of William Harman BLACK, respondent, to examine in proceedings supplementary to execution Daniel J. SULLY, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Israel O. BLAKE, Resp., v. Patrick MCGOVERN et al., Applts. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Harold S. BLAKE, resp., v. SUN PRINTING & PUBLISHING ASSOCIATION, applt. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for leave to appeal to the Court of Appeals granted and question for review certified.

Isidor BLEIMAN, Applt., v. LIBMAN REALTY CO. et al., Respts. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Max BLITZER, appellant, v. Isidore GELLERING, respondent. (Supreme Court, Appellate Division, Second Department. October 11, 1919.) As the appellant's counsel, opposing the motion to dismiss, has not shown that the appeal is meritorious (rule 12 of this department), the motion to dismiss the appeal is granted, with \$10 costs, without prejudice to a motion upon proper papers to be relieved from the order of dismissal.

B. N. C. WAIST CO., Inc., v. B. N. S. WAIST CO., Inc. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Richard M. BOLAND, respondent v. PENNSYLVANIA RAILROAD COMPANY, appellant. (Supreme Court, Appellate Division, Sec-

ond Department. November 17, 1919.) Appeal dismissed, without costs.

Frances B. BONNER, Respt., v. Jessie DAVIDSON, Impld., etc., Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Louis M. BOOKBINDER v. PELTRIES PUBLISHING CO., Inc. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion granted, without costs. Order filed.

Louis M. BOOKBINDER, Respt., v. PELTRIES PUBLISHING CO., Inc. Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order modified, by confining the examination as to net profits up to and including December 31, 1918, and, as so modified, affirmed, without costs. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

BOOKLOVERS' SALES CO., Inc., Applt., v. PICTORIAL REVIEW CO., Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Joaquin A. De O. BOTELHO v. Julius H. SIEBERT. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion granted. Settle order on notice.

Joaquin A. De Oliveira BOTELHO, Respt., v. Julius H. SIEBERT, Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Robert E. BOYD, respondent, v. Charles L. APPEL, appellant. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motion denied, with \$10 costs.

In the matter of the application of Charles M. BRACELEN, for admission to the bar (from the state of Minnesota). (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Application granted.

In the matter of the final judicial settlement of the accounts of Charles M. BRADT, as ad-

ministrator of the goods, chattels, and credits of Dillon Bradt, deceased, respt. Henry WERT, Jennie Wert, Emma Bradt Thompson, Eva Wert Grey, and Edna Bradt Taerner, applts. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Decree unanimously affirmed, with costs.

William A. BRADY v. Abraham L. ERLANGER. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

Osaia BRAND v. KAYE & FRIEDHEIM, Inc. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Joseph BRANDEL, respondent, v. Elizabeth GRIBBIN, interpleaded with others, appellant. (Supreme Court, Appellate Division, Second Department. October 11, 1919.) Motion to dismiss appeal granted, with \$10 costs.

Edward W. BRENEN v. DAHLSTROM METALLIC DOOR CO. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal denied, with \$10 costs. Order filed.

Meyer BRESLOW, appellant, v. David SEROTA, et al., respondent. (Supreme Court, Appellate Division, Second Department. October 11, 1919.) The mere statement of counsel that in his opinion the appeal would succeed does not show that the appeal is meritorious, and therefore is not a compliance with rule 12 of this department. The motion to dismiss the appeal is granted, with \$10 costs, without prejudice to a motion upon proper papers to be relieved from the order of dismissal.

In the Matter of the Application of BRONX PARKWAY COMMISSION to acquire title to lands of Frederick W. KRAFT, et al. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order affirmed as to the damaged parcels involved in that portion of the appeal presented to the court, viz., parcels 7, 86, 96, and 106, with a bill of costs to the owners of each parcel. No opinion. Jenks, P. J., and Putnam, Blackmar, Kelly, and Jaycox, JJ., concur.

In the Matter of BRONX PARKWAY COMMISSION, Respt. In re James GUTHRIE et al., Applts. William H. Hughes et al., Respts. (Supreme Court, Appellate Division, First De-

partment. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

In the Matter of the Application of the BROOKLYN GRADE CROSSING COMMISSION, etc. Newkirk Avenue, etc. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

In the Matter of the Petition of the BROOKLYN UNION ELEVATED RAILROAD COMPANY, plaintiff, relative to acquiring title, etc. Parcel No. 1141 Fulton street; Henry B. Spencer, appellant, and others, defendants. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Thomas W. BROWN, resp., v. AUGUSTINE AUTOMATIC ROTARY ENGINE Co., applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Motion to dismiss appeal granted, unless appellant shall file and serve printed papers by October 13th and pay to respondent's attorney \$10.

Elizabeth A. BROWN, appellant, v. Evelyn CHASE, respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Motion for stay pending the payment of costs of former appeal granted, with \$10 costs.

Elizabeth A. BROWN, appellant, v. Evelyn CHASE, respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Motion for reargument denied, without costs. See, also, 189 App. Div. 904, 178 N. Y. Supp. 881.

Elizabeth A. BROWN, appellant, v. Evelyn CHASE, respondent. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

In the matter of the claim for compensation made by Walter BROWN, claimant, resp., v. M. P. SMITH & SONS COMPANY, employer, and Manufacturers' Liability Insurance Company, insurance carrier, appls. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

BUILDERS' BRICK & SUPPLY CO., Inc., Resp., v. WALSH TRANSPORTATION CO., Inc., Applt. (Supreme Court, Appellate Division. 178 N.Y.S.—56

sion, First Department. October 24, 1919.) Determination (106 Misc. Rep. 460, 174 N. Y. Supp. 690) affirmed, with costs. No opinion. Order filed.

BUILDERS' BRICK & SUPPLY CO., Inc., v. WALSH TRANSPORTATION CO., Inc. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion denied, with \$10 costs. Order filed.

Harcourt BULL v. James J. LOGAN. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

Luther J. BUNKER, claimant, applt., v. STATE of New York, applt. (Claim No. 15,366) (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Judgment unanimously affirmed, without costs.

Morris N. BUNT v. SAMUEL GROSNER. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion to dismiss appeal denied, with \$10 costs. Order filed.

Edward CALDWELL, as sole surviving executor, etc., respondent, v. Frank C. BAKER, appellant. (Supreme Court, Appellate Division, Second Department, November 17, 1919.) Appeal dismissed, without costs.

CALIFORNIA PACKING CORP'N v. KELLY STORAGE & DISTRIBUTING CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion granted; questions certified; order filed.

In the matter of the claim of Sarah CAMPBELL, claimant, resp., for compensation under the Workmen's Compensation Law, v. YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF BROOKLYN, employer, and Globe Indemnity Company, insurance carrier, appls. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Award unanimously affirmed.

Vincent CANZIO, respondent, v. Samuel E. ELLENBEIN, appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Order modified, by striking therefrom the provision that the judgment stand as security, and that defendant pay the costs as a condition to granting the motion, and, as so modified, affirmed, with \$10 costs and disbursements. The amended answer su-

perseded the notice of trial, the inquest taken was irregular, and defendant is entitled as a matter of right to have it set aside. If the amended answer created no issue, that fact should have been determined upon the motion made by plaintiff under section 542, Code of Civil Procedure, to strike out the amended answer as interposed for the purpose of delay. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

Frances M. CARLETON, Respt., v. Alexander CARLETON, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Charles A. CARNES, appellant, v. Eugene SMITH, respondent. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion granted, with \$10 costs.

Nellie M. CARPENTER, as administratrix of the goods, chattels, and credits of George E. Carpenter, deceased, respt., v. NEW YORK CENTRAL RAILROAD COMPANY, applt. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Judgment and order (173 N. Y. Supp. 785) unanimously affirmed, with costs.

Catharine CARR v. CITY OF NEW YORK et al. Thomas CARR v. SAME. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

Addie CELLER, respondent, v. John P. MONTFORT and J. Ralph Montfort, appellants. (Supreme Court, Appellate Division, Second Department. December 12, 1919.) Plaintiff's verdict for the full purchase price of the cow cannot be upheld, because plaintiff had not rescinded the sale by notifying defendant that she elected to return the cow. Neither did the evidence sufficiently establish plaintiff's damages from breach of the vendor's warranty that the cow was then in condition to breed. If such damages were suffered, they would be measured by the difference in value at the day of sale between the cow as warranted, and her value in the actual condition at time of sale. The judgment of the County Court of Dutchess County is therefore reversed, and a new trial ordered in said court, with costs to appellants to abide the event. Jenks, P. J., and Rich, Putnam, Kelly, and Jaycox, JJ., concur.

CENTRAL TRUST CO. OF NEW YORK, plff., v. PITTSBURGH, SHAWMUT & NORTHERN R. R. CO. et al., defts. Frank

Sullivan Smith, as receiver, etc., respt., Central Trust Co., of New York, as trustee, etc., et al., appls. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Upon consideration of the merits of the controversy, in accordance with the opinion of the Court of Appeals (223 N. Y. 347, 119 N. E. 565), the order entered May 21, 1917, and the order entered July 11, 1917, are reversed, upon the facts, and the matter remitted to the Special Term to take such further proof upon the questions involved in this proceeding as either party may desire to submit. Motion for stay granted upon giving additional security in the sum of \$50,000. All concur. See, also, 179 App. Div. 607, 168 N. Y. Supp. 702.

Edward T. CHAMBERS, respondent, v. FEDERAL BREWING COMPANY and New York & Brooklyn Brewing Company, appellants. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

CIAVANNI & CAVALLUZZO CONTRACTING CO., Respt., v. CITY OF NEW YORK, Applt. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Theresa CIOFFI, appellant, v. SUFFOLK GAS & ELECTRIC LIGHT COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order unanimously affirmed, with costs. No opinion.

Salvator CIOFFI, appellant, v. SUFFOLK GAS & ELECTRIC LIGHT COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order unanimously affirmed, with costs. No opinion.

CITY OF NEW YORK v. HUDSON & MANHATTAN RAILROAD CO. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

In the matter of the application of the CITY OF NIAGARA FALLS, relator, for a writ of prohibition against the PUBLIC SERVICE COMMISSION of the State of New York for the Second District, and International Railway Company. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order denying motion for writ of prohibition reversed, as matter of law and not as a matter of discretion, with \$10 costs and disbursements, and writ granted, on the authority of Matter of Quinby v. Public Service Commission, 223 N. Y. 244, 119 N. E.

433, and matter of the motion for a reargument of the same case, decided by the Court of Appeals October 21, 1919, 227 N. Y. —, 124 N. E. 790. All concur. Leave to appeal to the Court of Appeals granted. For opinion below, see 108 Misc. Rep. 567, 177 N. Y. Supp. 861.

C. J. RAINEAR CO. v. M. P. BERGLAS MFG. CO. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Alexander W. CLAPP, appellant, v. Catherine HUNTER, respondent, Nelly V. B. Clapp and others, appellants, and others. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

In the matter of the claim of Clarence CLARKE, for compensation under the Workmen's Compensation Law; STATE INDUSTRIAL COMMISSION, resp't., v. STANDARD SHIPBUILDING CORPORATION, employer, and Travelers' Insurance Company, insurance carrier, appls. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Compensation has been awarded for the loss of the use of one-half of the eye. The most favorable view of the evidence is that there was a loss of one-tenth only of the use. The award is therefore modified, by making the compensation for 12½ weeks, instead of 64 weeks, and, as thus modified, unanimously affirmed.

In the matter of the probate of the last will and testament of Elizabeth CLARKSON, deceased. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Motion to dismiss appeal denied. Motion to stay proceeding pending appeal denied. Order unanimously affirmed, with \$10 costs and disbursements. Witness to be examined pursuant to the original order, and the modification thereof, at her residence in the city of New York, on the 17th day of December, 1919, at 11 o'clock in the forenoon.

William Z. CLEARY, respondent, v. WEST SHORE GAS COMPANY and another, appellants. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Minnie M. OLEMENS, resp't., v. Sanford G. CLEMENS, as adm'r, etc., applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment affirmed, with costs. All concur.

In the Matter of the Application of Albert CLEMENTS, respondent, for a peremptory writ of mandamus, directed to William Williams, as Commissioner, etc., and another. EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN and another, appellants. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Appeal dismissed, with costs, upon the ground that an order granting an alternative writ of mandamus is not appealable. People ex rel. Levenson v. O'Donnel, 99 App. Div. 253, 90 N. Y. Supp. 961; People ex rel. Mt. Vernon Trust Co. v. Millard, 127 App. Div. 77, 111 N. Y. Supp. 22; People ex rel. Wilson v. African W. M. E. Church, 156 App. Div. 386, 141 N. Y. Supp. 394. Jenks, P. J., and Putnam, Blackmar, Kelly, and Jaycox, JJ., concur.

Everett COAKLEY, resp't., v. Ernest L. COOLEY, applt. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion to dismiss appeal granted, unless appellant shall file and serve printed briefs by September 29th and be ready for argument on October 6th.

Raymond G. COGHLAN, Resp't., v. Charles F. JENKINS et al., Appls. (two cases). (Supreme Court, Appellate Division, First Department. October 31, 1919.) Orders affirmed, with \$10 costs and disbursements. No opinion. Orders filed.

Joseph COHEN, an infant, etc., appellant, v. CITY OF NEW YORK, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Siegel COHEN et al. v. JOHN CURTIN, Inc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application granted. Order signed.

Isidor COHEN et al. v. Abraham GOLDMAN et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs, and stay vacated. Order signed.

Isidor COHEN v. Morris SOLOMON. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Joseph H. COHEN, Resp't., v. Charles B. TOOLE, impld., etc., Applt. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment and orders affirmed,

with costs. No opinion. Order filed. See, also, 171 N. Y. Supp. 577.

Alfred COLE, etc., respondent, v. AMERICAN BLIND STITCH MACHINE COMPANY, Inc., and others, etc., appellants. (Supreme Court, Appellate Division, Second Department. October 24, 1919.) Motion granted, without costs, on condition that appellants perfect the appeal, place the case upon the calendar for November 3, 1919, and be ready for argument when reached. The case, subject to the approval of the judge at Special Term, should remain upon the calendar.

In re Application of Franklin A. COLEGROVE for the opening of a highway at Barcelona in the Town of Westfield, known as First Street Extension. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion to dismiss appeal granted, with costs.

Bird S. COLER, Com'r, etc., on complaint of Barbara R. Kiripolsky, Resp't., v. George STRBA, Applt. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Judgment affirmed. No opinion. Order filed.

Joseph P. COLLINS, Resp't., v. INTERNATIONAL HIGH SPEED STEEL CO., Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

COMMERCIAL TRUST COMPANY OF NEW YORK, Applt., v. COLUMBIA TRUST COMPANY, Resp't. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment and order affirmed, with costs, on the authority of East River Nat. Bank v. Columbia Trust Co., 187 App. Div. 839, 174 N. Y. Supp. 901. Order filed. See, also, 183 App. Div. 106, 170 N. Y. Supp. 552; 184 App. Div. 881, 170 N. Y. Supp. 555.

COMMISSIONER OF PUBLIC CHARITIES, etc., on the complaint of Anna Cooper, respondent, v. James COLTON, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

In the Matter of the Proceeding of the COMMON COUNCIL OF THE CITY OF NORTH TONAWANDA, N. Y., to extend Bryant Street across the right of way of the Erie R. R. Co. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Petition for writ of certiorari granted.

Michael C. CONDELLO v. FREDERICK LOESER & CO., Inc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Anthony CONDELLO, an infant, v. FREDERICK LOESER & CO., Inc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Eva K. CONLON v. Edward B. HOSIER et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion granted. Order filed.

Guido CONSENTINO, respondent, v. ILLINOIS SURETY COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Costa CONSTANTINIDI et al. v. Rolf H. LINDEN. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

CONSUMERS PARK BREWING COMPANY, appellant, v. Charles BRAITCH, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

August CONTI et al., Respts., v. LEGEND REALTY CORPORATION, Applt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

August CONTI et al. v. LEGEND REALTY CORPORATION. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion denied, with \$10 costs, and stay vacated. Order filed.

August CONTI et al. v. LEGEND REALTY CORPORATION. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion denied, with \$10 costs. Order filed.

CONTINENTAL PRODUCING COMPANY, Inc., respondent, v. Michael A. SHEA and Isaac Slutzker, copartners, etc., defendants;

Isaac Slutzker, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

James CONWAY, plaintiff, v. BLUFF POINT STONE COMPANY, respt., and United States Fidelity and Guaranty Company of Baltimore, Maryland, impleaded with others, applt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Judgment unanimously affirmed, with costs. See, also, 180 App. Div. 835, 168 N. Y. Supp. 170.

Lillias D. COOKE and Norma MacD. Fischer, appellants, v. Charles C. BURLINGHAM, as executor, etc., of William Coverly, deceased, and Rebecca Frances Coverly, respondents. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment (105 Misc. Rep. 675, 173 N. Y. Supp. 614) affirmed, with costs. No opinion. Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ., concur.

Lillias D. COOKE and Norma MacD. Fischer, appellants, v. Charles C. BURLINGHAM, as executor, etc., and another, respondents. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motions denied. Putnam, J., not voting.

Lillias D. COOKE and Norma MacD. Fischer, appellants, v. Rebecca Frances COVERLY, respondent. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment (105 Misc. Rep. 675, 173 N. Y. Supp. 614) affirmed, with costs. No opinion. Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ., concur.

Lillias D. COOKE and Norma MacD. Fischer, appellants, v. Rebecca Frances COVERLY, respondent. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motions denied. Putnam, J., not voting.

COOPER COMPANY, respt., v. Mary HOAG and one, applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment affirmed, with costs. All concur.

Annie COPELAND, as Adm'x, etc., Applt., v. CENTRAL R. R. CO. OF NEW JERSEY, Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Ida COTT, as adm'x, etc., respta., v. ERIE RAILROAD COMPANY, as lessor, etc., applt. et al. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Appeal dismissed, unless appellants shall file and serve printed briefs by October 1st.

In the matter of the application of Frank B COTTE, appellant, for a writ of mandamus, etc. (Supreme Court, Appellate Division, Second Department. October 11, 1919.) Order of the Special Term, denying application for writ, affirmed, without costs. No opinion. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur. Order affirmed 125 N. E. 914.

William F. COX, Respt., v. CENTRAL RAILROAD OF HAITI, Inc., Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order, so far as appealed from, affirmed, with \$10 costs and disbursements; the date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

William B. CRAIG, Respt., v. William P. JENKS, Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Regina CRESCENT, appellant, v. Kate FLOOD et al., respondents. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion to dismiss appeal denied, on condition that appellant perfect the appeal, place the case on the calendar for Friday, November 21, 1919, and be ready for argument when reached; otherwise, motion granted, with \$10 costs. Motion to vacate stay denied, without costs.

Harry A. CRONK et al., Respts., v. LEVY DAIRY COMPANY, Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order, so far as appealed from, affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Cecelia CRONYN, an infant, etc., respt., v. BUFFALO BREWING CO., impleaded, etc., applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment and order affirmed, with costs. All concur.

Margaret CRONYN, respt., v. BUFFALO BREWING CO., impleaded, etc., applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment and order affirmed, with costs. All concur.

William G. OROSS, respt., v. WESTCOTT-JEWEL CO., applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment affirmed, with costs. All concur.

In the matter of the petition of Benjamin F. CROWELL et al. for the drainage of certain swamp lands. (Supreme Court, Appellate Division, Fourth Department. October 1, 1919.) Motion to dismiss appeal granted, unless appellant shall file and serve printed papers within 60 days and pay to respondent's attorney \$10.

William W. CUNNINGHAM, Applt., v. Robert LOGIE et al., Respts. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order reversed, without costs, and motion granted, to the extent of striking from the original order for examination items Nos. 2 and 3. The date for the examination to proceed to be fixed in the order. No opinion. Order filed.

Hugh F. CURRY, Respt., v. Francis X CODY, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Douglas W. CUTLER, an infant, by Daniel B. Duncan, his guardian ad litem, respondent, v. NEW YORK CENTRAL RAILROAD COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Emily H. DALZELL, respondent, v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Judgment and order affirmed, with costs. No opinion. Jenks, P. J., and Mills, Rich, and Jaycox, JJ., concur. Putnam, J., not voting.

Katie Dangler, respondent, v. Morris Dangler, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Luciano D'ANTONIO, Applt., v. N. Y. CONSOLIDATED R. R. CO., Respt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

In the matter of Aron DATESGOLD, deceased. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order reversed, with \$10 costs and disbursements, and the motion granted, and the time of the appellant in which to serve said purposed case is extended for 10 days from date of entry of this order. No opinion. Order filed.

In the Matter of the Application of Benjamin DAVIDSON, Respt. Joseph MONACO, Plff. v. Samuel BLANK, Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Judgment and order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Violet F. DAVIS, as administratrix, etc., of William C. Davis, deceased, respondent, v. Michael J. SALTZER and Michael Weinsier, copartners, etc., appellants. (Supreme Court, Appellate Division, Second Department. October 24, 1919.) Order unanimously affirmed, with costs. No opinion.

John DEE, respt., v. Mary J. LIGETHALL, appellant, Edwin Smith, Nancy A. Morris and Adella Cole, defendants (two cases). (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order unanimously affirmed, with \$10 costs and disbursements.

In the matter of the claim of Charles DEERY for compensation under the Workmen's Compensation Law, claimant, respt., v. H. C. & A. I. PIERCY CONTRACTING COMPANY, employer, and Aetna Life Insurance Company, insurance carrier, applts. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

Charles W. DE GROFF, respondent, v. THOMAS DRYSDALE, Inc., appellant. (Supreme Court, Appellate Division, Second Department. October 7, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

DELAWARE & HUDSON COMPANY, claimant, applt., v. STATE of New York, respt. (Claim No. 13969.) (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Judgment affirmed, with costs. All concur, except Woodward, J., dissenting.

DELAWARE & HUDSON COMPANY, claimant, applt., v. STATE of New York, respt. (Claim No. 13970.) (Supreme Court, Appellate Division, Third Department. November 12,

1919.) Judgment affirmed, with costs. All concur, except Woodward, J., dissenting.

Matteo DELFINO, respondent, v. Blanche STARITA and Carl Starita, appellants. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order unanimously affirmed, with costs. No opinion.

Stanislaus DEMEK, an inf., etc., Applt., v. BURNS BROS., Respt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment reversed, and a new trial granted, with costs to the appellant to abide the event, on the ground that upon this record it cannot be said that there was no evidence upon the issues of negligence and contributory negligence, so as to warrant taking the determination thereof from the jury. Order filed.

Isaac DENBOSKY, Applt., v. Blanche DENBOSKY, Respt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order modified, by reducing alimony to \$50 a week and counsel fee to \$250, and, as so modified, affirmed, without costs. No opinion. Order filed.

Isaac DENBOSKY, applt., v. Blanche DENBOSKY, respt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Appeal dismissed, without costs. No opinion. Order filed.

Richard C. DE NORMANDIE, Respt., v. BAY VIEW HEIGHTS LAND CO., Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. The date for the examination to proceed to be fixed in the order. Settle order on notice. See, also, 107 Misc. Rep. 140, 177 N. Y. Supp. 158.

William DENS DORF, appellant, v. NEW YORK REAL ESTATE IMPROVEMENT COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed without costs.

In the matter of the claim of Rose E. DESHON for compensation under the Workmen's Compensation Law, for the death of Irving DESHON; STATE INDUSTRIAL COMMISSION, respt., v. FEDERAL SUGAR REFINING COMPANY, employer, and Travelers' Insurance Company, insurance carrier, appls. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Award unanimously affirmed.

Siegfried DEUTSCH, Respt., v. Frederick BANGERTER, Applt. (Supreme Court, Appellate Division, First Department. October 24, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

In the matter of the claim of Anthony DI FAZIO, for compensation under the Workmen's Compensation Law, claimant, respt., v. LACK-AWANNA BRIDGE COMPANY, employer, respt., and Employers' Mutual Insurance Company, insurer, applt. State Industrial Commission, respt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Award unanimously affirmed.

Mary DILLON, Respt., v. CITY OF NEW YORK, Applt. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Clarence S. DINKENSPIEL, indiv., etc., Applt., v. Samuel ASKIN, indiv., etc., et al., Respts. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Harlow S. DIXON and another, as Adm'rs, etc., Appls., v. Eustace CONWAY, indy. and as Ex'r, etc., et al., Defts., and Charles F. Williams, Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

D. L. & W., Inc., v. Benjamin ARONOWITZ. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application granted. Order signed.

Adolph DOCTOR v. James MURRAY et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Lawrence J. DOLAN, appellant, v. Adolph BARR and Max Barr, respondents. (Supreme Court, Appellate Division, Second Department. October 11, 1919.) Motion to dismiss appeal denied, on condition that appellant perfect the appeal, place the case on the November calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

Lawrence J. DOLAN, appellant, v. Adolph BARR and another, respondents. (Supreme

Court, Appellate Division, Second Department. October 24, 1919.) Motion granted, without costs, on condition that appellant perfect the appeal and place the case upon the calendar for Friday, November 21, 1919, and be ready for argument when reached, and serve his papers and points on or before November 10, 1919.

DOMESTIC CHEMICAL CORPORATION, Respt., v. GENERAL PLATERS' SUPPLY CO., Inc., Applt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed with costs. No opinion. Order filed.

Patrick J. DONOHUE v. Harry C. SLEIGHT. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

William T. DREW, respondent, v. William M. BARRETT, as President of the Adams Express Company, appellant. (Supreme Court, Appellate Division, Second Department. December 6, 1919.) Judgment and order of the City Court of Mt. Vernon reversed, and complaint unanimously dismissed, with costs. Under the terms of the contract evidenced by the bill of lading, defendant was not to be liable unless the injury or loss be caused by defendant or its servants; also the shipper agreed as a condition precedent to any recovery that "such loss or damage should be proved by the shipper to have been caused by the negligence of the carrier." In a live stock bill of lading, such clauses are valid. As negligence was not proven, plaintiff must fail in his action. Jenks, P. J., and Rich, Putnam, Blackmar, and Jaycox, JJ., concur.

George W. DUELL, respt., v. DONNER STEEL COMPANY, applt. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Appeal dismissed, unless appellant shall file and serve printed briefs by September 29th.

Benjamin L. DURYEA, Respt., v. Charles R. BERGMANN et al., impleaded, etc., Appls. (Supreme Court, Appellate Division, First Department. November 7, 1919. Judgment affirmed, with costs. No opinion. Order filed.

Matter of Cornelius J. EARLEY, an attorney. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied. Settle order on notice.

EAST LAKE LUMBER CO., Applt., v. Greenleaf S. VAN GORDER et al., respts.

(Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for leave to appeal to the Court of Appeals denied, with \$10 costs.

Frederick R. EATON, Applt., v. W. & S. JOB CO., Inc., Respt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment modified, by striking out the words "upon the merits," and judgment, as so modified, and the order appealed from, affirmed without costs. No opinion. Order filed.

EDDY VALVE CO., plff., v. VILLAGE OF BARKER, respt., and Walter A. Wood, applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Motion for leave to appeal to the Court of Appeals denied, with \$10 costs.

Wm. J. EDELL, applt., v. Arthur F. GAI-LEY, respt. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion to dismiss appeal granted, with costs.

In the matter of the claim of **E. I. DU PONT DE NEMOURS POWDER COMPANY** against the **CITY OF NEW YORK**, under section 42, chapter 724, of the Laws of 1905, as amended by section 9, chapter 314, of the Laws of 1906. Business Damage Commission No. 3. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Appeal dismissed.

Wilhelmina EINBERGER v. DENWOOD REALTY CO., Inc. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Matter of J. Mortimer EISENBERG, an attorney. (Supreme Court, Appellate Division, First Department. October 24, 1919.) Proceeding dismissed. Settle order on notice.

Maurice EISENBERG, Applt., v. Augustus B. WOLVIN, Respt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

EMPIRE LIGHTING FIXTURE CO., Inc., Applt., v. Samuel CUTLER et al., Respts. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order modified, by imposing as a condition for the opening of the default the payment of \$30, together with \$10 costs of motion and the disbursements on

entering judgment, and, as so modified, affirmed, with \$10 costs and disbursements to the appellant. No opinion. Order filed.

Sigmund H. ENGELBERG, Applt., v. Bessie A. ENGELBERG, Respt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

EQUITABLE SOCIAL CLUB, Inc., Applt., v. Richard E. ENRIGHT, as Com'r, etc., et al., Respts. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Herbert L. EVELYN, respondent, v. Edward J. REID, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Edward W. EVERETT, Applt., v. James A. CAREY, Respt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Pietro EZZO, respondent, v. STEVES-LACIOS COMPANY, Inc., appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Helen FAHS, Respt., v. Louis A. FAHS, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. No opinion. Order filed.

Nicolo FAILLO, respondent, v. Alexander NOAH, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Louis FENNING, respondent, v. George LASKAS and Margaret Laskas, appellants. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Louis FENNING, respondent, v. George LASKAS and Margaret Laskas, appellants. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion for reargument granted, and case set down for Tuesday, December 2, 1919.

Nicholas FEULNER, Respt., v. UNION RAILWAY CO. of N. Y. CITY, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

FIRST NATIONAL BANK OF ANN ARBOR, MICH., Respt., v. John FARSON, et al. Appls. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

FIRST NAT. BANK OF ANN ARBOR, MICH., v. John FARSON et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

FIRST NATIONAL BANK OF ANN ARBOR, MICH., Respt., v. John FARSON et al., Appls. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order reversed, with \$10 costs and disbursements, and motion granted, to the extent of requiring additional undertaking in the sum of \$1,000, on the authority of Banes v. Rainey, 192 N. Y. 292, 85 N. E. 71. Order filed.

Harry O. FISHER v. STAR COMPANY. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

Myra A. FLANAGAN v. CITY OF NEW YORK, John J. FLANAGAN v. SAME. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

James A. FOLEY, as Rec'r, v. Reginald RONALDS et al. (Supreme Court, Appellate Division, First Department. November 23, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

Bridget FORD, appellant, v. Patrick F. CRADDOCK, respondent. (Supreme Court,

Appellate Division, Second Department. October 3, 1919.) Judgment modified, by striking therefrom the words "rendering a verdict for defendant" in the recital, and the words "on the merits" and "together with" in the ordering part, and in the latter inserting the word "with" in place of the words "together with," and, as so modified, unanimously affirmed, without costs. No opinion.

Margaret H. FORD, as administratrix of the goods, chattels, and credits of Truman C. Ford, deceased, resp't., v. William G. McADOO, Director General of Railroads, appl't. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Judgment and order (178 N. Y. Supp. 631) affirmed, with costs. All concur, except Lyon and Henry T. Kellogg, JJ., dissenting.

Charles FOSMIRE, appl't., v. NATIONAL SURETY COMPANY, resp't. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Motion granted, and question certified as follows: Does the complaint state facts sufficient to constitute a cause of action? See 189 App. Div. 44, 177 N. Y. Supp. 810, reversing 104 Misc. Rep. 166, 171 N. Y. Supp. 474.

Elsie B. FOWLER, Resp't., v. Harry L. POWERS, as Ex'r, etc., Impl'd., etc., Appl't. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Esther FRACHTEL v. Herman GEROF-SKY. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Ivan FRANK and another, Respts., v. Mathew N. RYAN, Appl't. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

FRED GRETSCH MANUFACTURING COMPANY, appellant, v. Hans HOHNER, respondent, and others, defendants. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Ansel L. FREEMAN, respondent, v. John J. LEONARD and others, defendants, Philip J. SHERIDAN, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Lester M. FRIEDMAN v. Thomas MACHCINSKI et al. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

I. Moses FRIEDMAN et al. v. Isaac RODSTEIN. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal denied, with \$10 costs. Order filed. See, also, — App. Div. —, 178 N. Y. Supp. 890; 178 N. Y. Supp. 554.

I. Moses FRIEDMAN et al., Respts., v. Isaac RODSTEIN, Appl't. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Order (178 N. Y. Supp. 554) affirmed, with \$10 costs and disbursements, with leave to defendant to withdraw demurrer and to answer, on payment of said costs and \$10 costs of motion at Special Term. No opinion. Order filed. See, also, 189 App. Div. 893, 178 N. Y. Supp. 890.

William W. FUNGE, Jr., Appl't., v. MAUSER MANUFACTURING CO., and another, Respts. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Peter GALLAGHER, Resp't., v. L. L. D. REALTY CO., Appl't. (Supreme Court, Appellate Division, First Department. October 24, 1919.) Judgment and order reversed, and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce verdict to \$5,000, in which event the judgment, as so modified, and the order appealed from, are affirmed, without costs. No opinion. Settle order on notice.

Edward V. GAMBIER, trustee, appellant, v. CITY & COUNTY CONTRACT COMPANY and another, respondents. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Agamemnon GARIFALOS, resp't., v. Anastasia GARIFALOS, appl't. (Supreme Court, Appellate Division, Fourth Department. October 1, 1919.) Order affirmed, without costs. All concur.

Adolph GENEROUS v. SHEPARD & MORSE LUMBER CO. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application granted. Order signed.

Robert GIBSON et al., Applts., v. QUICK-SILVER MINING CO. et al., Respts. (Supreme Court, Appellate Division, First Department, November 14, 1919.) Order reversed, with \$10 costs and disbursements, and plaintiffs' motion for a stay, as specified in their notice of motion, granted, with \$10 costs. No opinion. Order filed.

William E. GIESECKE, Respt., v. CARIB SYNDICATE, Ltd., et al., Applts. (Supreme Court, Appellate Division, First Department, October 17, 1919.) Order affirmed, with \$10 costs and disbursements. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

Matter of S. Edward GINSBURG, an attorney. (Supreme Court, Appellate Division, First Department, October 31, 1919.) Motion for reinstatement granted. Order filed. See 188 App. Div. 517, 177 N. Y. Supp. 293.

Meyer GLADSTONE et al. v. HOROWITZ & NEWMARK, Inc. (Supreme Court, Appellate Division, First Department, November 28, 1919.) Application denied, with \$10 costs. Order signed.

Kate GLEASON, respt., v. Lucy M. WANAMAKER et al., applts. (Supreme Court, Appellate Division, Fourth Department, September 22, 1919.) Motion to dismiss appeal granted.

Sarah GOLDBERG, Respt., v. Daniel SMITH, Applt. (Supreme Court, Appellate Division, First Department, October 31, 1919.) Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. No opinion. Order filed.

GOLDEN HILL BUILDING CO., Respt., v. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORP'N, Ltd., Applt. (Supreme Court, Appellate Division, First Department, October 24, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Abraham GOLDMAN, Applt., v. Harry ALTMAN and another, copartners, etc., Respts. (Supreme Court, Appellate Division, First Department, November 28, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Harry GOODMAN, Applt., v. Louis RUBINSTEIN et al., Respts. (Supreme Court, Appellate Division, First Department, October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

GOODWIN PRESERVING CO., applt., v. E. B. HOLTON, respt. (Supreme Court, Appellate Division, Fourth Department, September 22, 1919.) Appeal dismissed, without costs, upon stipulation filed.

In the matter of Harold A. GORDON, an Attorney. (Supreme Court, Appellate Division, Third Department, November 21, 1919.) Report of the official referee confirmed, and the complaint dismissed. All concur, except John M. Kellogg, P. J., and Lyon, J., dissenting.

Fred A. GORDON, on behalf of himself, etc., Respt., v. Jacob J. BENEDICT and another, imple., etc., Applts. (Supreme Court, Appellate Division, First Department, October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Esther I. GORDON, Applt., v. Hyman GORDON, Respt. (Supreme Court, Appellate Division, First Department, November 23, 1919.) Order reversed, with \$10 costs and disbursements, and the matter referred to Hon. John W. Goff, official referee, to take evidence as to the pecuniary condition of the parties and to report to the Special Term, with his opinion thereon, as to the proper amount, if any, to be allowed for increased alimony. No opinion. Settle order on notice.

George R. GORDON, Respt., v. Marie Brady MURRAY, Applt. (Supreme Court, Appellate Division, First Department, November 28, 1919.) Judgment and order reversed, and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulate to reduce verdict to \$2,500, in which event the judgment, as so modified, and the order appealed from, are affirmed, without costs. No opinion. Settle order on notice.

Teresa M. GRAHAM, appellant, v. PETER H. HAVEY & SONS, Inc., respondent. (Supreme Court, Appellate Division, Second Department, October 3, 1919.) Judgment of the City Court of Yonkers unanimously affirmed, with costs. No opinion.

Teresa M. GRAHAM, appellant, v. PETER H. HAVEY & SONS, Inc., respondent. (Supreme Court, Appellate Division, Second Department, November 7, 1919.) Motion denied, without costs.

William H. GREEN v. GREAT BEAR SPRING CO. (Supreme Court, Appellate Division, First Department, October 17, 1919.) Motion for extension of time granted, and ap-

pellant's time to file brief extended to October 27, 1919. Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Orders filed.

Minnie GREEN, respondent, v. Samuel RODIN, appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Charles L. GREENHALL, as trustee, etc., v. Eugene DAVIS. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

Morris GREENHILL, Respt., v. BROWN BROS. & CO., impleaded, etc., Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

John P. GRIFFIN, Respt., v. Samuel M. BASES, Applt. (Supreme Court, Appellate Division, First Department, November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Daniel G. GRIFFIN et al., as substituted trustees, etc., Appls., v. Michael WIELANDT et al., Respts. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Dominick GUAUSTAVINO, as Adm'r, etc., Respt., v. Mildred ROCK, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

GUENTHER PUBLISHING CO., Respt., v. RIDGWAY COMPANY, Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Carl F. GUGGENBUEHLER, Respt., v. CAST-A-LINER CO., Inc., et al., Appls. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order modified, by providing that the injunction shall become inoperative in the event that defendants within five days from service of this order, with notice of entry thereof, file an undertaking in the sum

of \$5,000 for any damages plaintiff may sustain, and, as so modified, affirmed, without costs. No opinion. Order filed.

Lillian GUINAN, as Adm'r, etc., Respt., v. HAYES STORAGE WAREHOUSE, Inc., Applt. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. No opinion. Order filed.

Adolph HABICH, appellant, v. Richard H. SMITH, respondent. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) We do not disturb the verdict upon the weight of evidence, but feel constrained to reverse the judgment and grant a new trial for errors in the admission of evidence at folios 382 and 386 of the record. Judgment and order denying motion for a new trial reversed, and new trial granted, costs to abide the event, and order denying motion to vacate and set aside verdict on the ground of improper conduct of the jury affirmed, without costs. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

James HADFIELD v. Joseph COLTER et al. (Supreme Court Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs, and stay vacated. Order filed.

Lionel HAGENAERS et al. v. Lucas CABALLERO et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed. See, also, 188 App. Div. 643, 177 N. Y. Supp. 813; 189 App. Div. 889, 178 N. Y. Supp. 892.

Lionel HAGENAERS and another, Appls.-Respts., v. Julio C. CABALLERO, implead., etc., Resp.-Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, without costs to either party. No opinion. Order filed. See, also, 188 App. Div. 643, 177 N. Y. Supp. 813; 189 App. Div. 896, 178 N. Y. Supp. 892.

Irving HAIGHT, as administrator, etc., of Frank Haight, deceased, respondent, v. S. Jeannette CARMEN, defendant, and Jackson BUTTS, appellant. (Supreme Court, Appellate Division, Second Department. October 17, 1919.) Judgment and order of the County Court of Dutchess County reversed, and new trial ordered, costs to abide the event, upon the ground that the verdict of the jury was contrary to the weight of the evidence. Mills, Rich, Blackmar, Kelly, and Jaycox, JJ., concur.

William HAIM, Applt., v. Philip RICHMAN and another, Respts. (Supreme Court, Appel-

Iate Division, First Department. October 17, 1919.) Order reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. No opinion. Order filed.

William HAIM v. Philip RICHMAN et al. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion denied, with \$10 costs. Order filed.

Abigail HAINES, applt., v. Arthur J. LEONARD, respt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Judgment unanimously affirmed, with costs.

Emily L. HALL, respondent, v. GEORGE R. HALL and Lillian S. Hall, appellants. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment modified, so as to provide that the mortgage be adjudged valid as against the plaintiff for the principal sum of \$1,788.34 only, and the question of the amount of interest due thereon may be settled upon application to be made by either party to the Special Term, and the judgment, as so modified, is affirmed, without costs to either party. We make the following additional findings, viz.: (a) That the expenses actually paid to the attorney of the mortgagee for the procuring of the said mortgage amounted to the sum of \$1,050, so that the proceeds of the said mortgage loan to the plaintiff and her son were only the sum of \$5,950; (b) that of the said proceeds the plaintiff, at the request of the defendant George R. Hall and for his benefit, paid out the sum of \$4,500, and that the balance thereof, to wit, the sum of \$1,450, she applied to her own uses and benefits; and (c) that the said expenses being divided between the said parties in proportion to their respective shares in and of the said proceeds, make the sum of \$338.34 thereof chargeable to the plaintiff, and the balance of \$711.66 due to the defendant George R. Hall. And we conclude, upon the findings as so amended, that it is equitable and just that the mortgage should stand as valid in the hands of the said George R. Hall for the principal sum of \$1,788.34 only, and for such interest thereon as upon further application to the court at Special Term may be found due, upon the ground that we think that, inasmuch as the plaintiff actually received for her own use and benefit, out of the proceeds of the mortgage, the sum of \$1,450, it is equitable and just that the mortgage in the hands of her son, the defendant George R. Hall, should be held valid for that amount, and for her proportionate part of the expenses of procuring the mortgage loan, which is the sum of \$338.34, making in all the principal sum of \$1,788.34. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

Louise HAMBURGER, applt., v. CORNELL UNIVERSITY, respt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order modified, by providing that the trial shall be had in the county of Broome, instead of the county of Tompkins, and, as so modified, unanimously affirmed, without costs. See, also, 99 Misc. Rep. 564, 166 N. Y. Supp. 46; 184 App. Div. 408, 172 N. Y. Supp. 5.

Louise HAMBURGER, applt., v. CORNELL UNIVERSITY, respt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order unanimously affirmed, with \$10 costs and disbursements. See, also, 99 Misc. Rep. 564, 166 N. Y. Supp. 46; 184 App. Div. 408, 172 N. Y. Supp. 5; — App. Div. —, 178 N. Y. Supp. 893.

William W. HAMLIN, respt., v. John N. PATTON, applt. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for reargument denied, with \$10 costs.

Lillian I. HAMMOND, respondent, v. Henry W. J. HAMMOND, appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

Marguerite E. HAND, Respt., v. Claudius A. HAND, Applt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

William E. HANNA, appellant, v. Aaron MEISLIN, respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) We are of opinion that there was a question for the jury whether there was a meeting of the minds of the parties on the question of cancellation, in that there was a question of fact whether Exhibit 2 had come to the knowledge of plaintiff when he wrote and mailed Exhibit A to the defendant. The judgment and order are therefore reversed, and a new trial granted, costs to abide the event. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

William E. HANNA, applt. v. WATERLOO WOOLEN MFG. CO., respt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Appeal transferred to the Appellate Division, First Department, to be there heard and determined, pursuant to section 231 of the Code of Civil Procedure.

In the matter of the judicial settlement of the second intermediate account of David W. HARKNESS and others, as executors, etc., of Julia BUTTERFIELD, deceased. In the matter of the judicial settlement of the second intermediate account of Albert Francis HAGAR, as one of the executors, etc., of Julia Butterfield, deceased. (Supreme Court, Appellate Division, Second Department. October 24, 1919.) Order (178 N. Y. Supp. 347) of the Surrogate's Court of Putnam County, of April 26, 1919, reversed, without costs, and appellants directed to perfect the appeal and notice the case for the third Monday of December, 1919, and be ready for argument on that day. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

Norman C. HARRIS, respondent, v. William KEATING, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Louis N. HARTOG, Applt., v. LIBERTY DEXTRINE SUGAR MANUFACTURING CORPORATION, Respt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Edward J. HAVEY, respondent, v. CITY OF MT. VERNON, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Motion denied, without costs.

James A. HAWES, Applt., v. Barclay E. V. McCARTY, Respt. (Supreme Court, Appellate Division, Second Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Katherine HAYES, respondent, v. Thomas H. HAYES, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order for alimony and counsel fee affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

In the matter of the appraisal of the ESTATE of Frederick R. HAZARD, deceased, under acts in relation to taxable transfers of property. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion to resettle order granted, and motion for leave to appeal to the Court of Appeals granted. See 188 App. Div. 869, 177 N. Y. Supp. 369.

Isaac HEINEMAN, Applt., v. Ivan JOSLIN et al., Respts. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Jacob HENIG and another, Respts., v. Eddy PALMER, implead., etc., Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Determination (175 N. Y. Supp. 519) affirmed, with costs and disbursements. No opinion. Clarke, P. J., dissents. Order filed.

HENRY P. BURGARD CO., respt., v. Julius ULLMAN et al., appls. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for leave to appeal to the Court of Appeals denied.

Morris S. HERMANN, respondent, v. NEW ENGLAND NAVIGATION COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Hieronimus A. HEROLD, respondent, v. Katherine S. DE VALENCIA, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Benjamin HERZBERG, respondent, v. Isaac BERMAN, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Motion for stay granted, on condition that Berman give a bond, with corporate security, in the sum of \$1,000, conditioned for the payment of any sum found to be due the plaintiff in case he succeeds.

Benjamin HERZBERG, respondent, v. Isaac BERMAN, appellant. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motions granted, with \$10 costs.

In the matter of HILL VIEW RESERVOIR SECTION NO. 2. CONTIGUOUS DAMAGE CLAIMS. Appeal of WAKEFIELD TERMINAL IMPROVEMENT COMPANY. (Supreme Court, Appellate Division, Second Department. October 11, 1919.) Motion denied.

William Hurd HILLYER, Respt., v. William Morris IMBRIE et al., Appls. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Matter of David HIRSHFIELD, Com'r, etc., Applt., v. Stephen J. HANLEY, Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Matter of David HIRSHFIELD, as Com'r of Accounts, v. Stephen J. HANLEY. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion denied, with \$10 costs. Order filed.

Henriette HOFMEYER, respt., v. CITIZENS' BREWING CORPORATION, applt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order unanimously affirmed, with \$10 costs and disbursements.

Harry B. HOLLINS et al., respondents, v. William R. GARRISON et al., appellants. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

HOOKE ELECTROCHEMICAL COMPANY, respt., v. Morris I. LANDAU, applt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order unanimously affirmed, with \$10 costs and disbursements.

Annie M. HOPE, respondent, v. Hyman BARON, appellant. (Supreme Court, Appellate Division, Second Department. October 17, 1919.) Judgment and order of the County Court of Richmond County unanimously affirmed, with costs. No opinion.

HORACE S. ELY & CO., Inc., v. Sigmund KRAUTER. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Application denied with \$10 costs. Order signed.

Aaron HOROWITZ, respondent, v. Sophie COHEN, as administratrix, etc., appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Anna HORTON, appellant, v. Max GLUCKMAN and Mollie Gluckman, respondents. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Judgment unanimously affirmed, with costs. No opinion.

George HOTZ, as administrator, etc., of Harold Hotz, deceased, respondent, v. CITY OF NEW YORK, appellant. (Supreme Court, Ap-

pellate Division, Second Department. November 21, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Willett E. HOYSRADT and Sigmund Horkimer, as temporary receivers, etc., respondents, v. MANUFACTURERS FINANCE COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

Elizabeth L. HUGHES v. Sarah E. TECHT. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion granted. Order filed.

In the matter of the judicial settlement of the accounts of Carrie B. L. HUMPHREY and Esther M. Colby, as executrices, etc. of Ruth Newey SMITH, deceased. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Decree of the Surrogate's Court of Suffolk County modified, so as to allow the executrices the sum of \$2,000 for legal services, to include the federal transfer tax proceedings, and to allow to each executrix as commissions the sum of \$1,331.47, and to allow to Robert Burnside for his services as special guardian the sum of \$300, and, as so modified, decree affirmed, with one bill of costs to the executrices, appellants, and one bill of costs to the appellant Burnside, payable out of the estate, upon the ground that the sum of \$2,000 agreed upon by the adult parties at the hearing before the Surrogate's Court seems to us a proper sum to be allowed the executrices for their expenses for legal services, the same, however, to include the completion of the federal transfer tax proceedings, and that we think that the appellant Burnside, as special guardian, was not derelict in duty in practically acquiescing in that agreement and not opposing it before the Surrogate's Court, and that we consider that the sum of \$300 is a proper compensation for his services as such guardian. Jenks, P. J., and Mills, Rich, Putnam, and Blackmar, JJ., concur.

INTERNATIONAL AGRICULTURAL CORPORATION, Respt., v. GEORGIA FERTILIZER CO., Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment and order affirmed, with costs. No opinion. Smith, J., dissents with respect to the taxes, and votes to reduce the judgment by \$512.50, the pro rata amount of the taxes upon the property while the tenant was in possession. Order filed.

In the matter of the application of the INTERNATIONAL COMMITTEE OF YOUNG MEN'S CHRISTIAN ASSOCIATIONS and

others, respondents, for an order directing David W. Harkness and Calvin S. May, respondents, and Albert Francis Hagar, appellant, as surviving executors of Julia L. Butterfield, deceased, etc., to pay a part of the residuary legacy, etc. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion granted, with \$10 costs. From the affidavit in question is stricken out as scandalous the following passages: Folio 20, from and including the words "An effort was made" to and including the words "part of the property" in folio 22. Folio 25, from and including the words "I charge" to and including "over \$34,000" in folio 30. The clerk of this court is directed to expunge said parts from the original affidavit, adding thereto, opposite the parts stricken out, "By order of the court November 7, 1919."

Jere R. IRELAND, appellant, v. Willard N. BAYLIS, respondent. (Supreme Court, Appellate Division. Second Department. October 17, 1919.) Motions denied, without costs.

Samuel B. IRISH, as executor, etc., of William B. Cutler, deceased, respondent, v. NEW YORK CENTRAL RAILROAD COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Charles B. IRWIN, respondent, v. Edward RIEGELMANN, as Sheriff of the County of Kings, appellant. (Supreme Court, Appellate Division, Second Department. November 14, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Siwert ISENE, respondent, v. George H. WARREN and Lloyd Warren, as trustees, etc., of George H. Warren, deceased, appellants, impleaded with others. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs, upon the ground that plaintiff's delay to prosecute the action was unreasonable, and the excuse therefor presented in his behalf entirely inadequate. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

Ellwood C. JACKSON, Applt., v. J. K. JOICE CO., Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements, on the ground that there is no proper proof that the defendant is a foreign corporation. Order filed.

Elwood C. JACKSON, Respt., v. J. K. JOICE CO., Applt. (Supreme Court, Appellate Division, First Department. November 14, 1919.)

Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Jacob JACOBS, respondent, v. Mary FORBMAN, appellant. (Supreme Court, Appellate Division, Second Department. November 14, 1919.) Motion to dismiss appeal denied, on condition that appellant perfect the appeal, place the case on the calendar for January, 1920, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

J. ARON & CO., Inc., Applt., v. William GILLESPIE et al., Respts. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Edna P. JENKINS, Respt., v. Edwin H. PECK, Applt. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Interlocutory judgment modified, by providing that the final judgment shall require plaintiff on payment of the amount awarded to her thereby to deliver to defendant assignments of the bonds and mortgages and deeds of the premises, conveying the title she received free from any lien or incumbrance created or placed thereon by her, and, as so modified, affirmed, with costs to respondent. No opinion. Settle order on notice.

Peter JOHANSEN, respondent, v. NEW ENGLAND STEAMSHIP COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Helga JOHANSEN, respondent, v. SEVENTY-SIXTH STREET & PARK AVENUE COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 17, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Arthur JOHNSON, respondent, v. W. BECKER'S ANILINE & CHEMICAL WORKS, Inc., appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion denied, on condition that appellant perfect the appeal, place the case on the December calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

Arthur T. JONES, respt., v. VILLAGE OF PALMYRA, applt. (Supreme Court, Appellate Division, Fourth Department. October 1, 1919.) Judgment affirmed, with costs. All concur.

Eloise Evans JORDAN, plaintiff, v. **Henry C. JORDAN et al.**, defendants. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) The rule that dower will not be admeasured upon dower will only be applied when dower is actually assigned. Testator's first wife never became seized of any portion of the real property described in the submission, and the admeasurement of plaintiff's dower upon the whole of the property in question does not constitute a violation of the rule. Judgment that plaintiff is entitled to have a gross sum paid to her, ascertained by computing the interest for one year at 5 per cent. upon one-third of \$23,000, and multiplying the result by the number of years purchase which an annuity of \$1 is worth at her age, is directed to be entered accordingly, without costs. **Mills, Rich, Blackmar, Kelly, and Jaycox, JJ.**, concur.

Alfred KAHN, Resp't., v. **DENNISON MANUFACTURING CO.**, Appl't. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Leo KANNENGEISSER v. **Henri ISRAEL-OWITZ**. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application granted. Order signed.

David KANTROWITZ, appellant, v. **PRESS PUBLISHING COMPANY**, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Morris KATZ v. **BROOKLYN & NORTH RIVER RAILROAD CO.** (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

JULIUS KAYSER & CO., plaintiff, v. **Richard ELSEMILLER**, individually and as president of the Silk Glove Cutters' Union, Local No. 888, Amsterdam, N. Y., of the United Textile Workers of America, **Ada Henshaw**, individually and as treasurer of the Warp Hands and Warpers' Union, Local No. 479, Amsterdam, N. Y., of the United Textile Workers of America, and **John Doe** and **Richard Roe** (the names John Doe and Richard Roe being fictitious, defendants' real names being unknown to plaintiff), defendants. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order unanimously affirmed, with \$10 costs and disbursements.

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Matter of Peter C. KELLY, an attorney. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Reference ordered to Hon. John W. Goff, official referee. Settle order on notice.

John KELLY, appellant, v. **William E. SENGES**, respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Motion to dismiss appeal granted, without costs.

In the matter of **Hugh F. KENNA**, an attorney. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) The attorney is blamable for his omission to remit in due course moneys to his client out of town, and for his carelessness in not heeding the client's requests for the moneys; but as we find no proof that the attorney's omission was due to design on his part to keep those moneys to his own use, we think that he is sufficiently punished by a formal censure of the court, which we now impose.

In the Matter of **Andrew F. KENNEDY**, dec'd. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Decree affirmed, with costs. No opinion. Order filed. See, also, 186 App. Div. 19, 174 N. Y. Supp. 96; 106 Misc. Rep. 216, 174 N. Y. Supp. 429.

Mary KENNEDY v. **SUPREME COUNCIL CATHOLIC BENEVOLENT LEGION**. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion granted. Order filed.

John T. KERESSEY v. **Mary D. KERESSEY** (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

In the matter of the claim of **Louis KIERNAN**, claimant, resp't., for compensation to himself under the Workmen's Compensation Law of the State of New York, v. **HUGHES-FOULKROD COMPANY** and **Maryland Casualty Company**, appl'ts. State Industrial Commission, resp't. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award reversed, on the authority of **Matter of Smith v. Heine Boiler Co.**, 224 N. Y. 9, 119 N. E. 878, Ann. Cas. 1918D, 316, and claim dismissed. All concur.

Harry J. KILE, respondent, v. **Frances C. KILE**, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, without costs. No opinion. **Jenks, P. J.**, and **Mills, Putnam, Blackmar, and Kelly, JJ.**, concur.

In the Matter of Karlene E. KING, Deceased. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed. See, also, 172 N. Y. Supp. 868.

Matter of Karlene E. KING, deceased. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

William H. KINSELLA, respondent, v. Jacob BERMAN and Ida Berman, appellants. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Order affirmed, with costs. No opinion. Mills, Rich, and Kelly, JJ., concur.

BLACKMAR, J. I dissent. I consider the principle well established that in the case of a contract for the sale of real property the assignee of the vendee cannot maintain an action for specific performance against the vendor unless there is a novation, which does not exist in this case.

JAYCOX, J., concurs with BLACKMAR, J.

Howard F. KINSEY, Applt., v. QUALITY AMUSEMENT CORPORATION, Respt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Jacob A. KIRSCH, Applt., v. PACIFIC COMMERCIAL CO., Respt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed. See, also, 181 App. Div. 614, 169 N. Y. Supp. 124.

KNICKERBOCKER TRUST COMPANY, as trustee, respondent, v. TARRYTOWN, WHITE PLAINS & MAMARONECK RAILWAY COMPANY et al., defendants, and Village of Mamaroneck, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

KNOMARK PRODUCTS CORP'N, Applt., v. A. A. MAILLETT CO., Inc., Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Joseph KOHL, an infant, etc., by Louise Kohl, his guardian ad litem, respondent, v. Florence KOHL, appellant. (Supreme Court, Appellate Division, Second Department. Octo-

ber 17, 1919.) Order denying motion for leave to serve supplemental answer reversed, with \$10 costs and disbursements, and motion granted, without costs. The answer in the action for divorce admitted the allegation that there was no issue of the marriage. At the date of service of the answer the statement in the complaint was true, but one month thereafter and before trial a child was born, and the defendant wife alleges that it is the child of the plaintiff. She promptly moved for leave to serve a supplemental answer under section 544 of the Code, but, the case having been marked off the trial calendar, the motion was not brought on for argument until plaintiff restored the case for trial two years later. Defendant then brought on her motion before the case was reached for trial. The question of the legitimacy of the child born is directly involved, because, considering the allegations in the complaint and the date of birth of the child, it may have been begotten after the dates of the alleged offenses. In justice to the parties plaintiff, defendant and the child, the question should be determined in this action. Jenka, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

David KORNIKOFF, as Adm'r, etc., Respt., v. Tillie FINKELBRANDT, also known as Tillie Hyman, Applt. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Henry KOSTER, appellant, v. YONKERS RAILROAD COMPANY, City of Yonkers, et al., respondents. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion denied, on condition that appellant perfect the appeal, place the case on the December calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

Laura KOZUBE, respt., v. ROCKAWAY LUNCH CO., and one, appls. (Supreme Court, Appellate Division, Fourth Department. October 1, 1919.) Order entered February 24, 1919, reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs to abide event. Appeal from order granted March 28, 1919, dismissed, without costs. All concur.

Fanny W. KREMER v. LIBERTY STORAGE & WAREHOUSE CO. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Robert KREUSCH, respondent, v. WERTHER & RAUSCH COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Samuel KROHNBERG and another, as co-partners, etc., *Appls.*, v. **Louis N. SHOUR**, *Respt.* (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs, and the order for examination reinstated. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

Robert G. LANG v. **COUNTY FIRE INSURANCE CO. OF PHILADELPHIA**. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

Robert G. LANG v. **COUNTY FIRE INSURANCE CO. OF PHILADELPHIA**. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Application denied, with \$10 costs. Order signed.

Lydia LANGE, respondent, v. **Vincenzo MASSAGLI** et al., copartners, etc., appellants. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Charles LANO v. **Benjamin SEL** et al. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Frank J. LA POINT, *respt.*, v. **Charles N. BIBBINS** and **William C. Couch**, *appls.* (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order reversed, without costs, and motion granted, without costs. All concur, except **Cochrane, J.**, dissenting.

PER CURIAM. From the affidavits in this case we are satisfied the trial of the action should be where the transaction took place.

Jewell E. LA SAGE, *Respt.*, v. **Clarence C. PERPALL** et al., *Appls.* (Supreme Court, Appellate Division, First Department. October 24, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

In the matter of the claim of **Amelia LEBENDICK**, **Helena Lebendick**, **Stanislaw Lebendick**, and **Alexander Lebendick**, claimants, *respts.*, for compensation for the death of **Joseph Lebendick**, deceased, under the Workmen's Compensation Law, v. **BOSSERT CORPORATION**, employer, and **Utica Mutual Insurance Company**, insurance carrier, *appls.*

(Supreme Court, Appellate Division, Third Department. November 21, 1919.) Award unanimously affirmed.

Robert E. LEBER, plaintiff-appellant, v. **Leigh L. WILLIAMS** and another, defendants-respondents. (Supreme Court, Appellate Term, First Department. November 6, 1919.) Appeal from Municipal Court, Borough of Manhattan, Ninth District. Action by **Robert E. Leber** against **Leigh L. Williams** and another. Judgment for defendants, after trial by court without a jury, and plaintiff appeals. Reversed, and judgment ordered for plaintiff.

PER CURIAM. We find no reason to disturb the conclusion of the learned trial justice that there had been a surrender and acceptance. It seems to have been overlooked, however, that the landlord appellant is entitled to \$30 rent for the month of October, 1917. Respondent on this appeal does not even deny that obligation. The judgment must therefore be reversed, and judgment ordered in favor of the plaintiff for \$30, with appropriate costs in the court below, and without costs of this appeal to either party.

Thomas F. LEE, *Respt.*, v. **Lawrence DON-AHUE**, *Applt.* (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. **Dowling, J.**, dissents. Order filed.

Jane LEE, *Applt.*, v. **NEW YORK RAILWAYS CO.**, *Respt.* (Supreme Court, Appellate Division, First Department. November 7, 1919.) Order affirmed, with \$10 costs and disbursements, with leave to plaintiff to serve amended complaint, on payment of said costs and \$10 costs of motion at Special Term. No opinion. Order filed.

Ansel S. LEO, *Respt.*, v. **Carl VON PUSTAU**, *Applt.* (Supreme Court, Appellate Division, First Department. October 24, 1919.) Orders modified, by providing that the original order for examination be amended, by striking out the provision for examination in regard to the affirmative defenses and counterclaims, and, as so modified, affirmed, without costs. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

Albert F. LESHER, *Respt.*, v. **MANUFACTURING JEWELERS' EXPORT CO., Inc.**, *Applt.* (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. The date for the examination to proceed to be fixed in the order. Settle order on notice.

William LEVIN v. NEW ENGLAND CASUALTY CO. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion granted. Order filed.

Nat LEVINE v. Paul A. ISLER et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

Moses LEVINSON and another, Applts., v. Leo FINKENBERG et al., Respts. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

In the Matter of the Application of Max LEVY for admission to the bar (from the state of New Jersey). (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Application granted.

Benjamin LEVY, Respt., v. Samuel EPSTEIN et al., impleaded, etc., Applts. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Gustave LEVY, respondent, v. Benjamin JACOBSON et al., individually and as copartners, etc., appellants, and Frank Martin, defendant. (Supreme Court, Appellate Division, Second Department. November 14, 1919.) We think that the judgment, in so far as it holds the defendant Sam Perlin, is not justified, and that the findings that he was a copartner with the other defendants, or was a joint venturer with the other parties to this action, are against the evidence. The judgment, in so far as it holds Perlin, is reversed, and judgment given in his favor, with costs. The judgment, as thus modified, is affirmed as to the other defendants, with costs. Jenks, P. J., and Mills, Rich, Putnam, and Jaycox, JJ., concur. Let proposed findings and conclusions of law be submitted within 10 days by the parties to the Presiding Justice.

Abraham LEVY respondent, v. Louis ROSENBERG and others, appellants. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Benjamin LEWENTHAL et al. v. Isaac LEWENTHAL et al. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion denied, with \$10 costs. Order filed.

Thomas A. LEWIS, Applt., v. MERRITT & CHAPMAN DERRICK AND WRECKING CO., Respt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Frederick N. LEWIS, appellant, v. NEW YORK MUNICIPAL RAILWAY CORPORATION, defendant, and Conners Bros. Co., Inc., and another, respondents. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motions denied, without costs.

In the Matter of Oscar LEWISOHN, dec'd. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order (107 Misc. Rep. 582, 177 N. Y. Supp. 790) affirmed, with \$10 costs and disbursements on opinion of Surrogate Cohalan. Order filed. See, also (Sur.) 171 N. Y. Supp. 958.

Bernard L. LICHTEN and another, Respts., v. Isaac NAHEM, Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

In the Matter of the Application of Erwin Robinson LILLARD for admission to the bar (from the state of Illinois). (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Application granted.

Le Roy A. LINCOLN, as trustee, etc., applt., v. I. M. LUDINGTON SONS, Inc., respt. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Appeal dismissed, unless appellant shall file and serve printed briefs by October 20th.

Rolf H. LINDEN v. Costa CONSTANDINIDI et al. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

Rolf H. LINDEN, Applt. v. Costa CONSTANTINIDI et al., Respts. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

In the Matter of the claim of Robert LINK-LATER for compensation under the Workmen's Compensation Law v. BURLING EN-

GINEERING & CONSTRUCTION COMPANY, employer, and **Zurich General Accident & Liability Insurance Company, Ltd.**, insurance carrier, applts. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

Lipman LIPSHITZ, appellant, v. **Hector BEERE et al.**, respondents, and **Title Guarantee & Trust Company**, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Amanda LISSNER, as administratrix, etc., of **Henry Lissner**, deceased, respondent, v. **Celie WEINGARTEN**, defendant, and **Wecl Realty Corporation**, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and order affirmed, with costs. No opinion. **Rich, Blackmar**, and **Kelly, JJ.**, concur. **Mills, J.**, dissents, and votes for a new trial, upon the ground that the court erred in refusing to charge the request at folio 575 of the record, with whom **Jenks, P. J.**, concurs.

John LITTLE, applt., v. **Minot CREHORE**, respt. (No. 1.) (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Order unanimously affirmed, with \$10 costs and disbursements.

John LITTLE, applt., v. **Minot CREHORE**, respt. (No. 2.) (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Order unanimously affirmed, with \$10 costs and disbursements.

Sarah E. LODEWICK, Applt., v. **Juliana CUTTING**, implt., etc., Respt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with 10 costs and disbursements. No opinion. Order filed.

In the matter of the claim of **Dominick LOGARMARSSINO** for compensation under the Workmen's Compensation Law, v. **JOHN T. STANLEY COMPANY, Inc.**, employer, and **Zurich General Accident & Liability Insurance Company, Ltd.**, insurance carrier, applts. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

Mary A. LUDLAM v. **Henry A. LUDLAM** et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal denied. Order filed.

In the Matter of **John H. LUDWIG**, dec'd. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Decree affirmed, with costs. No opinion. Order filed.

Rudolph LUDWIG, Respt., v. **Warren F. ROLLINS et al.**, Applts. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

Albert LYONS et al. v. **Benjamin GOLDBERG et al.** (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application granted. Order signed.

In the Matter of the claim of **Annie McCaffery** for compensation under the Workmen's Compensation Law, **STATE INDUSTRIAL COMMISSION**, respt., v. **E. I. DU PONT DE NEMOURS & COMPANY, Inc.**, employer, applt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Award reversed, and claim dismissed. All concur.

In the matter of the application of **William McCARTHY**, relator-respondent, v. **BOARD OF EDUCATION OF THE CITY OF NEW YORK**, appellant. (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Motion denied, without costs.

Thomas J. McCONNELL, Respt., v. **N. Y. RAILWAYS CO.**, Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Thomas Leo McCONNELL, an inf., etc., Respt., v. **N. Y. RAILWAYS CO.**, Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Patrick McCRANN, Respt., v. **OLD COLONY CONSTRUCTION CO.**, implt., etc., Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Peter McCRANN, an infant, Respt., v. **OLD COLONY CONSTRUCTION CO.**, implt., etc., Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Brice W. McDOWELL v. GLENS FALLS INSURANCE CO. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion granted, without costs. Order filed.

Brice W. McDOWELL, Applt., v. GLENS FALLS INSURANCE CO., Respt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

John F. MacENULTY, Respt., v. CARNEGIE STEEL CO., Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order modified, by striking out the provision for the examination of plaintiff's own witnesses on this commission, and, as so modified, affirmed, without costs. No opinion. Order filed.

Frank J. McGOWAN, respondent, v. P. BALLANTINE & SONS, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Judgment and order reversed, and new trial granted, costs to abide the event, on the ground that the verdict was against the weight of the evidence. Jenks, F. J., and Mills, Rich, Putnam, and Blackmar, JJ., concur.

In the Matter of Patrick J. McGRATH. (Supreme Court Appellate Division, First Department. October 21, 1919.) Order reversed, and motion granted, and the matter remitted to the court at Special Term for determination upon the merits. No opinion. Order filed. Motion to dismiss appeal denied. Order filed. See, also, 180 App. Div. 140, 178 N. Y. Supp. 231.

In the matter of the judicial settlement of the account of Robert H. McGRATH, as substituted trustee under the will of John C. Miles, deceased. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion for leave to appeal to the Court of Appeals denied.

Matter of Patrick J. McGRATH. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion denied, without costs. Order filed.

In the Matter of John MacGREGOR, an attorney. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Reference ordered before Hon. Henry A. Gilderdalee, official referee. Settle order on notice.

Henry McGURK, respt., v. Mary J. LIGHTHALL, appellant, Edwin Smith, Nancy A. Morris, and Adella Cole, defendants. (Supreme

Court, Appellate Division, Third Department. November 21, 1919.) Order unanimously affirmed, with \$10 costs and disbursements.

Charlotte L. MACKENZIE et al., Appls., v. Arthur F. LUKE et al., impleaded, etc., Respts. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order (108 Misc. Rep. 177, 178 N. Y. Supp. 154) affirmed, with \$10 costs and disbursements. No opinion. Order filed.

John W. McKINNON, as agent, etc., v. CITY OF NEW YORK (two cases). (Supreme Court, Appellate Division, First Department. October 31, 1919.) Motion denied, with \$10 costs. Order filed.

Mary McLAUGHLIN, as guardian ad litem of Michael Edward McLaughlin, an infant, respondent, v. Max KORNBLUM, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Judgment and order of the County Court of Kings County unanimously affirmed, with costs. No opinion.

In the Matter of the Judicial Settlement of the Accounts of James H. McNAIR, as administrator, etc. (Supreme Court, Appellate Division, Fourth Department. October 1, 1919.) Motion to dismiss appeal granted, unless appellant within 10 days shall give the undertaking required by section 2759 of the Code of Civil Procedure, and pay to respondent's attorney \$10.

John G. McNALLY, respondent, v. SAMUEL APPEL COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) The evidence amply justified the finding of negligence upon the part of the appellant. Plaintiff had the right, in a measure at least, to rely on the presumption that the driver of the automobile would obey the law, and would not enter the prohibited zone within eight feet of the street car, and if the plaintiff had seen the approaching automobile he still could have relied on the presumption that it was slowing down with the intention of stopping in obedience to the law. Subdivision 3, § 17, art. 2, c. 24, of the Code of Ordinances of the City of New York; *Crombie v. O'Brien*, 178 App. Div. 807, 166 N. Y. Supp. 858. Judgment and order unanimously affirmed, with costs.

Irene McNAMARA, as administratrix, etc., respt. v. EASTMAN KODAK CO., impleaded, etc., applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Motion for reargument granted, and particularly on the question whether or not the court should have limited the jury in its consideration of the alleged fraud of Mullen in procuring the release, to the claim that the \$300 was paid to

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the plaintiff as a gratuity only. Reargument to be had on October 18th.

Helen E. McNAMARA, an infant, etc., resp't., v. INTERNATIONAL RAILWAY CO. and one, appls. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment and order affirmed, with costs. All concur.

Jeremiah McNAMARA, resp't., v. INTERNATIONAL RAILWAY COMPANY and one, appls. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment and order affirmed, with costs. All concur.

Bessie McNAMARA, appellant, v. KRANICH & BACH, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Peter H. McNULTY, appellant, v. BROOKLYN HEIGHTS RAILROAD COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

MADDALINO OLIVE OIL CO., Inc., v. GIOVANO AQUINO. (Supreme Court, Appellate Division, First Department. October 21, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms of order. Order filed.

In the matter of the claim for compensation under the Workmen's Compensation Law, made by James MAGLIOLA, resp't., v. HURON STEVEDORING CORPORATION, employer and self-insurer, applt. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

Jonas J. MAISEL, respondent, v. Harry SHANHOLT, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Motion for stay granted, on condition that appellant perfect the appeal, place the same on the calendar, and be ready for argument on Friday, November 14, 1919, for which day the cause is specially set down; otherwise, motion denied, with \$10 costs.

George H. MAKEPEACE, Applt., v. Philip VAN VALKENBURGH, Resp't. (Supreme Court, Appellate Division, First Department. October 24, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Matter of Alfred S. MALCOMSON, deceased. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed. See 188 App. Div. 600, 177 N. Y. Supp. 238.

Frank MANDEL, appellant, v. Dominick SPINELLI and Elizabeth Mandel, respondents. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

Martin MANDELL v. INSURANCE CO. OF THE STATE OF PENNSYLVANIA. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application granted. Order signed.

Minnie I. MARQUET, appellant, v. William S. KINSEY and Emma L. Kinsey, respondents. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Lorena L. MARSTON, Resp't., v. Nat. A. MILLMAN and another, Appls. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

Grazia MASULLI, respondent, v. IMPERIAL DRESS COMPANY, Inc., appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

John MATUS, respondent, v. John SMEL-OFSKI and Mary Smelofski, appellants. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Judgment and order of the County Court of Westchester County unanimously affirmed, with costs. No opinion.

George T. MAXWELL and Cantine T. Scoville, appellants, v. Lella S. SCOVILLE, as executrix, etc., impleaded with others, respondents. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Putnam, Blackmar, Kelly, and Jaycox, JJ., concur.

George T. MAXWELL and Cantine T. Scoville, appellants, v. Lella S. SCOVILLE, as executrix, etc., defendant; Lella Frances Sco-

ville, respondent, impleaded with others. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

MECHANICVILLE & FT. EDWARD RAILROAD COMPANY, applt., v. **FITCHBURGH RAILROAD COMPANY**, Boston & Maine Railroad, Lessee, and James H. Hustis, as receiver of Boston & Maine Railroad, respts. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Judgment (103 Misc. Rep. 46, 170 N. Y. Supp. 476) unanimously affirmed, with costs.

Philip **MECHLOWITZ** et al. v. Joseph **KRENK**. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

In the Matter of Henry D. **MERCHANT**, etc., Applt., v. William F. **SCHNEIDER**, as Clerk, etc., Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Matter of Henry D. **MERCHANT** v. William F. **SCHNEIDER**, as Clerk of the County of New York. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion denied, with \$10 costs. Order filed.

METAL SHELTER CO., Inc., v. William I. T. **FOSDICK**, implead. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, without costs. Order filed.

METROPOLITAN PETROLEUM CORP'N OF DELAWARE v. Harry **CONTENT** et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, without costs. Order filed.

METROPOLITAN PETROLEUM CORPORATION OF DELAWARE, Respt., v. Harry **CONTENT** et al., Applts. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

METROPOLITAN PETROLEUM CORPORATION OF DELAWARE, Respt., v. Richmond **LEVERING** et al., Applts. (Supreme

Court, Appellate Division, First Department. November 14, 1919.) Order, so far as appealed from, affirmed, with \$10 costs. No opinion. Order filed.

In the Matter of the Appraisal of the **ESTATE** of James T. **MILLER**, deceased, under the acts in relation to taxable transfers of property. (Supreme Court, Appellate Division, Fourth Department. October 1, 1919.) Order reversed, and original order entered upon the report of the appraiser affirmed, with costs. Held, that the American Institute of Scientific Research, the respondent, is not an educational corporation within the meaning of section 221 of the Tax Law. (Consol. Laws, c. 60.) All concur.

Isaac **MILLER**, appellant, v. Anna **TELSEY** et al., as executors, etc., respondents. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Motion granted, without costs.

Salvatore **MINOLFI**, Applt., v. Louis **CASAZZA** et al., Respts. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

J. Kearsley **MITCHELL** et al., Respts., v. William F. **HUDSON** et al., implead., etc., Applts. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

M. LURIE WOOLEN CO., Inc., Respt., v. **HEYMAN COHEN & SONS, Inc.**, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Frederick W. **MOORE** et al., Applts., v. **ARISTO HOSIERY CO., Inc.**, et al., Respts. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed. See, also, 178 N. Y. Supp. 344.

William D. **MOORE**, respondent, v. James F. **MOORE** and others, appellants. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Anson B. **MORAN** et al., Applts., v. Herbert H. **VREELAND** et al., implead., etc., Respts. (Supreme Court, Appellate Division, First Department. October 24, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Anson B. MORAN et al. v. Herbert H. VREELAND et al. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion denied, with \$10 costs. Order filed.

Margaret MORIARTY, Applt., v. Mary A. E. WENDEL et al., Respts. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Ida MORRIS v. John MUIR et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application granted. Order signed.

Samuel A. MORRISON, respondent, v. Fritz Leopold SCHMIDT, Jr., appellant. (Supreme Court, Appellate Division, Second Department. December 5, 1919.) A broker employed to sell an interest in land is presumed to accept, as the subject-matter for negotiation, the quantity of title which his principal gives him. Reliance on representations, though necessary in tort actions, is not essential to be averred in such actions of contract. The terms of the contract itself import assent and materiality. Hence plaintiff, suing for commissions, need not plead that he relied on the principal's title as offered for negotiation, and need not negative the possibility that he had discovered his principal's error. The averment that he "procured a purchaser for the said interest" sufficiently alleges performance. *Morton v. Pettit*, 133 App. Div. 377, 117 N. Y. Supp. 364. The word "procured" means, not merely to initiate a transaction, but to bring it about. Order unanimously affirmed, with costs.

Matter of G. Arnold MOSES, an attorney. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Reference ordered to Hon. John W. Goff, official referee. Settle order on notice.

Albert G. MOSHER, respt. v. Estella BLANCHARD and another, appls. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion to open default granted, upon condition that the appellant pay to respondents' attorney \$10 and be ready at the election of the respondent to argue the appeal at the present term of court.

MOTOR HAULAGE COMPANY, Inc., respondent, v. STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Samuel C. MOTT v. RAPID TRANSIT SUBWAY CONSTRUCTION CO., impleaded, etc. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Louis MROZAK, appellant, v. Prudence M. COBB, respondent. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Judgment of the County Court of Westchester County reversed, and new trial ordered in said court, costs to abide the event, upon the ground that the evidence tended to establish that plaintiff was free from contributory negligence. *Mills, Rich, Putnam, Kelly, and Jaycox, JJ.*, concur.

Ida MULKINS, applt., v. Nellie SNOW et al., respts. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Order (106 Misc. Rep. 556, 175 N. Y. Supp. 41) affirmed, with \$10 costs and disbursements, with leave to the plaintiff to serve amended complaint within 20 days, upon payment of the costs of the motion and of this appeal. All concur.

Joseph P. MULQUEEN, as receiver, etc., appellant, v. John LORENZEN and another, defendants, and Henry Apfel, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Lottie MUNCIL, as administratrix of the goods, chattels, and credits of Samuel P. Martin, deceased, respt. v. DIRECTOR GENERAL OF RAILROADS, applt. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Judgment and order unanimously affirmed, with costs.

In the matter of the judicial settlement of the accounts of Anthony B. MUNROE, administrator with the will annexed of the estate of Christina COWARDEN, deceased. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Motion denied. Decree (107 Misc. Rep. 408, 177 N. Y. Supp. 783) unanimously affirmed, with costs, on the opinion of Surrogate Senn.

Jenny Stafford MURPHEY, Applt., v. Alvin M. CRAIG, Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

John MURPHY, respondent, v. ERIE RAILROAD COMPANY, appellant. (Supreme Court, Appellate Division, Second Department.

October 31, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Hyman B. MYERS, appellant, v. RECTOR, CHURCHWARDENS AND VESTRYMEN OF ST. PAUL'S CHURCH, etc., respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

NASSAU LUMBER COMPANY, respondent, v. BAY BOULEVARD REALTY COMPANY, Inc., appellant. (Supreme Court, Appellate Division, Second Department. November 14, 1919.) Judgment unanimously affirmed, with costs. No opinion.

Harry NATHAN v. Ferdinand STRAUSS, implead., etc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

NATIONAL CITY BANK OF NEW YORK, Resp't., v. PARTOLA MANUFACTURING CO., Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

NATIONAL GUM & MICA CO., Applt., v. GENERAL COMMERCIAL CO., LTD., OF U. S., Resp't. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Adam NECKER, respondent, v. RICHMOND ICE COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Mary I. NEILSON, Resp't., v. ELLA REALTY CORPORATION et al., Appls. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Order modified, so as to permit defendants to serve amended answers, setting up as separate defenses the matters now referred to in paragraphs 16 to 21, inclusive, and to incorporate in each separate defense such specific, not general, denials as may be necessary to pleading that defense, and, as so modified, affirmed, without costs. No opinion. Settle order on notice.

NELSON, LEE & GREEN, Inc., Applt., v. "Isaac" WIT, Resp't. (Supreme Court, Appellate Division, First Department. October 31,

1919.) Order affirmed, with \$10 costs and disbursements, with leave to plaintiff to serve amended complaint on payment of said costs, and the costs awarded to defendant by the order appealed from. No opinion. Order filed.

NEWMAN BROS. GRAIN CO., Inc., applt., v. George W. BURLING, resp't. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment affirmed, with costs. All concur.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO., Plff., v. Edmund P. COTTLE et al., defts-respts., and the People of the State of New York, defts-appls. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for leave to appeal to the Court of Appeals denied, with \$10 costs.

NEW YORK LIFE INSURANCE COMPANY, plaintiff, v. Marie TUR and others, defendants, Bernard Davis, appellant, and William Wills, as receiver, respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order affirmed on resubmission, with \$10 costs and disbursements. No opinion. Mills, Rich, Putnam, and Kelly, JJ., concur. Blackmar, J., dissents, on the ground that, in the state of the proof, especially in view of the fact that the assignment was under seal, he thinks the court should not pass upon it without sending it to a referee, to take further proof and report, with his opinion.

NEW YORK & ALBANY LIGHTERAGE CO. v. LAMBERT TRANSPORTATION CO. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

Marie NICOLETTI, Resp't., v. UNION RAILWAY CO. OF N. Y. CITY et al., Appls. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Mary NIEDZWIECKA, an infant, by Vincent Nowicki, her guardian ad litem, respondent, v. WESTCHESTER STREET RAILROAD COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Harriet E. NOBLE v. William B. KENDALL, impleaded, etc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

In the matter of the claim of Mrs. Maja NORMAN for compensation under the Workmen's Compensation Law for the death of Louis Norman v. MERRITT & CHAPMAN DERRICK AND WRECKING COMPANY, employer, and New Amsterdam Casualty Company, insurance carrier, app'ts., and General Contracting & Engineering Company, employer, and Employers' Liability Assurance Corporation, insurance carrier. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

Washington F. NORTON et al., respondents, v. ATLANTIC BEACH REALTY COMPANY et al., respondents, and William A. White and another, appellants. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion denied, without costs.

Frederick H. NORTON and another, appellants, v. Robert MERCHANT, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Mary C. O'BRIEN, appellant, v. BRONX PARKWAY DEVELOPMENT COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

In the matter of the claim of Fred A. OCHSEN for compensation under the Workmen's Compensation Law. STATE INDUSTRIAL COMMISSION, resp't., v. EMPIRE ART METAL COMPANY, employer, and Travelers' Insurance Company, insurance carrier, app'ts. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award modified, by requiring payment for 64 weeks, instead of 76½ weeks, and, as so modified, unanimously affirmed.

PER CURIAM. This is an appeal by the employer and insurance carrier from an award made by the State Industrial Commission, April 16, 1919, awarding compensation for the loss of 60 per cent. vision of the right eye. The most favorable view for the claimant is that the loss was 50 per cent. Award modified, by requiring payment for 64 weeks, instead of 76½ weeks, and, as modified, affirmed.

O'CONNELL CONTRACTING CO., Resp't., v. G. B. RAYMOND & CO., App't. (Supreme Court, Appellate Division, First Department.

November 21, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Jennie O'CONNOR v. RICHARD CARVEL CO., Inc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

Jacob OEHRIG, etc., appellant, v. BROAD CHANNEL CORPORATION, respondent. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Judgment unanimously affirmed, with costs. No opinion.

Bertha E. OLSEN, as adm'x, resp't., v. NEW YORK CENTRAL RAILROAD CO., app't. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for reargument or leave to appeal to the Court of Appeals denied, with \$10 costs.

Adelaide E. O'MEARA, Resp't., v. Nicholas BETJEMAN et al., impleaded, etc., App'ts. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Thomas A. O'NEILL, appellant, v. LAKE CHAMPLAIN TRANSPORTATION COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Judgment unanimously affirmed, with costs. No opinion. Jenks, P. J., and Mills, Rich, Putnam, and Blackmar, JJ.

Fred OTTE, Jr., Resp't., v. INTERIOR METAL MANUFACTURING CO., App't. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

PACIFIC FLUSH TANK COMPANY, plaintiff, v. VILLAGE OF HEMPSTEAD, appellant and respondent, New York County National Bank, appellant, and Archibald G. Patterson and Breslin Company, respondents, impleaded with others, defendants. (Supreme Court, Appellate Division, Second Department. November 14, 1919.) Judgment of the County Court of Nassau County unanimously affirmed, with a separate bill of costs to each respondent appearing and filing a brief upon this appeal. No opinion.

Max PALESTINE v. Edwin H. SAYRE et al., as Ex'rs, etc. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Application denied, with \$10 costs, and stay vacated. Order signed.

Rose M. PALMER and Lillian Palmer, plaintiffs, v. ROTARY REALTY COMPANY, Inc., et al., defendants. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) The order of Mr. Justice Cropsey of October 7th, for an examination before trial of defendant Rotary Realty Company by its president, having so far been unexecuted, makes a ground to stay the trial until such order be obeyed. Although no appeal here is pending, the Appellate Division has power to act under C. C. P. § 1348. Matter of Mitchel v. Cropsey, 177 App. Div. 663, 164 N. Y. Supp. 336. But as Part III of the Special Term should in the first instance deal with its calendar and applications for postponements, we deem it best to decline now to interfere in the trial procedure. Application for a stay is therefore denied, without costs.

Annina PANESSA, respondent, v. Francesco PANESSA, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed without costs.

John PARISE v. Arthur GOLDSTEIN et al. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

Margaret PARKER, Resp't., v. Maria A. PFISTER, Applt. (Supreme Court, Appellate Division, First Department. November 23, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Christian PAWLIK, resp't., v. Julius S. BERKMAN, applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Motion to dismiss appeal granted, unless appellant shall file and serve printed papers by October 23d, pay to respondent's attorney \$10, and be ready for argument at the opening of November term.

Kate PECKHAM, as administratrix, etc., of Frank W. Peckham, deceased, respondent-appellant, v. CENTRAL RAILROAD COMPANY OF NEW JERSEY, appellant-respondent. (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Orders unanimously affirmed, without costs to either party. No opinion.

PEKIN RESTAURANT CO., Inc., Resp't., v. Jacob H. GRUBMAN, Applt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Eliza J. PELLIS, applt.-resp't., v. Carl KATZENSTEIN, resp't.-applt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order granting a new trial on the ground of newly discovered evidence affirmed, without costs. All concur. Appeal from judgment and order denying motion for a new trial on the minutes dismissed, without costs.

George S. PENNIE, respondent, v. NEW-BURGH ELECTRIC RAILWAY COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

PENNSYLVANIA & DELAWARE OIL CO. plaintiff-appellant, v. A. KLIPSTEIN & CO. defendant-respondent. (Supreme Court, Appellate Term, First Department. October 27, 1919.) Appeal from City Court of New York, Trial Term. Action by the Pennsylvania & Delaware Oil Company against A. Klipstein & Co. From a judgment dismissing the complaint at the close of plaintiff's case, and directing judgment for defendant on the counterclaim, plaintiff appeals. Reversed, and new trial granted. See, also, 175 N. Y. Supp. 540.

PER CURIAM. Judgment reversed, and a new trial granted, on the authority of our opinion on the previous appeal, reported in 175 N. Y. Supp. 540.

PEOPLE v. Otto BANG. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal denied. Order filed.

PEOPLE of the State of New York, respondents, v. Hugh J. CONNELL, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

PEOPLE of the State of New York, resp't., v. FAIRMONT CREAMERY CO. OF NEW YORK, applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Order affirmed, with \$10 costs and disbursements, with leave to the defendant to plead over within 20 days, upon payment of the costs of the motion and of this appeal. All concur.

PEOPLE of the State of New York, resp't., v. Edward GARRISON, applt. (Supreme Court, Appellate Division, Third Department.

November 12, 1919.) Order and judgment unanimously affirmed.

PEOPLE of the State of New York, respondents, v. William F. HARRIGAN, appellant. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motion denied, on condition that appellant perfect the appeal, place the case on the calendar for the January, 1920, term, and be ready for argument when reached; otherwise, motion granted.

PEOPLE, etc., Respt., v. Dennis JARDINE et al., Appls. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment affirmed. No opinion. Order filed.

PEOPLE of the State of New York, respondents, v. LONG ISLAND RAILROAD COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

PEOPLE of the State of New York, respondents, v. Philip MILLER, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment of conviction and order of the County Court of Kings County affirmed. No opinion. Jenks, P. J., and Putnam, Blackmar, and Kelly, JJ., concur.

PEOPLE of the State of New York, respondents, v. Joseph L. MURRAY, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment of conviction and order of the County Court of Westchester County affirmed. No opinion. Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ., concur.

PEOPLE of the State of New York, plaintiffs, v. NATIONAL SECURITY COMPANY, defendant. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Motion denied.

PEOPLE of the State of New York, respt., v. James O'HAGAN, applt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Judgment of conviction affirmed. All concur, except Woodward and Cochrane, JJ., dissenting.

PEOPLE of the State of New York, respondents, v. Charles OELENSCHLAGER, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

PEOPLE of the State of New York, respondents, v. Thomas PERKINS, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed.

PEOPLE, etc., Respt., v. Jacob PRICE, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment affirmed. No opinion. Order filed.

PEOPLE, etc., v. Samuel ROSENFELD. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted. Order filed.

PEOPLE of the State of New York, respt., v. Herbert B. SMITH, applt. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Judgment and order unanimously affirmed, with costs.

PEOPLE of the State of New York, Respt., v. Walter SMITH, Applt. (Supreme Court, Appellate Division, First Department. November 23, 1919.) Judgment affirmed. No opinion. Order filed.

PEOPLE of the State of New York, respondents, v. Fred SYROP, appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment of conviction of the County Court of Kings County affirmed. No opinion. Rich, Putnam, and Kelly, JJ., concur. Blackmar, J., votes for reversal of the judgment and a new trial, with whom Jenks, P. J., concurs. Order denying motion for new trial on newly discovered evidence affirmed. Jenks, P. J., and Rich, Putnam, Blackmar, and Kelly, JJ., concur.

PEOPLE of the State of New York, respts., v. James E. WATTERS, applt. (Supreme Court, Appellate Division, Fourth Department. October 1, 1919.) Order affirmed, with \$10 costs and disbursements. All concur.

PEOPLE of the State of New York, respondents, v. Paul WERTHAISER, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Motion to dismiss appeal denied, upon condition that the appeal be perfected and the case placed upon the calendar for the second Monday of the November term, for which date the cause is set down; otherwise, motion granted.

PEOPLE of the State of New York, respondents, v. Paul WERTHAISER, appellant. (Supreme Court, Appellate Division, Second De-

partment. November 14, 1919.) Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., and Rich, Putnam, Blackmar, and Jaycox, JJ., concur.

PEOPLE, etc., Respt., v. Max WOLFISH, Applt. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Judgment affirmed. No opinion. Order filed.

PEOPLE ex rel. Aimee BAKER, Respt., v. Walter BAKER, Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order reversed and petition for writ denied, without costs, upon the ground that the relator is not an inhabitant of the state of New York, as required by section 70 of the Domestic Relations Law (Consol. Laws, c. 14). Order filed.

PEOPLE, etc., ex rel. Charles BAST, respondent, v. John R. VOORHIS et al., constituting the Board of Elections, etc., and another, appellants, Fred C. Pearson, and Samuel J. Mitchell as Sheriff for the County of Queens. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) We are of opinion that the Constitution and the statutes in furtherance thereof require the election of a sheriff of the county of Queens at the general election in November, 1919, and that the fact that Sheriff Mitchell was elected at a special election to fill the vacancy caused by the death of Sheriff Stire does not in any way prevent or postpone this application of the Constitution and the Election Law. The order (108 Misc. Rep. 559, 178 N. Y. Supp. 645) is therefore reversed, without costs, and the motion denied, without costs. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur. Order reversed, 125 N. E. 86.

PEOPLE ex rel. Gertrude CRANE, as Adm'x, etc., Respt., v. Louis H. HAHLO et al., as the Board of Revision and Assessments, etc., et al., Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

PEOPLE ex rel. Gertrude CRANE, as Adm'x, etc., v. Louis H. HAHLO et al., constituting the Board of Revision of Assessments, etc., et al. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion denied, with \$10 costs. Order filed.

PEOPLE, etc., ex rel. Charles F. DELANO, respondent, v. Henry P. TUTHILL, as County Treasurer of the County of Suffolk, appellant. (Supreme Court, Appellate Division, Sec-

ond Department. November 7, 1919.) We cannot conclude positively that the answering affidavits did not raise an issue of a contract, not express, but implied, to accept the reduced rate of payment for this advertising. Under the general rule declared in *People ex rel. McMackin v. Board of Police*, 107 N. Y. 240, 13 N. E. 920, followed in *People ex rel. Van Deren v. Moore*, 78 App. Div. 28, 79 N. Y. Supp. 7, as to the construction of pleadings, we reverse the order, without costs, and deny the motion for a peremptory writ, without costs. The relator may have an order for an alternative writ, without costs, if he be so advised. We express no opinion upon the merits. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur. Settle order before the Presiding Justice.

PEOPLE, etc., ex rel. Watson B. DICKERMAN and another, relators-respondents, v. George W. SUTTON, as Commissioner, etc., et al., appellants. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs, upon the ground that the petition is insufficient as to the claim of overvaluation, because the extent of overvaluation is stated in the aggregate for both parcels assessed, not separately for each, and as to inequality, because the instances in which said inequality exists are not specified. See *People ex rel. O'Neill v. Purdy*, 188 App. Div. 485, 177 N. Y. Supp. 48; *People ex rel. Coney Island Jockey Club v. Purdy*, 152 App. Div. 175, 136 N. Y. Supp. 667, affirmed 207 N. Y. 695, 101 N. E. 1116. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

PEOPLE ex rel. ERIE RAILROAD COMPANY, applt., v. Samuel BAYLESS et al., as Assessors of the Town of Kirkwood, Broome County, New York, respt. (1901-1902, 1903-1904). (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Order unanimously affirmed, with \$10 costs and disbursements.

PEOPLE, etc., ex rel. Hugh A. FLOOD, relator, v. Arthur WOODS, as Police Commissioner of the City of New York, respondent. (Supreme Court, Appellate Division, Second Department. October 24, 1919.) Determination confirmed, and writ dismissed, with \$50 costs and disbursements. No opinion. Mills, Rich, Putnam, Kelly, and Jaycox, JJ., concur.

PEOPLE, etc., ex rel. Dora HERMAN, etc., appellant, v. William J. DOYLE, sheriff, etc., and others, respondents. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

PEOPLE ex rel. William M. HOES, as Adm'r, etc., Respt., v. Lawson PURDY et al., as Com'rs, etc., Applts. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

PEOPLE of the State of New York, on the relation of Frank IRWIN, respt., v. William J. HOMER, Agent and Warden of Great Meadow Prison, applt. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Order unanimously affirmed, on the opinion of Whitmyer, J., at Special Term (107 Misc. Rep. 677, 177 N. Y. Supp. 482), and on the authority of *People ex rel. Kohler v. Kidney*, 223 N. Y. 666, 119 N. E. 1066.

PEOPLE of the State of New York, on the relation of Frank IRWIN, respt., v. William J. HOMER, Agent and Warden of Great Meadow Prison, applt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Motion granted.

PEOPLE of the State of New York on the relation of Frank IRWIN, respt., v. John B. TROMBLY, as Warden of Dannemore Prison, Clinton County, State of New York, applt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Motion granted.

PEOPLE ex rel. Thos. W. KEDDY et al. applts., v. John F. MALONE, as commissioner, etc., respt. (Supreme Court, Appellate Division, Fourth Department. October 1, 1919.) Order (175 N. Y. Supp. 465) affirmed, with \$10 costs and disbursements. Held, without attempting to define the limits of the discretion which may be exercised by the commissioner of parks and public buildings in renting the hall, we see no reason for interfering with the discretion of the Special Term in denying the relator's application for mandamus. All concur.

PEOPLE ex rel. MEXICAN TELEGRAPH CO v. STATE TAX COMMISSION et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

PEOPLE ex rel. Ida MULKINS, applt., v. George A. JIMERSON et al., respts. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for leave to appeal to the Court of Appeals denied, with \$10 costs.

PEOPLE, etc., ex rel. Henry J. MULLEN, respondent, v. John W. MOORE, as Superintendent of Buildings, etc., appellant, and Ste-

phen Cantoni, intervener-appellant. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Order reversed, with \$10 costs and disbursements, on the ground that it was granted without authority of law. The proper remedy was to review the action of the Board of Appeals by certiorari. Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ., concur.

PEOPLE ex rel. NEW YORK DOCK CO., Applt., v. Travis H. WHITNEY et al., as Public Service Commissioners, Respts. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Page, J., dissents. Order filed.

PEOPLE, etc., ex rel. Frank NORDONE, etc., v. Edward S. IRELAND and others, as Sewer Commissioners, etc., respondents. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motion granted, in so far as to relieve the relator from the obligation to print the exhibits. Settle order before Mr. Justice Blackmar.

PEOPLE ex rel. A. Edward SYLVEN, Respt., v. Gust. Pers. WERN, as Pres. and Treas., etc., et al., Applts. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

PEOPLE, etc., ex rel. Grace D. THORNE et al., relators-respondents, v. George W. SUTTON, as Commissioner, etc., et al., appellants. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements, upon the ground that while the petition is insufficient to set up the claim of inequality (see *People ex rel. O'Neil v. Purdy*, 188 App. Div. 485, 177 N. Y. Supp. 48; *People ex rel. Coney Island Jockey Club v. Purdy*, 152 App. Div. 175, 136 N. Y. Supp. 667, affirmed 207 N. Y. 695, 101 N. E. 1116), it is sufficient to set up a claim of overvaluation. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

PEOPLE of the State of New York, ex rel. TOWNS OF BEDFORD, Cortlandt, Eastchester, Harrison, Lewisboro, Mamaroneck, Mt. Pleasant, North Castle, North Salem, Pelham, Rye, Scarsdale, Somers, and Yorktown, and City of Mt. Vernon, relators, v. STATE TAX COMMISSION OF THE STATE OF NEW YORK, and Walter H. Knapp, John J. Merrill, and Michael J. Walsh, constituting the State Tax Commission, and the City of New Rochelle, Westchester County, N. Y., respts. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Determination unanimously confirmed, with \$50 costs and disbursements.

PEOPLE, etc., ex rel. WALLASTON REALTY COMPANY, respondent, v. Charles L. CRAIG, as Comptroller of the City of New York, appellant. (Supreme Court, Appellate Division, Second Department. October 11, 1919.) The corporation counsel applying for leave to appeal to the Court of Appeals, instead of now granting the motion, inasmuch as the corporation counsel states that the questions involved are far-reaching and may affect many similar cases of condemnation, we order a reargument of this appeal, and the case is set down for Friday, October 24, 1919.

PEOPLE, etc., ex rel. Mary C. WARD et al., as executors, etc., relators-respondents, v. George W. SUTTON, as Commissioner, etc., et al., appellants. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs, upon the ground that the petition is insufficient as to the claim of overvaluation, because the extent of overvaluation is stated in the aggregate for both parcels assessed, not separately for each, and as to inequality, because the instances in which said inequality exists are not specified. See *People ex rel. O'Neil v. Purdy*, 188 App. Div. 485, 177 N. Y. Supp. 48; *People ex rel. Coney Island Jockey Club v. Purdy*, 152 App. Div. 175, 136 N. Y. Supp. 667, affirmed 207 N. Y. 695, 101 N. E. 1116. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur. See, also, 186 App. Div. 550, 174 N. Y. Supp. 547.

PEOPLE ex rel. WEST SHORE TRACTION COMPANY, appellant, v. Frederick W. BAUER and others, etc., respondents. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

PEOPLE, etc., on complaint of William COHEN, Resp't., v. Ashbury O. LEONARD, Appl't. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment affirmed. No opinion. Dowling and Merrell, JJ., dissent. Order filed.

PEOPLE, etc., on complaint of Agnes S. LAWLER, respondent, v. William J. LAWLER, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Motion for reargument granted, and case set down for the second Monday of the November term.

PERKINS-GOODWIN COMPANY, Resp't., v. P. H. KEAHON, Inc., Appl't. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order, so far as appealed from, affirmed, with \$10 costs and disbursements. No opinion. Order filed.

PERKINS-GOODWIN CO. v. P. H. KEAHON, Inc. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion denied, with \$10 costs. Order filed.

Joella M. PERRY v. ROAMER SALES CO., Inc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application granted. Order signed.

Sebastian PETRO, respondent, v. INWOOD DAIRY COMPANY, etc., appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment of the County Court of Westchester County reversed, and new trial ordered in said court, costs to abide the event, unless within 20 days plaintiff stipulate to reduce the judgment by deducting therefrom the sum of \$15.50, with interest thereon at 5 per cent. from November 17, 1917, in which event the judgment, as so modified, is unanimously affirmed, without costs. We think that upon the evidence it was a question of fact which should have been submitted to the jury whether or not defendant was entitled to such additional deduction. Jenks, P. J., and Mills, Rich, Putnam, and Blackmar, JJ., concur.

PHILLIPINE VEGETABLE OIL CO., Resp't., v. Spire PITOU, Jr., Appl't. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment and order (105 Misc. Rep. 634, 178 N. Y. Supp. 812) affirmed, with costs. No opinion. Order filed.

James K. PHILLIPS, resp't., v. Julia O. HYDE, as administratrix with the will annexed of Judson L. Hyde, deceased, appl't. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Judgment unanimously affirmed, with costs. John M. Kellogg, P. J., not sitting.

PHOENIX COAL CO. v. PENNSYLVANIA RAILROAD CO. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

James H. PIGOT, appellant, v. Edward J. McKEEVER and another, copartners, etc., respondents. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Marguerite FIGUET v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

PILLSBURY FLOUR MILLS CO., applt., v. Frank OLIVER et al., respts. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Order, so far as appealed from, reversed, with \$10 costs and disbursements, with leave to the defendant to apply at Special Term for leave to serve an amended answer, if so advised. All concur.

Michael PISCATELLI, an infant, etc., v. Michael L. BIRD. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

PITTSBURG WOOL CO., Inc., Respt., v. Hans SCHMIDT, Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. No opinion. Order filed.

In the matter of the application of Elmer O. PLACE for the removal of Paul BAILEY from the office of Justice of the Peace in and for the Town of Babylon, etc. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motion denied.

Arnold POCHER, applt., v. Meyer ASHENBERG and one, respts. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for reargument denied, with \$10 costs. Motion for leave to appeal to the Court of Appeals denied.

Abraham POLLACK, Applt., v. Vincent J. FARLEY, Respt. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

Harry PONCHER, respt., v. NEW YORK RAILWAYS CO., applt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Meyer PONCHER, an infant, etc., Respt., v. NEW YORK RAILWAYS CO., Applt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Mary E. PORTER v. Henry L. BOGERT et al., as Trustees. (Supreme Court, Appellate Division, First Department. November 178 N.Y.S.—58

28, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellants comply with terms stated in order. Order filed.

Daniel C. POTTER, respondent, v. William H. ALIEN, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Clyde POTTS v. CITY OF HORNELL. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Motion to dismiss appeal denied, with \$10 costs. Order filed.

In the Matter of Henry C. PRICE, an attorney and counselor at law. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Issues raised by petition and answer referred to Hon. George A. Benton, official referee.

Berko PRINCE v. CLAUSEN FLANAGAN BREWERY. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

In the matter of the application of the CITY OF NEW YORK, etc., for the opening and extending of PUBLIC PLAYGROUND AND PARK, etc.; Lorimer Street, etc. (Supreme Court, Appellate Division, Second Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. The determination of the value of the expert's services was for the Special Term. Unlike the Rinn Case, 188 App. Div. 903, 175 N. Y. Supp. 918, the detailed services of the expert appear in the record, and the value has been passed upon by the learned justice at Special Term. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

James Garfield PURDY, respondent, v. TITLE GUARANTY & SURETY COMPANY, defendant, and John R. Sweeny and another, appellants. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Milton C. QUIMBY, Respt., v. SCANDINAVIAN-AMERICAN SHIPPING CORPORATION, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs, on the ground that it does not appear that the party sought to be examined has any personal knowledge of the matters which are the subject of the examination. Order filed.

Catherine QUINN, respondent, v. Ellen McCRYSTAL, impleaded with another, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Anna QUINN, respondent, v. Herman W. WIPPERMANN, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Motion denied, on condition that appellant perfect the appeal, place the case on the November calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

RAFFAELE CASCONI & COMPANY, Inc., respondent, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 17, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

RAFFAELE CASCONI & COMPANY, Inc., respondent, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion denied.

Lillian RAFTIS, an infant, etc., Resp't., v. Fred FRY (or Frey), Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. No opinion. Order filed.

In the Matter of the Application of George RAMSEY, for admission to the bar (from the District of Columbia). (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Application granted.

Joseph RANDAZZO, respondent, v. Sarah LEVINE, appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion denied, on condition that appellant perfect the appeal, place the case on the calendar for January, 1920, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

Annie RAPPAPORT v. Lena WILLIAMSON. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Frank J. RECK, resp't., v. Frank X. BERNHARDT, impleaded, etc., applt. (Supreme Court, Appellate Division, Fourth Department.

October 8, 1919.) Judgment affirmed, with separate bills of costs to each of the respondents appearing upon this appeal by separate attorney and filing brief. All concur.

Louis B. REEDER v. William W. FERGUSON, implead., etc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

Patrick REGAN, respondent, v. Charles E. DRAKE and Horace E. Jones, copartners, etc., appellants. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Lorens REICH, Applt., v. Alexander S. COCHRAN et al., as Ex'rs, etc., Resp'ts. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed. See, also, 171 App. Div. 113, 157 N. Y. Supp. 130.

Matter of REID'S MILL LANE. In re Carl CHRISTIAN. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion denied, with \$10 costs. Order filed.

In the Matter of Appointment of Commissioners, etc., to ascertain compensation which should be justly made to Emil C. Martens and F. F. Martens. In re closing of REID'S MILL LANE, IN BOROUGH OF THE BRONX. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Clarke, P. J., dissenting, upon the ground that in his opinion it is not satisfactorily shown that Reid's Mill Lane was ever a public street or thoroughfare. Order filed.

Emma REIGER, Resp't., v. Charles J. BERGOLD, implead., etc., Applt. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

In the Matter of Hermann REIMERS, dec'd. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Order (107 Misc. Rep. 322, 176 N. Y. Supp. 430) affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Clara L. RENARD, Resp't., v. Maurice RENARD, Applt. (Supreme Court, Appellate Division, First Department. November 14,

1919.) Order modified, by reducing counsel fee to \$500, and, as modified, affirmed, without costs. No opinion. Order filed.

Anita K. RENAULT, appellant, v. Louis F. RENAULT, respondent. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Order affirmed, without costs. No opinion. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

Max RENNERT, Respt., v. Andrew E. KALBACH, as Receiver, Applt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Anita L. REOHR, Respt., v. Charles D. REOHR, Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order modified, by reducing counsel fee to the sum of \$500, and, as so modified, affirmed, without costs. No opinion. Order filed.

Philip RHINELANDER, as surviving ex'r and trustee, etc., Applt., v. Eugene L. RICHARDS, as trustee, etc., Respt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment affirmed, with costs. No opinion. Order filed. See, also, 184 App. Div. 67, 171 N. Y. Supp. 436.

RICHMOND ASSETS COLLECTING COMPANY, respondent, v. Albert H. GROSS, defendant, and Philip Kleeberg, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Valentine RIES, respondent, v. CITY OF NEW YORK, appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment and order reversed, and new trial granted, costs to abide the event, unless within 20 days plaintiff stipulate to reduce the verdict to \$20,000, in which event the judgment, as so modified, and the order, are unanimously affirmed, without costs. No opinion. Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ., concur.

Bernard RIFKIN, Applt., v. NOVELTY MANUFACTURING CO., Respt. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Judgment and order reversed, and new trial ordered, with costs to appellant to abide event, on the ground that a question of fact was presented as to whether or not the defendant repudiated the contract,

which should have been submitted to the jury. Dowling and Smith, JJ., dissent. Order filed.

In the Matter of the ESTATE of Wardell G. ROBINSON, deceased. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Decree affirmed, with separate bills of costs to each of the respondents appearing upon this appeal by separate attorney and filing brief, payable out of the estate. All concur.

Morris ROBINSON, Respt., v. WILSON & CO., Inc., Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Helen M. RODGERS v. Martha M. RODGERS et al. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Motion granted. Order filed.

Jehiel M. ROEDER, as Trustee, etc., Applt., v. Oscar J. MAYER, Respt. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

In the matter of the application of John F. ROGERS, for a peremptory writ of mandamus, etc. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

John J. A. ROGERS, respondent, v. Carolina SCHNEIDER, appellant. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) The learned County Court was too courteous and too complacent to the various irregularities which marked the trial of this case. The animosity of the attorneys explains, but does not palliate, their conduct of the trial. We think that in the interests of justice there should be a new trial for the error in permitting evidence as to the defendant's signature to the application for her marriage license. See folios 444, 445, 446, and 447. Judgment and order of the County Court of Queens County reversed, and new trial ordered, costs to abide the event. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

Katherine H. ROHLOFF, Respt., v. Robert M. CATTS, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order (175 N. Y. Supp. 888) reversed, without costs, and order of the City Court modified, by providing that defendant

may serve his answer upon payment of full costs of the action, to be taxed by the clerk, and by the further provision that the judgment may stand as security, and staying the action of the sheriff in the further execution of the judgment until the action be finally determined. No opinion. Settle order on notice.

Samson ROSENBLATT, Applt., v. B. BROWN, Inc., Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

William ROSENBLATT, Applt., v. W. R. GRACE & CO. et al., Respts. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs, on the ground that the proper remedy for the relief desired would be by motion for a bill of particulars. Order filed.

Miles ROSENBLUTH v. Augusta SULTAN et al. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Hilliard J. ROSENCRANTZ, Applt., v. GASTON, WILLIAMS & WIGMORE, Inc., Respt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs, on the authority of Commercial Trust Co. v. Columbia Trust Co., 183 App. Div. 106, 170 N. Y. Supp. 552. Order filed.

Mabel G. ROTHCHILD, etc., appellant, v. George EICKEMEYER et al., respondents. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

Gertrude M. ROWE, respondent, v. George W. SNYDER, appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion granted, with \$10 costs, on the ground that the appellant has failed to comply with the provisions of rule XII of this court, without prejudice to an application to be made to reinstate the appeal.

Gertrude M. ROWE, respondent, v. George W. SNYDER, appellant. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motion to reinstate appeal

granted, on condition that appellant pay \$10 costs, perfect the appeal, place the case on the December calendar, and be ready for argument when reached; otherwise, motion to reinstate appeal denied, with \$10 costs.

ROYAL INDEMNITY CO., Respt., v. Elizabeth W. HASSLACHER, Applt. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Samuel RUBENSTEIN, Applt., v. ASTORIA VENEER MILLS & DOCK CO., Respt. (Supreme Court, Appellate Division, First Department. October 24, 1919.) Order of June 18, 1919, modified, as stated in order, and, as so modified, affirmed, with \$10 costs and disbursements to appellant. Order of July 8, 1919, reversed, and motion denied, without costs. No opinion. Order filed.

RUDOLPH WALLACH COMPANY (W. W. Erwin et al., substituted plaintiffs), Respts., v. Jacob HOLZMAN et al., impls., etc., Appits. (Supreme Court, Appellate Division, First Department. November 23, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Maximillian M. RUTTENAU, respondent, v. Elizabeth L. RUTTENAU, appellant. (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Motion granted, without costs.

Augusta RUX, respondent, v. John H. SCHUMANN, Jr., appellant. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Martha P. RYDER, respondent, v. Lida P. BELL, as executrix, etc., of James Bell, deceased, appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

SACKETT COAL COMPANY, respondent, v. LINK REALTY & CONSTRUCTION COMPANY and others, defendants, and Linken Realty Corporation, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order affirmed, without costs. No opinion. Jenks, P. J., and Mills, Rich, Putnam, and Blackmar, JJ., concur.

SACKETT COAL COMPANY, respondent, v. **LINK REALTY & CONSTRUCTION COMPANY** and others, defendants, and **Linken Realty Corporation**, appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion denied.

William J. SAGER, respondent, v. **NEW YORK RAILWAYS COMPANY**, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Gabriel SALANT et al. v. PENNSYLVANIA RAILROAD CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion granted; questions certified; order filed.

In the matter of the claim for compensation under the Workmen's Compensation Law, made by **Eufenia B. SALERNO**, as widow of **James Salerno**, deceased, claimant, resp., v. **LANE CONSTRUCTION COMPANY**, employer, and **Aetna Life Insurance Company**, insurance carrier, appls. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

SAMUEL EISEMAN & CO., Inc., v. **Julius G. KUGELMAN et al.** (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

Michael SANTORO, Resp., v. **Remigio SANTERAMO et al.**, Appls. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Order modified, and limited to requiring defendants to pay over to the receiver the face of the note to the firm for \$913.70, payable June 8, 1919, assigned by them after the appointment of the receiver, together with interest thereon, and eliminating all other provisions of the order, and, as so modified, affirmed, without costs. No opinion. Settle order on notice.

Michael SANTORO, resp., v. **Remigio SANTERAMO**, applt. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Order reversed without costs, and motion denied without costs. No opinion. Order filed.

In the matter of opening of **SARATOGA AVENUE**, etc., **Chester Street**, etc., **NEW YORK, BROOKLYN & MANHATTAN BEACH RAILWAY COMPANY** and another, appellants, v. **CITY OF NEW YORK**, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

George W. SCHAICH, resp., v. **Reuben A. ADAMS** and one, appls. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Order entered upon stipulation, substituting **Sidney I. Adams** and **John Adams** as executors of the estate of **Reuben A. Adams**, deceased, as defendants in place of said **Reuben A. Adams**, deceased.

Rose SCHATZ et al., as Adm'ces, etc., Appls., v. **NEW YORK CENTRAL RAILROAD CO.**, Resp. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Rose SCHATZ et al., as Adm'rs, v. **NEW YORK CENTRAL RAILROAD CO.** (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion denied, with \$10 costs. Order filed.

Herman F. SCHELLING, Resp., v. **Lewis H. ROGERS**, Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order affirmed, with \$10 costs and disbursements, with leave to defendant to withdraw demurrer and to answer, upon payment of said costs and \$10 costs of motion at Special Term. No opinion. Order filed.

Rose SCHENDEL, Resp., v. **INTERBOROUGH RAPID TRANSIT COMPANY**, Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Gesine SCHENKER v. Henry DOSCHER, impld., etc. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Emily M. SCHLOEMAN, respondent, v. **Vincenzo MASSAGLI et al.**, copartners, etc., appellants. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Jennie SCHLOSSBERG, Resp., v. **BECK SHOE CO., Inc.**, Applt. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Samuel SCHLOSSBERG, Respt., v. BECK SHOE CO., Inc., Applt. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Amelia SCHOONMAKER, respondent, v. Mary A. DIETRICK, appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment and order reversed, and new trial granted, costs to abide the event, unless within 20 days plaintiff stipulate to reduce the verdict to the sum of \$1,500, in which event the judgment, as so modified, and the order, are unanimously affirmed, without costs, upon the ground that we think that the damages allowed by the verdict were excessive, and that \$1,500 would be a liberal allowance therefor. It is to be noted that plaintiff's physician did not testify, and the charge of the court did not permit any allowance for future effects of the injuries. *Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ., concur.*

John C. SCHRIEVER, respondent, v. Antonio CERASO and Alfred Ceraso, appellants. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

John C. SCHRIEVER, respondent, v. Antonio CERASO et al., appellants. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Motion granted.

Joseph SCHUESSLER, as Adm'r, etc., Respt., v. Auguste T. RIEDINGER and another, as temporary adm'rs, etc., Appls. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment affirmed, with costs. No opinion. Order filed.

SCHWALB COAL CO., respt., v. Sabina C. DECKER, applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment affirmed, with costs. All concur.

Louis SCHWARTZREICH v. BAUMAN-BASCH, Inc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion granted. Order filed.

John SCRAB, applt., v. Walter D. HINES, as Director-General of Railroads, and one, respts. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Order affirmed, with \$10 costs and disbursements. All concur.

Austin G. SCULLY, appellant, v. Walter P. TAYLOR, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

SECURITY MORTGAGE CO. v. I. Sidney KALLIS. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

George G. SEGAL, respondent, v. Oscar ENGLANDER, appellant, impleaded with Fannie Siegel, as executrix, etc., defendant. (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Motion granted without costs, on condition that the appeal be heard on October 10, 1919.

George G. SEGAL, respondent, v. Oscar ENGLANDER, appellant, and another, defendant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. *Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.*

Edward SEVERIN, etc., appellant, v. BROAD CHANNEL CORPORATION, respondent. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Judgment unanimously affirmed, with costs. No opinion. See, also, 180 App. Div. 264, 167 N. Y. Supp. 495.

George L. SEXTON v. BRIDGEPORT ENGINEERING CO. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

George L. SEXTON, Applt., v. BRIDGEPORT ENGINEERING CO., Respt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Nelson SHAFFER, appellant, v. Charles E. LEWIS and Frank C. Lewis, respondents. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. *Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.*

Emma C. SHAW, Respt., v. James G. SHAW, Applt. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

SHIPPERS' CAR LINE, Inc., Applt., **v. BROWN HOISTING MACHINERY CO.,** Respt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

SIEGFRIED LOWENTHAL, Inc., Respt., **v. Anna F. SULLIVAN,** impld., etc., Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

David SILBERSTEIN et al., copartners, etc., Respts., **v. Spencer ALDRICH,** Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Robert M. SILVERMAN v. J. Herbert WARE et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellants comply with terms stated in order. Order filed. See, also, 189 App. Div. 216, 178 N. Y. Supp. 520.

George SIMON, respt., v. Comfort ALLEN, applt. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion to dismiss appeal denied, without costs.

Jessie V. SIMONS, appellant, v. Manuel J. JOHNSON, treasurer, etc., respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Motion denied, with \$10 costs.

Jessie V. SIMONS, appellant, v. Manuel J. JOHNSON, as Treasurer, etc., respondent. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Judgment unanimously affirmed, with costs. The allegations of the complaint, construed most favorably to plaintiff, do not show that she was possessed of any office that had any definite tenure of continuance under the by-laws or rules of the association. The position she held was a mere administrative agency, subject to be terminated at any time, with or without cause, at the pleasure of the governing board of the association. The principles applicable to the expulsion of members from corporations, or the amotion of officers having definite terms of office, or the expulsion of members from voluntary associations, do not apply.

In the Matter of the Application of Anna W. SIMPSON, as General Guardian, etc. In re **Richard C. BONDY et al., Trustees, etc.** (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Paul SINNEK, appellant, v. BEADLESTON & WOERZ, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Herbert S. SISSON, as State Commissioner of Excise, appellant, v. Vincenzo GENEEDA, respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment affirmed, with costs. No opinion. **Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ.,** concur.

SKANDIA PACIFIC OIL ENGINE CO., Respt., **v. CHRISTOFFER HANNEVIG, Inc.,** and another, impld., etc., Applts. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order affirmed, with \$10 costs and disbursements, the date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

George I. SKINNER v. Annie N. ALEXANDER, as Ex'r, etc., impleaded. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

David S. SKINNER, appellant, v. BROOKLYN HEIGHTS RAILROAD COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

George I. SKINNER, as Supt. of Banks, v. Alice M. PHIPPS, as Executrix and Trustee, etc., impleaded. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

George I. SKINNER v. PHOENIX INSURANCE CO. et al., impleaded, etc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

George I. SKINNER v. George T. ROGERS, impleaded, etc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

George L. SKINNER, etc., as Superintendent of Banks of the State of New York, respondent, v. David A. SULLIVAN, defendant, Home Bank of Brooklyn and William A. Main, appellants, and others, defendants. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Reargument ordered, and case set down for Monday, November 10, 1919.

In the matter of the claim for compensation under the Workmen's Compensation Law, made by Meyer SLUTZKY, alleged dependent father, Dorothy Slutzky, dependent mother, and by the dependent sister and dependent brother of William Slutzky, on account of the death of William Slutzky, deceased, respts., v. LUDWIG BAUMANN & COMPANY, employer, and Standard Accident Insurance Company, of Detroit, Mich., insurance carrier, appls. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

Edith SMITH, appellant, v. F. B. STEARNS COMPANY, a foreign corporation, and another, respondents. (Supreme Court, Appellate Division, Second Department. October 11, 1919.) Motion denied, on condition that appellant perfect the appeal, place the case upon the December calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

Edith SMITH, appellant, v. F. B. STEARNS COMPANY and another, respondents. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion denied, without costs.

Robert W. SMITH, Jr., appellant, v. Albert KOONZ, respondent, and Harold A. Koonz, defendant. (Appeal No. 1.) (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs. The circumstances disclosed in the affidavit are such as to justify the court that made the order for the examination of defendant in acting upon an affidavit made by plaintiff's attorney. The case falls within the principle of Oshinsky v. Gumberg, 188 App. Div. 23, 176 N. Y. Supp. 406, in that the examination is for the purpose of proving plaintiff's case only. The facts shown to the court indicate that the defendants, and they alone, have personal knowledge of exactly what was done in the operation upon plaintiff's mouth. Those facts the plaintiff must prove, and, as the defendants alone have the knowledge, their examination is material and necessary to the plaintiff's case. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

Robert W. SMITH, Jr., appellant, v. Albert KOONZ, defendant, and Harold A. Koonz, respondent. (Appeal No. 2.) (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Order reversed, with 10 costs and disbursements, and motion denied, with \$10 costs, on authority of Smith v. Koonz (Appeal No. 1.) 189 App. Div. 913, 178 N. Y. Supp. 920, decided herewith. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

In the matter of the claim of Matthew J. SMITH, for compensation under the Workmen's Compensation Law, v. L. E. ELLIS & SON, employer, and Zurich General Accident & Liability Insurance Company, Ltd., insurance carrier, appls. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

May Belle SMITH v. Henry Hammond SMITH, applt. (Supreme Court, Appellate Division, Fourth Department. October 1, 1919.) Order affirmed. No costs are allowed upon this appeal, for the reason that respondent's counsel did not appear upon the argument nor file brief. All concur.

Eugene SMITH, respondent, v. L. Edith SMITH, appellant. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) Motion granted, with \$10 costs.

Matter of Charles A. SMYTHWICK, an attorney. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Respondent's motion to reopen hearing before the referee and take further testimony denied. Settle order on notice.

Charles J. SODERBERY, respondent, v. LAURELTON LAND COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment affirmed, with costs. We think that the Feldblum Case, 151 App. Div. 24, 135 N. Y. Supp. 349, and 210 N. Y. 594, 104 N. E. 1129, is still authority for a situation such as proven here; that is, where the contemplated or represented improvements have been abandoned, and not merely delayed, as was the situation in the Brede Case, 216 N. Y. 247, 110 N. E. 430. In other words, we think that the decision in the Brede Case should not be regarded as having impaired the authority of the Feldblum Case in that respect. Jenks, P. J., and Mills, Rich, Putnam, and Blackmar, JJ., concur.

Samuel SOLOMON, Applt., v. UNION SAVINGS BANK OF THE CITY OF AUGUSTA, GA., Respt. (Supreme Court, Appellate Di-

vision, First Department. December 5, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Harris SPEVAK, respt., v. Edward McMAHON, applt. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Motion for leave to appeal to the Court of Appeals denied, with \$10 costs. Hubbs, J., not sitting.

Moritz D. SPITZER, Applt., v. CHILDS COMPANY, Respt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

In the matter of the claim of Maryanna SPODBALSKI, widow, on behalf of herself and infant child, on account of the death of Frank Spodbalski, deceased, claimant, respt., under Workmen's Compensation Law, v. L.A. LANCE & GROSJEAN MFG. COMPANY, employer, and Globe Indemnity Company, insurance carrier, appls. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Award unanimously affirmed.

Anna STACKLER, as administratrix, etc., respondent, v. Harold R. TALBOT, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Fred STANDLER, Respt., v. Barbara STANDLER, Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment affirmed. No opinion. Order filed.

STAR COMPANY v. WHEELER SYNDICATE, Inc. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

George STEELE, applt., v. TOWN OF WAYNE, respt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment and order affirmed, with costs. All concur.

Bertha STEINBERG, plaintiff, v. Lizzie C. DOSCHER, implicated with others, respondent, and Thomas Kohlweiss, purchaser-appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ., concur.

Martin STELLJES and Anna J. Stelljes, appellants, v. NORTH SIDE BANK OF BROOKLYN, respondent. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. In the absence of any allegation in the complaint that plaintiffs have paid the \$8,000 secured by the bond and mortgage, it is difficult to perceive upon what theory their demand is based. Nor is there any allegation of return or tender of the note, the amount of which they seek to recover in this action. In any event the defense interposed in the answer raises an issue for trial. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

Charles STEMBERG, respondent, v. Lladyslava STEMBERG, appellant. (Supreme Court, Appellate Division, Second Department. October 17, 1919.) Motion denied, without costs.

Emanuel J. STERN, appellant, v. ACME MALTING COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. November 14, 1919.) Judgment and order unanimously affirmed, with costs. No opinion.

Eva STERN, Applt., v. Fannie BROMBERG, Respt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order, so far as appealed from, modified, by denying the motion as to the third, fourth, and fifth specifications of particulars, and, as so modified, affirmed, with \$10 costs and disbursements to the appellant. No opinion. Order filed.

Leonore R. STERN, Respt., v. INTERBOROUGH RAPID TRANSIT CO., Applt. (Supreme Court, Appellate Division, First Department. November 21, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Pauline STERNBERGER and another, as executors and trustees, etc., respondents, v. Randolph M. SMILEY, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Morris STILLERMAN and another, respondents, v. Joe HANDELSMAN, appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Application denied, without costs.

Christine STOCK, respondent, v. August KNIPPENBERG, appellant, and Lord & Taylor and Eleton Company, defendants. (Supreme Court, Appellate Division, Second De-

partment. October 31, 1919.) Judgment unanimously affirmed, with costs. No opinion.

Maude R. STODDARD v. John M. STODDARD. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

Maude R. STODDARD, Resp't., v. John M. STODDARD, Applt. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Motion granted, and application for leave to appeal granted. Order signed.

In the matter of the petition of **Leita H. STRATTON**, to compel **James E. Bennet**, to render and settle his account as one of the executors of **Horatio Mulford Stratton**, deceased. (Supreme Court, Appellate Division, Second Department. November 7, 1919.) The record discloses that the item of \$686.13, with which the accountant is surcharged, was money loaned to Warner from objectant's personal funds, was a personal transaction, and not a proper subject for surcharge. The item of \$45.36 had been accounted for in the so-called agent's account, and the item of \$883, with which the accountant was surcharged, was a part of appellant's charge for legal services, and was chargeable upon objectant's interest, not on the estate, and the surrogate was without power to disallow any portion thereof. The decree as to these items is reversed. The motion for a rehearing should have been granted, to give accountant an opportunity to show the disbursements which appear from the agent's account, and which might properly offset the surcharges of items \$622.51 and \$257.33. The order of the Surrogate's Court of Kings County, denying motion for a rehearing, is therefore reversed, and the matter remitted to the surrogate, to take further proof, with costs to appellant. **Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ.,** concur.

In the matter of the application of **Charles STRAUSS et al.**, constituting the Board of Water Supply of the City of New York, to acquire real estate, etc., in the Towns of Mt. Pleasant, Harrison, and North Castle, Westchester County, etc. **Kensico Reservoir (Highways).** (Supreme Court, Appellate Division, Second Department. November 21, 1919.) No part of respondents' land was acquired in this proceeding, nor is any of it contiguous to land acquired by appellant, and no portion thereof abuts upon any discontinued portion of any of the highways which have been closed and discontinued by this proceeding. Respondents' right of recovery cannot be based upon section 42 of chapter 724, Laws of 1906, as amended by section 9, chapter 314, Laws of 1906, because the statute does not apply to this

proceeding, as it is limited to lands within the counties of Ulster, Albany, or Greene. The lands involved in this proceeding are situated in the county of Westchester, and it follows that the order is reversed with \$10 costs and disbursements. **Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ.,** concur.

Howard STREETER, resp't., v. Eugene N. FOSS, applt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Judgment and order reversed, on the ground that the damages are excessive, and a new trial granted, with costs to the appellant to abide the event, unless the plaintiff stipulates to reduce the verdict to \$10,000 and interest, in which event the judgment is so modified, and, as so modified, judgment and order affirmed, without costs to either party. All concur, except **Woodward and Cochrane, JJ.,** who vote for affirmance.

Daniel F. STROBEL, resp't. v. PRESS COMPANY, applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment and order affirmed, with costs. All concur; **De Angelis, J.,** not sitting.

Allene STROHMANN, respondent, v. S. LIEBMAN'S SONS BREWING COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Judgment and order reversed, and new trial granted, costs to abide the event, unless within 20 days plaintiff stipulate to reduce the verdict to \$2,500, in which event the judgment, as so modified, and the order, are unanimously affirmed, without costs. **Mills, Rich, Blackmar, Kelly, and Jaycox, JJ.,** concur.

Oscar STROSENSKY, appellant, v. NASSAU ELECTRIC RAILROAD COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Judgment reversed, and new trial granted, costs to appellant to abide the event. The jury having found a verdict for the plaintiff's wife in her action for damages, the verdict for the defendant in the husband's case is against the evidence and inconsistent. He was at least entitled to recover a reasonable amount for the doctor's services. **Gray v. Brooklyn Heights R. R. Co., 72 App. Div. 454, 76 N. Y. Supp. 24.** **Rich, Putnam, Blackmar, Kelly, and Jaycox, JJ.,** concur.

Rebecca STROSENSKY, appellant, v. NASSAU ELECTRIC RAILROAD COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Judgment unanimously affirmed, with costs. No opinion.

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Leo STRUKEL v. Ignatz ADLER. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs, and stay vacated. Order signed.

Catharine SULLIVAN, Resp't., v. Helen L. ASHLEY as Adm'x, etc., Resp't. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Catharine SULLIVAN, Resp't., v. Helen L. ASHLEY, as Adm'x, etc., Appl't. (Supreme Court, Appellate Division, First Department. December 5, 1919.) Judgment and order affirmed, with costs. No opinion. Clarke, P. J., dissenting, and voting for reversal on the ground that the verdict is against the weight of the evidence. Order filed.

In the matter of the claim of James H. SULLIVAN for compensation under the Workmen's Compensation Law v. DETROIT CADILLAC MOTOR CAR COMPANY, employer, and Zurich General Accident & Liability Insurance Company, Ltd., insurance carrier, appl'ts. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

Birdie H. SURUT, Resp't., v. Henry SURUT, Appl't. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order modified, by reducing alimony to the sum of \$200 a month, and, as so modified, affirmed, without costs. No opinion. Order filed.

In the matter of proceedings supplementary to execution, Frederick B. SUYDAM, as executor, etc., appellant, v. Thomas B. PENTON, Jr., impleaded, etc., respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Charles SWECHULIS, Appl't., v. LEHIGH VALLEY COAL CO., Resp't. (Supreme Court, Appellate Division, First Department. October 24, 1919.) Judgment reversed, and new trial ordered, with costs to appellant to abide event. No opinion. Order filed.

Walter F. SYKES, Resp't., v. Joseph DEGNAN, Appl't. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. The date for the examination to proceed to be fixed in the order. Settle order on notice.

Morris TALSKEY v. Isaac S. WOLF et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

Leon TANENBAUM et al. v. 663-665 BROADWAY CO. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

In the matter of the claim of Hazel TERRELL and minor dependents for compensation under the Workmen's Compensation Law for the death of Isaac Terrell. STATE INDUSTRIAL COMMISSION, resp't. v. ACCO TAXI COMPANY, employer, and Travelers' Insurance Company, insurance carrier, appl'ts. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award unanimously affirmed.

Orville C. TERWILLIGER, respondent, v. MILES-TIGHE CONTRACTING COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Arthur THOMPSON, resp't., v. CAMPE CORPORATION, appl't. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Order unanimously affirmed, with \$10 costs and disbursements.

Edward B. THOMPSON, Appl't., v. Carl W. HAMILTON and another, Respts. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment and order affirmed, with costs. No opinion. Laughlin and Smith, JJ., dissent. Order filed.

Matter of Bernard J. TINNEY, an attorney. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied. Settle order on notice.

William A. TITUS, Resp't., v. Jacob SCHENCK, Appl't. (Supreme Court, Appellate Division, First Department. November 14, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. The date for the examination to proceed to be fixed in the order. Settle order on notice. See, also, 185 App. Div. 585, 173 N. Y. Supp. 230.

Elsie G. TOMPKINS, Resp't., v. Ralph M. CRANE, Appl't. (Supreme Court, Appellate Division, First Department. October 31,

1919.) Order modified, by providing that the original order, dated June 2, 1919, be modified, by striking therefrom the words "converted to the defendant's own use, and parts of it sold and disposed of, what proceeds were derived from the said sale, and to whom it was sold," and, as so modified, affirmed, without costs. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice.

Henry TRAURIG, Respt., v. CARAVEL CO., Inc., Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs, on the authority of *Konheim v. Harris*, 148 App. Div. 238, 240, 132 N. Y. Supp. 1028. Order filed.

Ernest TRIBELHORN, Respt., v. J. K. ESTATE REALTY CORP'N, Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Matter of Granville H. TRIPLETT, an attorney. (Supreme Court, Appellate Division, First Department. October 31, 1919.) The respondent having resigned in writing as a member of the bar of the state of New York, and consented that an order be entered thereon to that effect, and such order having this day been entered, no further proceedings are necessary herein, and they are discontinued.

Rosalie TUTONE, respondent, v. NEW YORK CONSOLIDATED RAILROAD COMPANY, appellant. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Order (107 Misc. Rep. 571, 177 N. Y. Supp. 818) of the County Court of Kings County reversed, with \$10 costs and disbursements, and motion to vacate the order denied. The order of June 5, 1919, for examination of the plaintiff, is modified, so as to provide that the report of the doctor be given to the attorney for defendant, and a copy thereof be given to the attorney for plaintiff. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

In the Matter of the Application of Charles A. TYRRELL, for Letters of Administration, etc., of Emma M. Tyrrell (so called), Deceased. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

U. S. EXPANSION BOLT CO. v. John MARMORSTEIN. (Supreme Court, Appellate Division, First Department. October 17, 1919.)

Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

James H. VAN BRAMER, appellant, v. FIRST NATIONAL BANK OF PEARL RIVER and William A. Serven, respondents, and Robert R. Felter et al., defendants. (Supreme Court, Appellate Division, Second Department. November 14, 1919.) The line of authorities (*Town of Hancock v. First National Bank*, 93 N. Y. 83; *Matter of Bryan*, 3 Abb. N. C. 289; *Matter of Anthony & Co.*, 42 App. Div. 66, 58 N. Y. Supp. 907; *Matter of White*, 44 App. Div. 119, 60 N. Y. Supp. 702; *Long Island Bottlers v. Bottling Brewers*, 65 App. Div. 459, 72 N. Y. Supp. 976; *Akhurst v. National Starch Co.*, 64 Misc. Rep. 445, 119 N. Y. Supp. 561; *American Woolen Co. v. Altkrug*, 139 App. Div. 671, 124 N. Y. Supp. 203, and *Knowlton v. Bannigan*, 11 Abb. N. C. 419), to the effect that the examination of a third party before trial is permissible only for the purpose of perpetuating the testimony to be used on the trial, and that therefore such an order cannot be sustained without allegations that the witness is about to depart from the state, or is sick, or there is some other reason why his testimony cannot be secured at the trial, has been departed from only in cases where the defendant had secured an order compelling plaintiff to furnish a bill of particulars or to make his complaint more definite and certain, which order could not be complied with unless plaintiff obtained the information by the examination of a third party (*Chittenden v. San Domingo Improvement Co.*, 132 App. Div. 169, 116 N. Y. Supp. 829; *Hill v. Bloomingdale*, 136 App. Div. 661, 121 N. Y. Supp. 870; *People v. Armour*, 18 App. Div. 584, 46 N. Y. Supp. 317). We think the exception to the general rule should not be extended, and therefore affirm the order, with \$10 costs and disbursements. Jenks, P. J., and Mills, Putnam, Blackmar, and Kelly, JJ., concur.

VANDERVEER CROSSINGS, Inc., respondent, v. Louis HOCHSTEIN, appellant; Abraham H. Feldman, defendant. (Supreme Court, Appellate Division, Second Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

In the matter of the claim of William H. VAN PATTEN, for compensation under the Workmen's Compensation Law, respt., v. ROCHESTER, SYRACUSE & EASTERN RAILROAD COMPANY, applt. (Supreme Court, Appellate Division, Third Department. November 21, 1919.) Award unanimously affirmed.

Stanzy VEELDORANO v. UNION RAILWAY CO. OF NEW YORK CITY. (Supreme Court, Appellate Division, First Department.

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November 28, 1919.) Motion denied, with \$10 costs. Order filed.

In the matter of the claim of Cornelius VINE, for compensation under the Workmen's Compensation Law, resp't., v. WEST END PRESBYTERIAN CHURCH, his employer, and General Accident, Fire & Life Assurance Corporation, Ltd., insurance carrier, appl't. (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Award reversed, and claim dismissed, on the authority of Matter of Doey v. Howland Co., 224 N. Y. 30, 120 N. E. 53, and Hassen v. Elm Coal Co., 184 App. Div. 715, 172 N. Y. Supp. 430. All concur.

George VOLZ, appellant, v. MANHATTAN BEACH HOTEL & LAND COMPANY (Limited), respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

Jennie P. WAGNER, resp't., v. Matilda A. MITTENDORF, appl't. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Parker WAGNER, an infant, etc., Resp't., v. Matilda A. MITTENDORF, Appl't. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

Gertrude E. WALSH v. Theodore TIEDEMANN. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

WARNER MANUFACTURING CO. v. Joseph S. JACOBS. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

George WASNER, appellant, v. Richard MALONEY, respondent. (Supreme Court, Appellate Division, Second Department. October 8, 1919.) Judgment reversed, with costs, and case remanded to the Trial Term for decision, with findings of fact and conclusions of law as required by section 1022 of the Code of Civil Procedure, upon the ground that the action was tried upon the merits, and there should have been a decision with findings of fact and conclusions of law made by the trial justice, as required by section 1022 of the Code, and that the memorandum filed by said court did not authorize the entry of any judgment whatever.

Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ., concur.

Calvin W. WEDDLE and Lemelly F. Bowne, respondents, v. Stanley GRZECZEZAK, appellant. Appeal No. 1. (Supreme Court, Appellate Division, Second Department. November 21, 1919.) Order of the County Court of Nassau County unanimously affirmed with costs. No opinion. See, also, 189 App. Div. 493, 178 N. Y. Supp. 563.

John WEIDER v. W. R. GRACE & CO. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application granted, upon plaintiff's filing stipulation for judgment absolute in event of affirmance. Order signed.

Ralph M. WEINRICHTER, Resp't., v. INCORPORATED LAND CO., Appl't. (Supreme Court, Appellate Division, First Department. November 7, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

WEISSMAN v. Harris SOLOMON. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion to dismiss appeal granted, with \$10 costs. Order filed.

Matilda WELLS, appl't., v. CITY OF BUFFALO, resp't. (Supreme Court, Appellate Division, Fourth Department. September 22, 1919.) Appeal dismissed, upon stipulation filed.

Oliver J. WELLS v. SOUTHERN RAILWAY CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed.

Joseph WERBELA, appellant, v. THOMAS COLLIERY COMPANY, respondent. (Supreme Court, Appellate Division, Second Department. October 10, 1919.) Order and judgment unanimously affirmed, with costs. No opinion.

William WERNER, respondent, v. CITY OF NEW YORK and another, appellants. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment modified, by deducting from the total amount of damages recovered the sum of \$181.30 principal, and the sum of \$39.98 interest, making a total deduction of \$249.28, and, as so modified, the judgment and the order are unanimously affirmed, with costs, upon the ground that it appears that certain deductions to the amount

of \$181.80 principal were clearly proven, and by inadvertence not allowed by the learned trial justice in directing the verdict for the plaintiff.

John WHALEN, appellant, v. CITY OF NEW YORK, respondent. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

WHEELER SYNDICATE, Inc., v. STAR COMPANY. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Motion denied, with \$10 costs. Order filed. See, also, 180 N. Y. Supp. 693; 188 App. Div. 964, 176 N. Y. Supp. 925.

In the matter of the application of Edward P. WHITE and others to perpetuate the testimony of James H. Fanning and others, respondents; Thomas A. Howell, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Jenks, P. J., and Mills, Rich, Kelly, and Jaycox, JJ., concur.

Patrick WHITE, Respt., v. Peter P. CAPPEL, Applt. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

WHITE TAR ANILINE CORPORATION, Respt., v. SUNBEAM CHEMICAL CO., Inc., Applt. (Supreme Court, Appellate Division, First Department. October 31, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

Zygmunt WIENCKOWSKI, respt., v. INTERNATIONAL RAILWAY COMPANY, applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment and order affirmed, with costs. All concur.

Stella WIENCKOWSKI, respt., v. INTERNATIONAL RAILWAY CO., applt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Judgment and order affirmed, with costs. All concur.

Jay G. WILBRAHAM, Respt., v. Jenny Stafford MURPHEY, Applt. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Order affirmed, with \$10 costs and disbursements. No opinion. Order filed.

In the Matter of Mary E. S. WILLIAMS, Deceased. (Supreme Court, Appellate Division, First Department. November 28, 1919.) Decree, so far as appealed from, affirmed, with costs to the respondents payable out of the estate. No opinion. Order filed.

Frank L. WING, respondent, v. Bessie STEINBERG and another, appellants. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

W. M. RITTER FLOORING CORPN v. Aaron KIRSCH, imple. (Supreme Court, Appellate Division, First Department. October 17, 1919.) Application denied, with \$10 costs. Order signed.

Alexander WOLF, appellant, v. Mary L. KEEFE, respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Order affirmed on argument, without costs. Jenks, P. J., and Mills, Rich, Blackmar, and Kelly, JJ., concur.

In the matter of proceedings supplementary to execution of Tillie WOLK, respondent, v. Jennie LANGER, respondent, and James J. Harvey, receiver, appellant. (Supreme Court, Appellate Division, Second Department. November 17, 1919.) Appeal dismissed, without costs.

WOODRIDGE FARMERS' CO-OPERATIVE CREAMERY CO., Inc., respt., v. Emanuel D. OFFEN, applt. (two cases). (Supreme Court, Appellate Division, Third Department. November 12, 1919.) Order unanimously affirmed, with \$10 costs and disbursements.

Donovan E. WORLEY et al. v. Theodore B. CLEVINGER, respt. (Supreme Court, Appellate Division, Fourth Department. October 8, 1919.) Motion to dismiss appeal granted, unless appellants shall file and serve printed papers on appeal by November 1, 1919, and be ready for argument at the opening of the November term.

Charles F. WRIGHT, respondent, v. Benjamin MARTIN, appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1919.) Judgment unanimously affirmed, with costs. No opinion.

Clara T. WRIGHT as Adm'r, etc., Respt., v. Ralph M. SIMON et al., imple., etc., Appls. (Supreme Court, Appellate Division, First De-

partment. October 31, 1919.) Judgment and order affirmed, with costs. No opinion. Order filed.

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*

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¶74(3) (N.Y.City Ct.) In action by policeman for personal injury in an attempt while on duty to stop a runaway horse, harnessed to a wagon with no one in control, wherein it was neither alleged nor claimed that defendant owner had notice of any particular vice or previous predisposition of the animal which would account for its flight, it was not necessary to allege and present evidence of notice, but the burden was on plaintiff to allege and prove negligence.—Rice v. Von Der Lieth, 178 N. Y. S. 441.

¶74(5) (N.Y.City Ct.) In action by policeman for personal injury in an attempt while on duty to stop a runaway horse harnessed to a

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⇒866(1) (N.Y.Sup.) On appeal from judgment of nonsuit, where the motion for nonsuit was general in its terms, the appellate court will consider only the question actually decided and litigated at the trial.—*Di Caprio v. New York Cent. R. Co.*, 178 N. Y. S. 626.

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⇒1066 (N.Y.Sup.) In an action for the purchase price of bottles, where the only questions for the jury were whether there was a sale by sample and whether the goods delivered conformed to the contract, court committed reversible error by delivering an elaborate charge, in which he submitted question whether plaintiff had "substantially performed," and whether or not the contract was one "which simply called for the delivery of bottles of a certain manufacturer, or whether it called for a delivery in accordance with a sample displayed."—*Heuman v. Kapper*, 178 N. Y. S. 315.

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on a cause for fraud and conversion, *held* to state a cause of action on the judgment and to be sufficient basis for an order of arrest.—*Uintah Basin Producing & Refining Co. v. Campbell*, 178 N. Y. S. 373.

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⚡291 (N.Y.Sup.) Where one bank authorized another bank to pay certain company up to certain amount upon presentation of bills of lading indorsed to first bank's client, and the credit so established was sought to be attached in action against client, client was sufficiently interested to move to set aside attachment and summons and complaint, being entitled to removal of any cloud created by levy as affecting client's ultimate liability for reimbursement to first bank.—*Rosenberg v. Occidental Trading Co.*, 178 N. Y. S. 477.

⚡293 (N.Y.Sup.) To succeed on motion, under Code Civ. Proc. § 682, by junior attaching creditor to vacate a senior warrant of attachment, it must appear that the papers upon which the subsequent attachment was issued were themselves sufficient.—*Hellwig v. Seeley*, 178 N. Y. S. 313.

Where subsequent attachment creditor fails to present the papers upon which his attachment was granted, and does not disclose the ground of such attachment in affidavit upon which motion, under Code Civ. Proc. § 682, to vacate prior warrant of attachment, is based, as required by sections 636, 641, the motion will be denied.—Id.

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IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

⚡130 (N.Y.Sup.) Interests of defendant, who sought to be relieved from contracts for her services as an actress, and interest of film company, desiring to engage her services, were not adverse, and the fact that plaintiff was an attorney for said company at the time he rendered services to defendant in securing her release from said contracts, and in securing for her a more advantageous contract at an increased salary with her old employer, did not bar right of recovery for services rendered.—*Field v. Moore*, 178 N. Y. S. 842.

An attorney may not serve two masters, and may not represent adverse interests or undertake to discharge conflicting duties, and, if he attempts to do so, he is not entitled to compensation from either party.—Id.

⚡147 (N.Y.Sup.) An attorney has a right to enter into a contract fixing the amount of his compensation at a percentage of the amount to be recovered in the action or proceeding, and the court will recognize and protect the right to such compensation, unless the attorney has forfeited it by misconduct, or the agreement was induced by fraud, or the attorney has taken some unconscionable advantage.—In *re Liebergall*, 178 N. Y. S. 857.

⚡158 (N.Y.Sup.) Where an attorney has not been dismissed during the pendency of the proceeding, he will not be relegated to a quantum meruit for recovery of his fee.—In *re Liebergall*, 178 N. Y. S. 857.

(B) Lien.

⚡190(2) (N.Y.Sup.) Where judgment for plaintiff was satisfied, without satisfying the lien of plaintiff's attorney upon the judgment, the satisfaction of the judgment will be set aside to the extent of the attorney's lien.—*Weitzel v. Schmitt*, 178 N. Y. S. 429.

⚡192(1) (N.Y.Sup.) Summary proceeding to determine amount of attorney's lien, under Judiciary Law, § 475, cannot be maintained against a party other than client, except when amount due is beyond dispute; such statute being applicable only to disputes between attorney and client.—*Maier v. Maze Realty Co.*, 178 N. Y. S. 502.

Where attorney's lien is sought to be enforced against party other than client, and amount due is in dispute, proper remedy is action in equity.—Id.

⚡192(2) (N.Y.Sup.) On petition to set aside satisfaction of judgment to the extent of an unsatisfied attorney's lien, court in setting aside satisfaction has no authority to determine the amount for which judgment will be restored, but will merely set aside satisfaction to the extent of the attorney's lien, leaving amount thereof to be determined thereafter in an appropriate proceeding.—*Weitzel v. Schmitt*, 178 N. Y. S. 429.

⚡192(2) (N.Y.Sup.) In proceedings to fix the lien of applicant's attorney, employed to secure his reinstatement as a clerk in the park department of the city of New York, evidence held insufficient to sustain the court's determination that the attorney's conduct had been such as would vitiate his contract for

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half the back pay recovered by him.—In re Liebergall, 178 N. Y. S. 857.

AUTOMOBILES.

See Appeal, $\S$ 927, 1177; Bailment, $\S$ 1; Bridges, $\S$ 44, 46; Livery Stable and Garage Keepers; Master and Servant, $\S$ 301, 302; Municipal Corporations, $\S$ 705, 706; Negligence, $\S$ 89; Sales, $\S$ 392.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

$\S$ 79(1) (N.Y.Sup.) Where defendant, who had been admitted to bail, was called for trial, and three witnesses were examined for the people, which completed their case, and motion was made for direction of acquittal on the ground that the people had failed to make a case, which motion was denied, and defendant was continued on bail during recess to enable him to procure witnesses, and he failed to appear in court when it reconvened to continue trial, but was subsequently arrested in another state and acquitted on the testimony of the same witnesses at second trial, the people were put to the expense of a retrial, and the surety on the undertaking is not entitled to refund of the amount paid in satisfaction of judgment entered on forfeiture.—People v. Scopas, 178 N. Y. S. 291.

BAILMENT.

See Appeal, $\S$ 1177.

$\S$ 1 (N.Y.Sup.) One not connected with a garage or the owner of a car kept therein, who took the same out with the intent of assisting another person in obtaining a priest and doctor to attend such other person's wife, who was critically ill, was not a bailee, but only an interloper.—Niagara Fire Ins. Co. v. Nathan, 178 N. Y. S. 450.

BANKRUPTCY.

See Assignments for Benefit of Creditors; Courts, $\S$ 97.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS.

$\S$ 4 (N.Y.Sup.) The provisions of the federal Bankruptcy Act are paramount to any state statute.—Brenen v. Dahlstrom Metallic Door Co., 178 N. Y. S. 846.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

$\S$ 140(1/2) (N.Y.) Where a contract for the construction of a school building provided that if the contractor should abandon the work the material could be used by the board of education in completing the contract, expenses to be charged against the contractor and deducted from unpaid balances due him, and board of education subsequently took charge of the work under the contract, together with materials and equipment, the material so taken over con-

stituted a part payment in reduction of the contractor's obligation, and was not in any manner affected with a lien, so that on the contractor's bankruptcy four days later the bankrupt's trustee had no right of possession to the property so taken as against the board of education.—Wilds v. Board of Education of City of New York, 125 N. E. 89, 227 N. Y. 211.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

$\S$ 423(1) (N.Y.Sup.) Evidence held to justify finding that defendant bankrupt, at time of obtaining loan from plaintiff to a third person, was beneficially interested, so that plaintiff's judgments against defendant, rendered in an action for obtaining property by false representations, under Bankruptcy Act, $\S$ 17 (U. S. Comp. St. $\S$ 9601), were unaffected by defendant's discharge, and improperly canceled at defendant's motion pursuant to Debtor and Creditor Law, $\S$ 150.—Hyland v. Fink, 178 N. Y. S. 114.

$\S$ 433(7) (N.Y.Sup.) Bankruptcy Act, $\S$ 677 (U. S. Comp. St. $\S$ 9651), applies to executions issued under Code Civ. Proc. N. Y. $\S$ 1301, as to execution against wages being a lien and continuing levy upon wages due or to become due, and the debtor's discharge in bankruptcy, judgment having been duly proven and allowed, frees the bankrupt's salary from the effects of such execution in so far as payments subsequent to the date of adjudication are concerned.—Brenen v. Dahlstrom Metallic Door Co., 178 N. Y. S. 846.

BANKS AND BANKING.

See Attachment, $\S$ 291; Trusts, $\S$ 283.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

$\S$ 148(1) (N.Y.Sup.) Where name of plaintiff firm on check forged by its confidential bookkeeper, drawn upon defendant bank to order of another bank, and deposited in such other bank to credit of plaintiff and paid by defendant, was a clumsy forgery, which could have been discovered by defendant in exercise of ordinary care, the deposit could not be deemed a payment to plaintiff, where payment of the forged check enabled the bookkeeper to cover up his defalcations.—Stumpp v. Farmers' Loan & Trust Co., 178 N. Y. S. 811.

$\S$ 148(3) (N.Y.Sup.) In action by firm against its bank to recover amount paid on a check forged by firm's bookkeeper on bank to order of another bank, deposited therein to firm's credit, and paid by defendant, proof that firm regularly examined monthly statement rendered to them by such other bank, and was deceived into thinking that accounts were correct, because accounts were usually gone over in presence of bookkeeper, who manipulated examination so as to throw firm off its guard, did not show firm's negligence in checking statements.—Stumpp v. Farmers' Loan & Trust Co., 178 N. Y. S. 811.

BARGE CANAL ACT.

See Canals, $\S$ 17.

BASTARDS.**I. ILLEGITIMACY IN GENERAL.**

Ⓒ-3 (N.Y.Sur.) Where parents of boy, 6 years of age in May, 1919, 3 months before his birth agreed to get married, and mother knew that father was furnishing a house, so that they might live there as husband and wife, and was known by his name, and bore him another child, the presumption is that boy, who is and had been living with his maternal grandparents in same city as his father, is legitimate.—*In re Mancini*, 178 N. Y. S. 57.

Ⓒ-3 (N.Y.Sur.) The presumptions favor the validity of a last marriage, of which children were born, and their legitimacy.—*In re Cassidy's Estate*, 178 N. Y. S. 366.

Ⓒ-12 (N.Y.Sup.) Son born prior to ceremonial marriage was legitimated by the marriage, notwithstanding that it was voidable.—*Wolf v. Wolf*, 178 N. Y. S. 726.

BEDBUGS.

See Landlord and Tenant, Ⓒ-125, 171.

BENEFICIAL ASSOCIATIONS.

See Insurance, Ⓒ-646-754.

BIGAMY.

Ⓒ-1 (N.Y.Sur.) Under Domestic Relations Law, §§ 6, 7, a wife has a right to marry again after absence of her husband, unheard of, for a period of five years, and after seven years the husband is presumed to be dead, and bigamy cannot be predicated of any subsequent marriage of the wife.—*In re Cassidy's Estate*, 178 N. Y. S. 366.

BILLS AND NOTES.

See Accord and Satisfaction, Ⓒ-11; Banks and Banking, Ⓒ-148; Counties, Ⓒ-153, 171; Mechanics' Liens, Ⓒ-211, 213, 291; Payment, Ⓒ-21; Pleading, Ⓒ-8; Sales, Ⓒ-89; Wills, Ⓒ-733.

VIII. ACTIONS.

Ⓒ-489(4) (N.Y.) In an action on a note, evidence of forgery was admissible under a denial of execution.—*Dougherty v. Salt*, 125 N. E. 94, 227 N. Y. 200.

Ⓒ-489(7) (N.Y.Sup.) In action on note dated February 28, 1918, the offering for identification of note dated September 28, 1918, held insufficient to sustain judgment for plaintiff.—*Morris Plan Co. of New York v. Rainess*, 178 N. Y. S. 370.

Ⓒ-493(4) (N.Y.) Where the testimony of plaintiff's own witness, speaking at plaintiff's instance, shows that there was no consideration for a note, the mere fact that the note contained the words "value received" did not raise a question for the jury, in view of Negotiable Instruments Law, § 54; for the inference of consideration to be drawn from the form of the note was completely rebutted.—*Dougherty v. Salt*, 125 N. E. 94, 227 N. Y. 200.

BOILER INSPECTION ACTS.

See Master and Servant, Ⓒ-285, 286.

BONDS.

See Attachment, Ⓒ-251, 278; Corporations, Ⓒ-657; Counties, Ⓒ-173; Discovery, Ⓒ-41; Drains, Ⓒ-32; Executors and Administrators, Ⓒ-28, 298; Infants, Ⓒ-82; Injunction, Ⓒ-251; Insurance, Ⓒ-362; Schools and School Districts, Ⓒ-106; Trusts, Ⓒ-161.

II. CONSTRUCTION AND OPERATION.

Ⓒ-48 (N.Y.) Courts should look at an undertaking and the recitals therein, and the legal proceedings out of which it grew, in order to determine its real consideration and conditions.—*Grafton v. U. S. Fidelity & Guaranty Co.*, 124 N. E. 742, 227 N. Y. 162.

BOUNDARIES.**I. DESCRIPTION.**

Ⓒ-8 (N.Y.Sup.) Where only purpose of colonial patent, the description of which did not close, was to make certain the boundaries of patent previously given, the omitted boundary will not be supplied; the straight line rule being one of necessity, applied for purpose of giving effect to grantor's intention, when that intention is obvious, and to prevent a nullification of the grant.—*West Virginia Pulp & Paper Co. of Delaware v. Peck*, 178 N. Y. S. 663.

BOYCOTT.

See Injunction, Ⓒ-101.

BREACH OF THE PEACE.

See Criminal Law, Ⓒ-250.

BRIDGES.

See Canals, Ⓒ-17.

II. REGULATION AND USE FOR TRAVEL.

Ⓒ-37 (N.Y.Ct.Cl.) Where guard gates at the approaches of a drawbridge or lift span were impracticable, because of a trolley wire, the state's failure to install them was not negligence. The keeping of flagman or watchman at each end of such bridge, and the providing of a gong and also an automatic ringing bell, were reasonable and ample precautions.—*Drennan v. State*, 178 N. Y. S. 278.

Ⓒ-44(1) (N.Y.Ct.Cl.) Where a drawbridge crossing a canal was about to be raised, and before starting to raise it an electric bell was kept ringing from the time of the signal to raise the bridge and until after the automobile had crossed over part of it, and the claimants for damages for personal injury were familiar with the bridge, its manner of operation and dangers, they were not negligent in acting upon the invitation and direction of the flagman to proceed in their automobile across the bridge.—*Drennan v. State*, 178 N. Y. S. 278.

Ⓒ-46(6) (N.Y.Ct.Cl.) In an action against the state for personal injuries, resulting from an

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accident upon a highway drawbridge over a canal, evidence *held* to fairly establish claimant's contention that, as they approached the bridge in their automobile, the flagman negligently and carelessly signaled them to pass over it, when he knew it was about to be raised.—*Drennan v. State*, 178 N. Y. S. 278.

BROKERS.

See Pleading, 64.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

624(1) (N.Y.Sup.) Stockbrokers' agreement with owner of stock deposited to protect marginal account to carry owner's account "for a reasonable time" and "see her through" *held* too uncertain from which to find a binding obligation.—*White v. Slayback*, 178 N. Y. S. 421.

635 (N.Y.Sup.) Where owners deposited stock with stockbrokers to protect marginal account, under brokers' agreement to make demand for margin and give due notice of the time and place of sale before selling stock for failure of margin, the sale of such stock by brokers without giving such notice constituted conversion.—*White v. Slayback*, 178 N. Y. S. 421.

638(3) (N.Y.Sup.) In an action against stockbrokers for conversion of collateral stock deposited for purpose of protecting marginal account, complaint *held* to state a cause of action.—*White v. Slayback*, 178 N. Y. S. 421.

IV. COMPENSATION AND LIEN.

654 (N.Y.Mun.Ct.) A broker is entitled to his commissions when he produces a purchaser ready, willing, and able to buy realty upon terms specified by the owner and submitted to broker at time of his employment.—*Guttman v. J. H. M. Const. Co.*, 178 N. Y. S. 443.

657(1) (N.Y.Mun.Ct.) A broker is entitled to his commissions when he produces a purchaser ready, willing, and able to buy realty upon terms specified by the owner and submitted to broker at time of his employment, and any subsequent modification, whether accepted by intending purchaser or not, cannot deprive broker of his commissions.—*Guttman v. J. H. M. Const. Co.*, 178 N. Y. S. 443.

Where a broker, suing to recover commissions, proved that the proposed purchaser was ready, willing, and able to accept, and did accept, the terms as modified by the seller in negotiations relating to the sale of real property, the broker was entitled to judgment in his action for commissions.—*Id.*

V. ACTIONS FOR COMPENSATION.

686(5) (N.Y.Sup.) In broker's action for commissions, evidence *held* to show that the procured purchaser had sufficient funds to purchase on the terms stated by defendant owners.—*Wright v. Blumenfeld*, 178 N. Y. S. 379.

BUGS.

See Landlord and Tenant, 125, 171.

BUILDING.

See Municipal Corporations, 734.

BURGLARY.

II. PROSECUTION AND PUNISHMENT.

637 (N.Y.Sup.) Evidence that tools sold to defendant two days before a burglary were found on the burglarized premises is admissible against defendant.—*People ex rel. Pressler v. Warden of City Prison*, 178 N. Y. S. 311.

642(1) (N.Y.Sup.) Evidence that defendant, shortly after a burglary, is found in the conscious and exclusive possession of property shown to have been on the burglarized premises, without other proof, warrants a conviction.—*People ex rel. Pressler v. Warden of City Prison*, 178 N. Y. S. 311.

643 (N.Y.Sup.) Evidence that defendant had conscious and exclusive possession, shortly before a burglary, of articles found on the burglarized premises directly after the crime was committed, without further proof, warrants a conviction.—*People ex rel. Pressler v. Warden of City Prison*, 178 N. Y. S. 311.

BURGLARY INSURANCE.

See Insurance, 318.

BUS.

See Carriers, 7.

CANALS.

See Bridges, 44, 46; Navigable Waters, 3, 22, 26.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

617 (N.Y.Sup.) Where claimant railroad was compelled to raise bridge over Mohawk river to conform to Barge Canal Act, the state is liable to claimant for expenses of raising street to grade established by bridge, as well as for damages paid to property owners for damage due to raising grade, though claimant before raising grade entered into agreement with village trustees to indemnify village against all claims of property owners for damage due to change of grade.—*Delaware & H. Co. v. State*, 178 N. Y. S. 474.

CANCELLATION OF INSTRUMENTS.

See Judgment, 747; Lis Pendens, 20.

CARMACK AMENDMENT.

See Carriers, 177, 184.

CARRIERS.

See Injunction, 137; Replevin, 4; Sales, 89, 177; Shipping, 139.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

67 (N.Y.Sup.) Laws 1919, c. 307, amending Transportation Corporations Law, § 26, restored to a considerable extent the jurisdiction of the Public Service Commission granted by Transportation Corporations Law, § 25, as en-

acted in 1913, of which the commission has been deprived by Laws 1915, c. 667, and gave every village and town the option to bring itself within the provisions of section 26, as amended, requiring from the commission local consents and certificates of public convenience and necessity for the operation of bus lines.—Niagara Gorge R. Co. v. Gaiser, 178 N. Y. S. 156.

Operator of bus line, partly in village and competing with street railway, *held* to have become a common carrier under Laws 1919, c. 307, amending Transportation Corporations Law, § 26, so that he was under Public Service Commission Law, § 53, requiring that he obtain certificate of public convenience and necessity before exercising a franchise granted by the village.—*Id.*

II. CARRIAGE OF GOODS.

(H) Limitation of Liability.

§151 (N.Y. City Ct.) Under Public Service Commissions Law, § 28, requiring posting of schedules of rates by carrier in every station or office, a transfer or express company, sued for loss of trunk, could invoke schedule limitation of liability to \$150 for each piece of baggage, where such schedule was duly posted in each of its two offices on main floor of terminal, although not posted at small movable desk on mezzanine floor of terminal, used by defendant's agent in writing out baggage receipts, including plaintiff's receipt; such desk not being an "office," within the statute.—*Levett v. Draper*, 178 N. Y. S. 670.

(I) Connecting Carriers.

§177(1) (N.Y. Sup.) In absence of a provision making remedy under Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) to the Interstate Commerce Act exclusive, and in view of proviso that it shall not deprive any holder of an initial carrier's receipt or bill of lading from any remedy or right of action under existing law, the initial carrier, connecting carrier, or terminal carrier may all be held liable to shipper for damage caused by their negligence.—*Pacific Coast Borax Co. v. Shippers' Navigation Co.*, 178 N. Y. S. 182.

§184 (N.Y. Sup.) A complaint alleging that an initial carrier delivered freight intrusted to it to a connecting carrier, not in the good condition in which it had been received, showed that damage was sustained on line of the initial carrier, and stated a cause of action against it under the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa).—*Pacific Coast Borax Co. v. Shippers' Navigation Co.*, 178 N. Y. S. 182.

Complaint alleging that damage to freight was caused while in the possession of the initial carrier, and not setting forth what part of the damage, if any, was sustained on each of the two lines, did not state a separate cause of action against the connecting carrier, in view of the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa).—*Id.*

IV. CARRIAGE OF PASSENGERS.

(D) Personal Injuries.

§286(1) (N.Y. Sup.) Laws 1915, c. 281 (inserting words "cattle guards" in Railroad Law, §

52), *held* not to justify a railroad company in exposing passengers to injury by guards at street crossings alongside station grounds.—*Kovarik v. Long Island R. Co.*, 178 N. Y. S. 705.

§286(9) (N.Y. Sup.) Defendant railroad, which placed cattle guards near its station, and between it and a village highway crossing, owed duty of warning prospective passengers against the danger of entering station grounds across the tracks, especially where guards were covered with snow.—*Kovarik v. Long Island R. Co.*, 178 N. Y. S. 705.

Plaintiff, who in going to station to take train, instead of entering through passenger gate, started from street crossing diagonally over tracks, and was injured by falling on cattle guards, *held* at least an unintentional trespasser without criminal intent.—*Id.*

§298(1) (N.Y.) In a passenger's action against a street railway company for personal injuries sustained by the sudden stopping of the car before the passenger was seated, evidence that the car was suddenly and violently stopped in order to avoid killing a boy upon the track *held* not to sustain a verdict for plaintiff.—*Mints v. International Ry. Co.*, 124 N. E. 893, 227 N. Y. 197.

§317(4) (N.Y. Sup.) In action by plaintiff, who in going to station to take train, instead of entering through passenger gate, started from street crossing diagonally across tracks, and was injured by falling on cattle guards, *held*, that plaintiff should have been permitted to show when the cattle guards were installed, and whether they were installed on both sides of the crossing.—*Kovarik v. Long Island R. Co.*, 178 N. Y. S. 705.

§317(9) (N.Y. Sup.) In an action by plaintiff, who in going to station to take train, instead of entering through passenger gate, started from street crossing diagonally across tracks and was injured by falling on cattle guards, *held*, that plaintiff should have been permitted to prove previous injuries to others.—*Kovarik v. Long Island R. Co.*, 178 N. Y. S. 705.

CATTLE GUARDS.

See Carriers, §286, 317.

CENTRAL PARK.

See Municipal Corporations, §721.

CERTIORARI.

See Municipal Corporations, §218, 621.

CHAMPERTY AND MAINTENANCE.

§7(1) (N. Y. Sup.) A quitclaim deed by record owner of land, who was out of possession, cannot be deemed champertous, where the character of the possession at the time of the execution of the deed was not shown.—*Pines v. Traktman*, 178 N. Y. S. 90.

CHARGE.

See Gas, §14.

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CHARITIES.

See Perpetuities, ¶4; Taxation, ¶886½.

I. CREATION, EXISTENCE, AND VALIDITY.

¶9 (N.Y.) The test of reasonableness has no place as between next of kin of a testator and a charitable trust provided for in a will, and the court will not take an estate from trustees to bestow it upon next of kin in disregard of the express desires of a testator.—*Morris v. Edwards*, 124 N. E. 724, 227 N. Y. 141.

¶11 (N.Y.Sur.) At common law, dispositions in favor of poor relations are to be ranked among charitable uses, whenever they seem to have been treated as such by the testator.—*In re Moller's Estate*, 178 N. Y. S. 682.

There is no principle of public policy prohibiting the foundation of a public charity by way of trust to care for the poor relations of the founder, if the conveyance or limitation is drafted accurately in a technical way.—*Id.*

¶16 (N.Y.) Masses are religious ceremonies and come within the religious or pious uses which are upheld as public charities.—*Morris v. Edwards*, 124 N. E. 724, 227 N. Y. 141.

¶21(5) (N.Y.) A bequest of property to executor to say masses was not void for indefiniteness, although the specific objects of the charity were not named.—*Morris v. Edwards*, 124 N. E. 724, 227 N. Y. 141.

CHILDREN.

See Infants; Parent and Child; Railroads, ¶361.

CHURCHES.

See Religious Societies.

CITIES.

See Municipal Corporations.

COLLATERAL INHERITANCE TAX.

See Taxation, ¶867; 900.

COMMERCE.

See Master and Servant, ¶365, 403.

II. SUBJECTS OF REGULATION.

¶27(8) (N.Y.Sup.) Claimant millwright, while engaged at a terminus of a run between Vermont and New York in ripping a piece of timber, to be used, when ripped, in repairing a caboose which had been operated on the run that day, was not engaged in interstate commerce.—*Fish v. Rutland R. Co.*, 178 N. Y. S. 439.

COMMERCIAL PAPER.

See Bills and Notes.

COMMON LAW.

See Marriage, ¶13, 50, 54; Statutes, ¶239.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, ¶479.

CONFUSION OF GOODS.

See Trusts, ¶166.

CONSPIRACY.

See Criminal Law, ¶511; Homicide, ¶80; Injunction, ¶101; Master and Servant, ¶338, 339; Pleading, ¶8.

CONSTITUTIONAL LAW.

For validity of statutes relating to particular subjects, see also the various specific topics.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(B) Judicial Powers and Functions.

¶70(3) (N.Y.Sup.) Courts have nothing to do with the wisdom of the law; such questions being for the Legislature.—*People ex rel. Franklin Mills Co. v. Collins*, 178 N. Y. S. 65.

¶70(3) (N.Y.Ct.Cl.) The Legislature alone has the power to say what conditions it will impose upon the acceptance by its citizens of the benefits of remedial legislation which it enacts, and courts cannot interfere therewith.—*Cooper-Snell Co. v. State*, 178 N. Y. S. 272.

CONTEMPT.

See Divorce, ¶277; Execution, ¶419; Injunction, ¶221-223.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

¶22 (N.Y.Sup.) Where defendant appealed from an order on plaintiff's motion for judgment on the pleadings, counsel's having execution issued subsequent to the granting of the stay was an attempt to enforce the order, and clearly violated the stay, and was an attempt to impair, impede, or prejudice the right of the defendant, and renders plaintiff's attorney subject to proceedings for contempt.—*Fosdick v. Globe Indemnity Co.*, 178 N. Y. S. 855.

CONTRACTS.

See Appeal, ¶888; Attorney and Client, ¶130, 147; Bills and Notes; Champerty and Maintenance; Corporations, ¶189, 306, 310, 580, 657; Covenants; Damages, ¶62, 123; Evidence, ¶442; Frauds, Statute of; Guaranty; Husband and Wife, ¶51, 138, 278, 279, 281; Indemnity; Injunction, ¶60, 136; Master and Servant, ¶3, 339, 368; Partnership, ¶22; Patents, ¶216; Pleading, ¶237, 311; Release; Sales; Specific Performance; Trial, ¶26, 159; Wills, ¶565; Work and Labor, ¶14.

I. REQUISITES AND VALIDITY.**(A) Nature and Essentials in General.**

⚡10(2) (N.Y.Sup.) Agreements not under seal, in which the promises are unilateral, are void; but, where there is a consideration expressed in the agreement, it may be implied that plaintiff was to render the services for the consideration in question.—*Stadler v. Samuels*, 178 N. Y. S. 324.

(B) Parties, Proposals, and Acceptance.

⚡28(3) (N.Y.Sup.) In action, by one contracting to build elevated railroad structure, to recover on quantum meruit, after rescission because of breach by a defendant, the original contractor, evidence held insufficient to sustain plaintiff's burden to prove contract alleged in complaint, showing that his bid was predicated on the contract of the railroad with the original contractor, the drawings therein referred to, and the drawings showing conditions taken from data furnished by the various city departments, etc.—*Lewis v. New York Municipal Ry. Corporation*, 178 N. Y. S. 116.

(D) Consideration.

⚡72 (N.Y.Sup.) While the abandonment of a colorable claim advanced by one party is consideration for the reciprocal promise by another, the claim must at least be colorable.—*Caruana v. Prudential Spice Co.*, 178 N. Y. S. 401.

(F) Legality of Object and of Consideration.

⚡116(4) (N.Y.Sup.) Where dairymen formed a co-operative association, later incorporated, their signed agreement to deliver all milk produced by them to it, except that retailed and needed for stock raising and family use, with a provision for liquidated damages in case of breach, was not void as against public policy and in restraint of trade.—*Bullville Milk Producers' Ass'n v. Armstrong*, 178 N. Y. S. 612.

II. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

⚡153 (N.Y.Sup.) In construing a contract the court must look at the instrument as a whole, and must give effect, if possible, to every part thereof.—*Kroll v. Oriental Nav. Corporation*, 178 N. Y. S. 250.

⚡175(2) (N.Y.Sup.) Evidence showing the practical construction placed on the agreement while the parties thereto were working under it is admissible in action on it.—*O'Neil v. McKinley Music Co.*, 178 N. Y. S. 459.

(C) Subject-Matter.

⚡204 (N.Y.Sup.) Under publisher's contract with advertiser, providing for monthly insertions of advertisements, "publisher to prepare copy, if not furnished by advertiser, previous advertisement to be repeated in absence of new copy," where advertiser furnished copy for the original advertisement, the publisher's right to recover under the contract depended on repeating the advertisement of the previous month; the publisher's right to prepare copy arising only when no copy at all was furnished by the

advertiser.—*Penton Pub. Co. v. American Oil-Refining Co.*, 178 N. Y. S. 371.

V. PERFORMANCE OR BREACH.

⚡312(1) (N.Y.Sup.) Original contractor to build elevated railroad structure, who sublet the work to plaintiff, suing to recover on quantum meruit after rescission for an alleged breach, held not to have breached the contract in the particular alleged, by requiring the placing of piers and their foundations in front of existing curbs.—*Lewis v. New York Municipal Ry. Corporation*, 178 N. Y. S. 116.

⚡316(3) (N.Y.Sup.) Plaintiff, suing to recover on quantum meruit after rescission, having expressly grounded his attempted rescission on the placing of the piers of the elevated railroad structure which he was to construct, and their foundation, in front of existing curbs, can be heard on no other ground for rescission.—*Lewis v. New York Municipal Ry. Corporation*, 178 N. Y. S. 116.

CONVERSION.

See *Trover and Conversion*.

⚡3 (N.Y.Sur.) Where the personal estate of a wife was insufficient to pay legacies, and her husband, the executor, contributed from his own pocket the difference between what would have gone to the legatees on the theory of an abatement and the amount the will gave, no conversion of the wife's realty resulted from such payment by the executor husband, who was not entitled on such theory to commissions on the entire amount of the estate.—*In re Rhodes' Estate*, 178 N. Y. S. 782.

CONVICTS.

See *Habeas Corpus*, ⚡3; *Pardon*, ⚡2.

CO-OPERATIVE ASSOCIATIONS.

See *Contracts*, ⚡116.

COPPER.

See *Landlord and Tenant*, ⚡161.

COPYRIGHTS.

See *Wills*, ⚡565.

CORPORATIONS.

See *Banks and Banking*; *Carriers*; *Discovery*, ⚡38, 47; *Electricity*; *Evidence*, ⚡244; *Executors and Administrators*, ⚡122; *Gas*; *Insurance*, ⚡16; *Municipal Corporations*; *Pleading*, ⚡51, 301; *Railroads*; *Religious Societies*, ⚡21; *Sales*, ⚡218; *Street Railroads*; *Taxation*, ⚡160, 161, 382; *Trusts*, ⚡217, 218, 272.

I. INCORPORATION AND ORGANIZATION.

⚡14(2) (N.Y.Sup.) A corporation cannot be lawfully authorized to practice dentistry.—*In re Lewis*, 178 N. Y. S. 533.

Under *Public Health Law*, § 203, subd. 4, prohibiting a person from practicing dentistry under a corporate, parlor, or trade name, pro-

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vided that legally incorporated dental corporations, existing prior to 1916, may continue operating while conforming to the provisions of the act, a corporation practicing dentistry which was incorporated prior to 1916 in accordance with the forms of law, is entitled to continue the practice of dentistry, though a corporation cannot be lawfully authorized to practice dentistry; the word "legal" referring to matters of form, while "lawful" refers to matters of substance.—Id.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(D) Transfer of Shares.

⚡120 (N.Y.Sup.) Where defendant, who was vice president and general manager of a corporation, solicited plaintiff to purchase shares of stock, and told her that, if she would buy the stock, he would give her the money back at any time she wanted it, and on the faith of such promise plaintiff paid for and received an "interim certificate," calling for the stock, she was entitled, on offering to return the certificate, to the return of her money; the promise of defendant being a personal one founded upon a good and sufficient consideration.—Pfeiffer v. Mansbach, 178 N. Y. S. 482.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

⚡181(7) (N.Y.City Ct.) Under Stock Corporation Law, § 69, the owner of 5 per cent. of capital stock of a domestic corporation, whether a director or not, upon written request to its treasurer or chief fiscal officer, has absolute right to a verified statement of corporate assets and liabilities, and irrespective of his motive, may maintain an action against the treasurer for the statutory penalty for his failure to comply with such request.—Klingenschmidt v. Martocci, 178 N. Y. S. 673.

⚡189(11) (N.Y.Sup.) Complaint in stockholder's action against two corporations, alleging that plaintiff and another were to be appointed sole representatives of the new or succeeding corporation, without directly alleging that it had adopted contract of the old corporation, and alleging old corporation's delivery of stock in new corporation to plaintiff as required by agreement, stated no cause of action against either corporation.—Lukach v. Blair, 178 N. Y. S. 8.

VI. OFFICERS AND AGENTS.

(A) Election or Appointment, Qualification, and Tenure.

⚡294 (N.Y.Sup.) Assistant manager of corporation, who has been discharged prior to completion of term for which he was employed, because of antagonism toward the president and general manager, will be enjoined from acting or claiming to act as assistant general manager, or from performing or attempting to perform any act or acts similar to those performed by him as assistant general manager prior to his discharge.—Henri Gutmann Silks Corporation v. Reilly, 178 N. Y. S. 457.

(B) Authority and Functions.

⚡306 (N.Y.Sup.) Where the promisee in a corporation's contract can enforce full satisfaction of a judgment obtained in an action against the corporation or the breach of the contract, the directors, if liable at all for causing breach of contract, would not be personally liable.—Lukach v. Blair, 178 N. Y. S. 8.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

⚡310 (1) (N.Y.Sup.) Directors of corporation, not parties to the contract, are not liable to a stockholder for having caused the corporation to breach its contract with another corporation, as such an extension of the doctrine of interfering with a contract right would tend to leave directors open to tort claims whenever the corporation had failed to perform its contracts.—Lukach v. Blair, 178 N. Y. S. 8.

Where a stockholder alleged no cause of action in tort against either of two corporations, the directors thereof could not be held liable on the theory that they were joint tort-feasors with either of their corporation principals in a breach by one corporation of its contract with the other.—Id.

⚡320(1) (N.Y.Sup.) Where the alleged wrongful acts of defendant directors, so far as they injure the corporation, are such as would give it a cause of action, a stockholder seeking to enforce its right of action must rely on a derivative, as distinguished from an individual and direct, action, and that wrongs are alleged to have been the result of a conspiracy, does not change their essential character or the character of the action.—Lukach v. Blair, 178 N. Y. S. 8.

⚡323 (N.Y.City Ct.) In action under Stock Corporation Law, § 69, by stockholder owning 5 per cent. of capital stock of domestic corporation for penalty for treasurer's refusal to comply with a written request for a verified statement of assets and liabilities, a separate defense alleging that stockholder, who was a director, was engaged in a competing business, and had daily access to books, and was suing in bad faith, in view of his pending suit for salary, contrary to an agreement, was insufficient as a matter of law.—Klingenschmidt v. Martocci, 178 N. Y. S. 673.

VII. CORPORATE POWERS AND LIABILITIES.

(D) Contracts and Indebtedness.

⚡482(4) (N.Y.Sup.) In a suit to foreclose a mortgage given by a corporation, where the averments of the complaint that it was executed in due form, and that the statutory certificate of consent of stockholders was adopted, etc., were not denied, allegations in the answer that the real purpose of the mortgage was to obtain money, so that one group of stockholders might buy out others, held insufficient to show that the mortgage was invalid; there being no averment that the mortgagee knew of the improper purpose.—Albany Sav. Bank v. Kingsbury-Leahy Co., 178 N. Y. S. 195.

IX. REINCORPORATION AND RE-ORGANIZATION.

☞580 (N.Y.Sup.) Complaint in stockholder's action against two corporations, alleging that plaintiff and another were to be appointed sole representatives of the new or succeeding corporation, without directly alleging that it had adopted contract of the old corporation, and alleging old corporation's delivery of stock in new corporation to plaintiff, as required by agreement, stated no cause of action against either corporation.—*Lukach v. Blair*, 178 N. Y. S. 8.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

☞599 (N.Y.Sup.) Though Business Corporations Law, § 5, requires one-half of the capital stock of corporations to be paid within one year of incorporation and a certificate of that fact to be filed, and Stock Corporation Law, § 34, requires a corporation to make and annually file in the office of the secretary of state a report, the failure of a corporation to file the certificate is no ground for annulling its charter when the annual report has been filed and the taxes paid on the stock.—*In re Lewis*, 178 N. Y. S. 533.

☞613(2) (N.Y.Sup.) A proclamation by the Governor of California was not necessary to render operative a suspension of corporate rights under the California Corporate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371).—*Siegel v. Maryland Casualty Co.*, 178 N. Y. S. 391.

☞617(1) (N.Y.Sup.) Where the corporate rights of a corporation were suspended by the California Corporate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371), an assignment of a cause of action during the suspension was invalid, and the assignee could not recover thereon.—*Siegel v. Maryland Casualty Co.*, 178 N. Y. S. 391.

The principle of estoppel cannot be applied against a corporation which has undertaken to perform an act after its corporate powers have been suspended, and hence its assignee is not estopped.—*Id.*

☞619 (N.Y.Sup.) The California statute permitting directors or managers of corporations which have been subjected to forfeiture to have full power as trustees to settle the affairs of the corporation, etc., has no application to a corporation whose rights have been suspended under the California Corporate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371).—*Siegel v. Maryland Casualty Co.*, 178 N. Y. S. 391.

Assuming that the California statute, permitting directors or managers of a corporation submitted to forfeiture to have full powers as trustees to settle the affairs of the corporation, applied to a corporation whose rights were suspended under the California Corporate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371), an assignment of a cause of action purporting to be made by the corporation itself would not be valid.—*Id.*

XII. FOREIGN CORPORATIONS.

☞657(1) (N.Y.Sup.) Where defendant executed an undertaking on attachment in an action

brought by a third person against plaintiff a foreign corporation, *held*, that recovery on the undertaking cannot be defeated on the ground that plaintiff was doing business in the state of New York without having complied with General Corporation Law, §§ 15, 16, declaring that no corporation shall maintain an action in the state upon any contract made by it in the state, unless it shall have procured a certificate, etc., for the Legislature could only have intended to bar actions on contracts made by a foreign corporation within the state, and the undertaking, though contractual in its nature, cannot be considered an ordinary contract made by a foreign corporation in the state.—*Fairmount Film Corporation v. New Amsterdam Casualty Co.*, 178 N. Y. S. 525.

☞662 (N.Y.Sup.) While authority of foreign corporations to do business in states other than that in which they are incorporated may be revoked or terminated, the liability incurred while authorized to do business in the foreign state is not limited to period during which such authority continues.—*American Fidelity Co. v. Leahy*, 178 N. Y. S. 511.

☞668(4) (N.Y.Sup.) Office employé of defendant foreign corporation *held* not a "cashier" of the company, to authorize service of summons on him, under Code Civ. Proc. § 432, subd. 3.—*Metropolitan Bank of New York v. Baker, Hamilton & Pacific Co.*, 178 N. Y. S. 140.

☞668(4) (N.Y.Sup.) Under General Corporation Law, § 16, in force when a foreign corporation, which had obtained authority to do business in the state, and had designated a person on whom process against it might be served, attempted to surrender such authority, and such person filed revocation of his consent, summons against the corporation, in an action on a liability theretofore incurred in the state, could be served on the secretary of state.—*Saxe v. Sugarland Mfg. Co.*, 178 N. Y. S. 454.

☞668(5) (N.Y.Sup.) Office employé of defendant foreign corporation, keeping in touch with market conditions and informing company of his opinion in regard to future prices, also obtaining quotations and furnishing them to the company, which made all purchases and payments itself from its home office, *held* not the "managing agent" of the company within the state, so as to authorize service of summons on him under Code Civ. Proc. § 432, subd. 3.—*Metropolitan Bank of New York v. Baker, Hamilton & Pacific Co.*, 178 N. Y. S. 140.

☞672(7) (N.Y.Sup.) In an action by a foreign corporation on an undertaking on attachment executed by defendant in an action brought by a third person against the corporation, the answer, which alleged that the corporation was conducting business in the state without having complied with the provisions of Tax Law, § 181, but which alleged no facts, *held* insufficient to show such a noncompliance with the Tax Law relating to payment of license fees by foreign corporations as to prevent the corporation from maintaining an action on the undertaking.—*Fairmount Film Corporation v. New Amsterdam Casualty Co.*, 178 N. Y. S. 525.

☞691 (N.Y.Sup.) A suspension of corporate rights in California under the California Corpo-

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rate License Act, approved May 11, 1917 (St. Cal. 1917, p. 371), is operative in New York, so as to prevent an action by an assignee of a cause of action, although no decree has been entered in New York making the suspension operative there.—*Siegel v. Maryland Casualty Co.*, 178 N. Y. S. 391.

COSTS.

See Appeal, 6781; Assignments for Benefit of Creditors, 6318; Infants, 682; Wills, 6405.

III. PERSONS, PROPERTY, AND FUNDS LIABLE.

6103 (N.Y.Sup.) When all the members of a class share in the fund preserved or increased by the individual efforts of a member of a class, the member in equity must be awarded his costs, expenses, and counsel fees, payable out of the fund so preserved or increased, before its distribution.—*In re Leon Mayer, Inc.*, 178 N. Y. S. 86.

V. AMOUNT, RATE, AND ITEMS.

6174(3) (N.Y.Sup.) In view of Code Civ. Proc. § 3256, a party may include in his cost bill his necessary disbursements, including those to the sheriff for levy under a valid execution on a judgment reversed on appeal, for such amount as the sheriff was entitled to under section 3307, subd. 23, and defendant was entitled to costs which he had to pay the sheriff to get him out of his place of business.—*Fosdick v. Globe Indemnity Co.*, 178 N. Y. S. 855.

VII. ON APPEAL OR ERROR AND ON NEW TRIAL OR MOTION THEREFOR.

6226 (N.Y.Sup.) The defendant, upon reversal, was entitled to the costs of an appeal from a final judgment in favor of plaintiff as a matter of right, and the court had no discretion to allow or disallow them, and the allowance of costs on an appeal from an order allowing plaintiff's motion for judgment on the pleadings was discretionary; but such allowance on that appeal cannot be held a limitation to the right to costs upon appeal from the judgment which was reversed.—*Fosdick v. Globe Indemnity Co.*, 178 N. Y. S. 855.

6236 (N.Y.Sup.) The defendant, on reversal, was entitled to the costs of an appeal from a final judgment in favor of plaintiff as a matter of right, and the court had no discretion to allow or disallow them, and the allowance of costs on an appeal from an order allowing plaintiff's motion for judgment on the pleadings was discretionary; but such allowance on that appeal cannot be held a limitation to the right to costs on appeal from the judgment which was reversed.—*Fosdick v. Globe Indemnity Co.*, 178 N. Y. S. 855.

VIII. PAYMENT AND REMEDIES FOR COLLECTION.

6275 (N.Y.Sup.) An order granting defendant's motion to withdraw its demurrer, and to plead over after judgment on the pleadings for plaintiff, should be conditioned upon the pay-

ment of taxable costs to date, but not upon additional costs.—*Kips Bay Brewing & Malting Co. v. J. H. Tooker Printing Co.*, 178 N. Y. S. 113.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

6153 (N.Y.Sup.) A county board of supervisors has no inherent, implied, or incidental power to borrow money or to issue negotiable paper in any manner, except in strict compliance with the statute.—*People ex rel. Moody Engineering Co. v. Hamilton*, 178 N. Y. S. 702.

Proposal by board of supervisors of Rockland county, after the construction and furnishing of a tuberculosis hospital at a cost exceeding the amount fixed by the vote authorizing such action, to raise \$40,000 by temporary loan not included in the tax budget, was in violation of General Municipal Law, § 5, so that county treasurer was justified in refusing to honor board's drafts, and an application by holder for a peremptory writ of mandamus to compel their payment must be denied.—*Id.*

6171 (N.Y.Sup.) A county board of supervisors has no inherent, implied, or incidental power to borrow money or to issue negotiable paper in any manner, except in strict compliance with the statute.—*People ex rel. Moody Engineering Co. v. Hamilton*, 178 N. Y. S. 702.

6173(2) (N.Y.Sup.) Where board of supervisors of Rockland county, in compliance with County Law, § 45, as amended by Laws 1915, c. 182, after adoption of proposition by voters to the amount of \$50,000, purchased real property and built and equipped a tuberculosis hospital at a greater expense, its issuance of bonds to amount of \$80,000, the proceeds of which had been expended, was legal, and it had power to raise an additional \$40,000, if necessary, but could only raise it by a bond issue as provided in section 45 (subd. 3).—*People ex rel. Moody Engineering Co. v. Hamilton*, 178 N. Y. S. 702.

COURT OF CLAIMS.

See States, 6184.

COURTS.

See Aliens, 667; Arbitration and Award, 657; Contempt; Criminal Law, 6250; Depositions, 629; Discovery, 630; Executors and Administrators, 6469; Jury, 626; Justices of the Peace; Lis Pendens, 620; Marriage, 632; States, 6184.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

655 (N.Y.Sup.) Under Inferior Criminal Courts Act, § 96, providing for the removal of "chief probation officer or any probation officer," a deputy chief probation officer of City

Magistrate's Court of the City of New York may be removed at pleasure of the appointing power; the omission to specifically include deputy chief probation officers not indicating legislative intent to omit them or to design that method of their removal is under Greater New York Charter, § 1543.—*McKay v. McAdoo*, 178 N. Y. S. 207.

(B) Terms, Vacations, Place and Time of Holding Court, Courthouses, and Accommodations.

§ 64(5) (N.Y.) The statement, in proclamation of Governor calling Extraordinary Special and Trial Term of Supreme Court pursuant to Judiciary Law, § 153, of the purpose of the term, does not enlarge or diminish the rights of litigants.—*Saranac Land & Timber Co. v. Roberts*, 125 N. E. 102, 227 N. Y. 188.

§ 68 (N.Y.) Extraordinary Special and Trial Term called pursuant to Judiciary Law, § 153, and which granted new trial, but denied motion to set aside consent of defendant that action be tried by a referee, could, though day to which term had been adjourned had been permitted to pass without further adjournment, consider the appointment of a new referee, a matter remitted by Court of Appeals, since Special Term remained in existence for purpose of deciding motion theretofore made, in view of Code Civ. Proc. § 45, Const. art. 6, § 2, and Judiciary Law, § 84.—*Saranac Land & Timber Co. v. Roberts*, 125 N. E. 102, 227 N. Y. 188.

When a term of court is ended for new and further business, it may be deemed continued for the purpose of deciding cases and matters finally submitted to it during its regular and formal sittings.—*Id.*

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 92 (N.Y.Sur.) Dicta of either foreign or domestic courts, however respectable, are not adjudications.—*In re Green's Estate*, 178 N. Y. S. 353.

§ 97(5) (N.Y.Sup.) The provisions of the federal Bankruptcy Act (U. S. Comp. St. §§ 9585-9656) are paramount to any state statute, and the courts of New York have always recognized and followed decisions of federal courts construing it, dealing with questions arising under that act, even if in conflict with New York decisions.—*Brenen v. Dahlstrom Metallic Door Co.*, 178 N. Y. S. 846.

§ 99(2) (N.Y.Sup.) On motion for further bill of particulars, court cannot base refusal on sufficiency of pleading, which would virtually set aside previous order, unappealed from, requiring a bill of certain particulars.—*Grolnick v. Mutual Life Ins. Co. of New York*, 178 N. Y. S. 176.

§ 116(1) (N.Y.Sup.) The Supreme Court has no control over the records of County Court of Kings County, and cannot correct errors in such records, assuming them to exist.—*In re Goodman*, 178 N. Y. S. 499.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 189(7) (N.Y.Sup.) Under Municipal Court Code, § 78, providing that "pleadings shall con-

sist of a complaint and answer, and, when ordered, a reply," and section 87, authorizing court to order written reply to a counterclaim, the Municipal Court has no power to order a reply to several defenses set up in answer; the ordering of replies being limited to counterclaims only, notwithstanding section 15.—*Kern v. Caledonian Ins. Co. of Scotland*, 178 N. Y. S. 340.

§ 190(2) (N.Y.Sup.) Order of Municipal Court, requiring plaintiff to file a reply to several defenses set up in answer, is appealable, under Municipal Court Code, § 154, subd. 8; the Municipal Court having no power to make such an order.—*Kern v. Caledonian Ins. Co. of Scotland*, 178 N. Y. S. 340.

V. COURTS OF PROBATE JURISDICTION.

§ 201 (N.Y.Sur.) Where, on judicial settlement of the account of proceedings of executors and testamentary trustees, it is claimed that assignment of vested remainder is void, because usurious, surrogate has jurisdiction to pass upon validity of assignment and existence of usury; the proper method of raising the issue in such case being, in view of Code Civ. Proc. §§ 521, 2519, for the respondents who urge usury in their answers to serve their pleadings with cross-notice upon other parties who may be affected by adjudication of such issue, and for court thereupon to set date for hearing.—*In re Phraner*, 178 N. Y. S. 768.

§ 201 (N.Y.Sur.) While the act of 1914 (Laws 1914, c. 443), by the enactment of Code Civ. Proc. § 2510, extended and enlarged the powers of the surrogate, the Surrogate Court is without jurisdiction to determine the claim of an executor that a second mortgage executed by testatrix in the course of an exchange of property was obtained by fraud; it appearing that the parties to the original transaction were not before the court.—*In re Whittemore*, 178 N. Y. S. 780.

§ 202(4) (N.Y.Sur.) In the absence of legislative restrictions on the exercise of its power, the Surrogate's Court, without regard to lapse of time, may vacate a decree void for lack of jurisdiction.—*In re Tucker's Estate*, 178 N. Y. S. 446.

§ 202(5) (N.Y.Sup.) Under Code Civ. Proc. § 2763, where an appeal from a Surrogate's decree is taken on the facts, the Supreme Court is not solely a court of review, but has the same power to decide questions of fact that the surrogate had, and in its discretion may receive further testimony or documentary evidence, and appoint a referee.—*In re Friedlander*, 178 N. Y. S. 50.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

§ 480(1) (N.Y.Sup.) In action by executors and trustees under a will for an accounting and for court's approval of their acts, making all interested parties defendants, the court, having acquired plenary jurisdiction of parties and subject-matter, will restrain prosecution of a separate proceeding for removal of a trustee, as a

motion in such action for his removal, being incidental and ancillary, would come clearly within sound rule that, if full relief can be had in one suit, no other shall be allowed.—Gould v. Gould, 178 N. Y. S. 37.

⚡481 (N.Y.Sup.) In an action begun in Kings county, in which an order was entered for the examination of defendants before trial, such examination to be held in New York county, in which the defendants resided, *held* that, as the judge before whom such examination is held sits as a judge out of court, under Code Civ. Proc. § 873, such judge could not, under sections 772, 769, vacate the order entered by the court of Kings county.—Palmer v. Rotary Realty Co., 178 N. Y. S. 461.

COVENANTS.

See Injunction, ⚡136; Landlord and Tenant, ⚡134.

III. PERFORMANCE OR BREACH.

⚡100(1) (N.Y.Sup.) The rule that purchaser is not compelled to accept a title in doubt because of the questionable effect of a restrictive covenant, does not apply to a case where purchaser sues to recover for breach of warranty money paid under a contract referring to restrictive covenants and warranting that they do have the effect of preventing the maintaining of a certain kind of building on the premises, for in such case the only question is whether the warranty is breached.—Goldstein v. Hirsh, 178 N. Y. S. 325.

Where contract for sale of realty referred to restrictive covenants, which intending vendor warranted did not prevent a garage on the premises, the intending purchaser, it being conceded that erection of a garage may be lawfully permitted under Zoning Ordinance, § 7, subd. (c), may not maintain action for money paid under contract, on ground of breach of warranty.—Id.

⚡103(2) (N.Y.Sup.) A restrictive covenant, prohibiting any "omnibus, livery, or cow stable, * * * or other dangerous, noxious, unwholesome, or offensive establishment, trade, calling, or business offensive to the neighborhood, being made in 1850, and repeated in subsequent deeds in 1852 and 1853, and referred in deeds down to 1896, is not in view of changed conditions, violated by erecting a garage; it not being a "stable," nor a "dangerous, noxious, unwholesome, or offensive establishment, trade, calling, or business offensive to the neighborhood."—Goldstein v. Hirsh, 178 N. Y. S. 325.

CREAMERIES.

See Contracts, ⚡116.

CRIMINAL LAW.

See Animals, ⚡35; Bail, ⚡79; Bigamy; Burglary; Extradition; Food, ⚡5, 15; Habeas Corpus, ⚡3; Homicide; Husband and Wife, ⚡304; Indictment and Information; Infants, ⚡16; Injunction, ⚡102; Larceny; Pardon; Perjury; Rape, ⚡54; Schools and School Districts, ⚡160.

178 N.Y.S.—60

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

⚡43 (N.Y.Sup.) A judgment in New York, declaring a certain marriage void from its inception, while not rendering the marriage inoperative for all purposes, at least relieved plaintiff husband from obligation to support his wife at any place or at any time subsequent to the marriage, and husband could not after its rendition be properly indicted in New Jersey for deserting his wife prior to its entry, notwithstanding Domestic Relations Law, § 7, and Code Civ. Proc. § 1754.—People ex rel. Plumley v. Higgins, 178 N. Y. S. 728.

III. PARTIES TO OFFENSES.

⚡59(1) (N.Y.Sup.) To be an "accomplice" one must be so connected with a crime that at common law he might have been convicted, either as a principal or as an accessory before the fact.—People v. Vollero, 178 N. Y. 787.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

⚡226 (N.Y.Sup.) Whether the facts stated in an information would support a conviction is not the question for the magistrate to decide.—People ex rel. Pressler v. Warden of City Prison, 178 N. Y. S. 311.

⚡250 (N.Y.Gen.Sess.) On proof that defendant, while a passenger on a train en route to New York City, uttered certain seditious remarks, the Magistrate's Court in that city, before whom he was charged with disorderly conduct tending to a breach of the peace, in violation of New York City Consolidation Act 1882, §§ 1458, 1459, had no jurisdiction to summarily adjudge defendant guilty and impose sentence, under Code Cr. Proc. § 137, giving jurisdiction to courts of any county through which train passes if a crime is committed on a railway train, etc.; as disorderly conduct, tending to a breach of the peace, is not a "crime."—People v. Lowendahl, 178 N. Y. S. 55.

Where city magistrate had no jurisdiction, under Code Cr. Proc. § 137, a case of disorderly conduct tending to a breach of the peace, in violation of New York Consolidation Act 1882, §§ 1458, 1459, based on defendant's seditious remarks on a train en route to New York City, the magistrate should have entertained a complaint for disorderly conduct under Penal Law, § 720, making it a misdemeanor to use disorderly language annoying passengers on railroads, etc., for purpose of holding him for trial in Court of Special Sessions.—Id.

X. EVIDENCE.

(J) Testimony of Accomplices and Codefendants.

⚡510 (N.Y.Sup.) Code Cr. Proc. § 399, requiring corroboration of accomplice testimony to warrant a conviction, extends to proceedings before the grand jury which found the indictment, in view of Code, § 258.—People v. Vollero, 178 N. Y. S. 787.

§511(10) (N.Y.Sup.) In a prosecution for murder growing out of an alleged conspiracy to kill six men, three of whom were murdered, the testimony of an accomplice to such crime was insufficient to corroborate that of a confessed accomplice, under Code Cr. Proc. § 399.—*People v. Vollero*, 178 N. Y. S. 787.

Corroboration of testimony of an accomplice, necessary under Code Cr. Proc. § 399, to a conviction, is subject to the exception that the fact that if, on trial of an indictment, two accomplices testify as to defendant's guilt, instead of one, is not a corroboration, and in such a case it requires the same amount of other evidence to connect the defendant with the crime as if but one accomplice testified, in order to establish his guilt.—*Id.*

Corroboration by independent evidence is not dispensed with, where several accomplices testify against accused, as the accomplices are not deemed to corroborate each other, so that, where one was not only an accomplice in fact, but on the testimony of a confessed accomplice, was an accomplice at law, his testimony was wholly ineffective to corroborate the testimony of the confessed accomplice.—*Id.*

XII. TRIAL.

(F) Province of Court and Jury in General.

§741(1) (N.Y.Sup.) Whether the evidence as matter of law is sufficient to exclude reasonable doubt of defendant's guilt is a matter for the court to decide.—*People v. Connelly*, 178 N. Y. S. 1.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§822(1) (N.Y.Sup.) The rule that a charge must be considered as a whole, and its correctness is not to be resolved upon isolated parts, is applicable, where it can be seen with reasonable certainty that error in isolated parts neither misled the jury nor influenced the verdict.—*People v. Abrattis*, 178 N. Y. S. 255.

§829(12) (N.Y.Sup.) The rule that a charge must be considered as a whole, and its correctness is not to be resolved upon isolated parts, is applicable where it can be seen with "reasonable certainty" that error in isolated parts neither misled the jury nor influenced the verdict, and the court's instruction on corroborative evidence held not to cure the harm of its refusals of defendant's instructions on corroboration of complainant in a prosecution for rape.—*People v. Abrattis*, 178 N. Y. S. 255.

XIII. MOTIONS FOR NEW TRIAL.

§945(1) (N.Y.Sup.) In prosecution for murder growing out of a conspiracy of one gang to kill six members of another gang, where a witness for prosecution, in corroboration of a confessed accomplice, was an accomplice, but was not so treated by parties or by court, and was subsequently indicted, a motion for new trial, under Code Cr. Proc. § 465, subd. 7, for newly discovered evidence, would be granted, as a different verdict would be probable after his relation to the offense became known, in view of the trial proceedings.—*People v. Vollero*, 178 N. Y. S. 787.

§949(1) (N.Y.Sup.) Defendant's motion for a new trial, after his conviction of murder in the first degree had been affirmed by the Court of Appeals by a divided court and without opinion, under Code Cr. Proc. § 542, based upon section 465, subd. 7, authorizing a new trial where defendant on another trial can produce evidence which would probably change the result after a showing of due diligence, held sufficient in form to authorize the grant of a new trial.—*People v. Vollero*, 178 N. Y. S. 787.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§1023(13) (N.Y.Sup.) On a motion for new trial in a prosecution for homicide, after affirmation of a conviction by the Court of Appeals by a divided court and without opinion, under Code Cr. Proc. § 542, the decision of a justice of the Supreme Court on defendant's motion for a new trial on the ground of newly discovered evidence is final and unappealable, either by defendant or by the people.—*People v. Vollero*, 178 N. Y. S. 787.

(G) Review.

§1169(10) (N.Y.Co.Ct.) In prosecution of a father under Education Law, § 624, for failure to send his children to school where the only permissible defense was that they were not in proper physical and mental condition, admission of evidence for people in rebuttal as to what was done at a school meeting, against objection that minutes were the best evidence, and that other children living as far away as defendant's children attended, and as to transportation, etc., was harmless, under Code Cr. Proc. § 764, where defendant's evidence was immaterial, because constituting no defense; and, if defendant's evidence was material, the People's evidence was proper in rebuttal.—*People v. Himmanen*, 178 N. Y. S. 282.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§1206(3) (N.Y.Sup.) Laws 1919, c. 410, amending Penal Law, § 2193, which provides that time spent by person convicted of crime in prison or jail prior to conviction and before sentence, shall be calculated as part of the sentence, whether it be indeterminate or for a definite term, should, in view of its remedial and beneficial effect, be given a retroactive construction, so as to apply to one convicted prior to enactment.—*People ex rel. Gabriel v. Warden of New York County Penitentiary, Wards Island*, 178 N. Y. S. 595.

§1216(1) (N.Y.Sup.) The courts always have had the discretionary power to take into account the time spent in prison awaiting trial in fixing the punishment.—*People ex rel. Gabriel v. Warden of New York County Penitentiary, Wards Island*, 178 N. Y. S. 595.

CUSTOMS AND USAGES.

See Principal and Agent, §104, 119.

DAMAGES.

See Appeal, ⚡1177; Eminent Domain, ⚡153; Evidence, ⚡323; Injunction, ⚡251; Libel and Slander, ⚡120; New Trial, ⚡76; Sales, ⚡160, 372, 418; Trial, ⚡26.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(B) Aggravation, Mitigation, and Reduction of Loss.

⚡62(4) (N. Y. Sup.) Injured party to contract is not required to make extraordinary effort to save party in default from damage; a reasonable effort being sufficient.—Salember, Levin & Co. v. North Adams Mfg. Co., 178 N. Y. S. 607.

VI. MEASURE OF DAMAGES.

(C) Breach of Contract.

⚡123 (N.Y.Sup.) In an action for breach of warranty in failing to dye skins in accordance with contract, plaintiffs, having elected to sue on the contract, not in disaffirmance, must credit defendants with the contract price of the work, and cannot recover undiminished the difference between the market value of the skins as delivered to defendants and their market value had they been dyed in accordance with the contract.—Miller v. Windholtz, 178 N. Y. S. 4.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

⚡132(7) (N.Y.Sup.) Where eminent clergyman fell in nighttime by stepping into open space on defendant's unlighted, unguarded elevated railroad stairs to a station, where a step was out, and fractured his right wrist and his hip bone, resulting in a permanent limp and a permanent impairment of motion in hand and wrist, though able to write without substantial physical restriction and to follow his vocation, and incurred \$2,000 expenses, without loss of salary, a verdict of \$48,000 was excessive, and under Code Civ. Proc. § 999, would be reduced to \$30,000.—Melish v. New York Consol. R. Co., 178 N. Y. S. 228.

DAMS.

See Navigable Waters, ⚡3, 22, 26.

DEATH.

See Bigamy, ⚡1; Judgment, ⚡12; Master and Servant, ⚡285, 351, 375, 378, 405; Municipal Corporations, ⚡706; Trial, ⚡337.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

⚡2(1) (N.Y.Sup.) Where no competent evidence was produced that defendant's former husband had been heard from within 7 years, the presumption is that he is no longer living.—Wolf v. Wolf, 178 N. Y. S. 726.

⚡2(1) (N.Y.Sur.) A husband, absent and unheard of for seven years, is presumed to be dead.—In re Cassidy's Estate, 178 N. Y. S. 366.

⚡2(1) (N.Y.Sur.) Six months' absence does not raise a presumption of death, justifying

temporary administration.—In re Chancellor's Estate, 178 N. Y. S. 832.

II. ACTIONS FOR CAUSING DEATH.

(E) Damages, Forfeiture, or Fine.

⚡101 (N.Y.) Under Code Civ. Proc. § 1905, proceeds of the cause of action for death of a child belong equally to its father, the administrator, and its mother.—In re Reisfeld, 124 N. E. 725, 227 N. Y. 137.

Upon his own interest in the cause of action for death of his child, the father, its administrator, might impose any lien that he pleased under Judiciary Law, § 474, but on the equal interest of his wife he could not lay a charge beyond the limits of the reasonable, under Code Civ. Proc. § 1903.—Id.

Where the mother did not assent to the father's contract to compensate attorneys for suing for the death of their child, to impose charge upon the mother's half right in the proceeds of any settlement, the contract must have been reasonable, though the fee might be made contingent, and its size be increased because of the contingency.—Id.

DEEDS.

See Champerty and Maintenance, ⚡7; Eminent Domain, ⚡153; Husband and Wife, ⚡14; Mortgages; Pleading, ⚡8; Reformation of Instruments, ⚡17.

DENTISTS.

See Corporations, ⚡14.

DEPOSITIONS.

See Discovery, ⚡47.

⚡29 (N.Y.Sur.) Surrogate's Court has power to grant application for a commission to take a deposition without the state, under Code Civ. Proc. § 888.—In re Gerbereux's Will, 178 N. Y. S. 779.

DESCENT AND DISTRIBUTION.

See Executors and Administrators; Taxation, ⚡867, 895, 900; Wills.

I. NATURE AND COURSE IN GENERAL.

⚡12 (N.Y.Sup.) Where a daughter inherited from her father as tenant in common with her brother and others, and her brother bid in the land on partition sale, the deed being made to him and her, they thereby becoming seised in fee as tenants in common of the entire property, the brother's share of which, on his death intestate, descended to her, no part of the land descended to her from her father, within the contemplation of Decedent Estate Law, § 88, so as to exclude the relatives of her mother from sharing therein on her death intestate, since the effect of the partition was to vest her undivided half in her by purchase, and not by descent.—Nelson v. Nelson, 178 N. Y. S. 80.

⚡14 (N.Y.Sup.) Under Decedent Estate Law, § 88, providing, if there is no heir entitled to take under preceding sections, the inheritance, if it shall have come to the intestate on the

part of the father, shall descend in certain specified ways, the property must have been an inheritance when it came to the intestate, and must have come to intestate on the part of intestate's father directly, either by devise, gift, or descent.—*Nelson v. Nelson*, 178 N. Y. S. 80.

DIRECTOR GENERAL OF RAILROADS.

See Railroads, ¶5½.

DISCOVERY.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examination of Parties and of Other Persons.

¶30 (N.Y.Sup.) Provisions for examination of parties before trial, as provided by Code Civ. Proc. § 870 et seq., do not apply to, and have not been extended by section 2770, or other statutes, to proceedings in the Surrogate's Court.—*People ex rel. Lewis v. Fowler*, 178 N. Y. S. 500.

¶33 (N.Y.Sup.) On application for examination of defendant before trial, the necessity and materiality of the testimony is a question for the court, as is also the good faith and fairness of the application.—*East Rochester Const. Co. v. Eyer*, 178 N. Y. S. 262.

¶36 (N.Y.Sup.) The fundamental purpose of the examination of the defendant before trial is to enable the moving party to obtain testimony for use at the trial in support of his cause of action as alleged in his pleading, and not to enable him to cross-examine his adversary, nor to put his adversary on record, nor that he may prepare his rebuttal.—*East Rochester Const. Co. v. Eyer*, 178 N. Y. S. 262.

An application to examine the defendant as a witness before trial cannot be properly granted for the sole purpose of enabling a litigant to examine his adversary, or his adversary's witnesses, to ascertain whether or not he will be able to maintain his cause of action or to succeed against an asserted affirmative defense.—*Id.*

¶38 (N.Y.Sup.) Code Civ. Proc. § 872, subd. 7, relating to the examination of corporate officers preliminary to production of books and papers, contemplates the examination of witnesses to show that the books contain relevant entries and the inspection of such entries preparatory to offering them in evidence, and does not authorize a general inspection which may be obtained under sections 803-809.—*Harby S. S. Co. v. Staten Island Shipbuilding Co.*, 178 N. Y. S. 813.

¶40 (N.Y.Sup.) In an action on an account stated and for wrongful discharge, plaintiff was entitled to examine defendant before trial as to facts showing whether account had been stated, and whether defendant had promised to pay plaintiff amount claimed, and was also entitled to examine defendant as to the yearly hiring and its terms, though not regarding facts designed to show plaintiff was discharged without cause.—*Swartz v. Ritweb Mfg. Co.*, 178 N. Y. S. 189.

¶40 (N.Y.Sup.) Plaintiff held entitled to examination of one of the defendants before trial

as to facts which he was required to establish in order to prove his cause of action.—*Beckel v. Salomon*, 178 N. Y. S. 209.

¶40 (N.Y.Sup.) Plaintiff is entitled to examine defendant before trial only as to allegations of complaint, as limited by bill of particulars.—*Lord Const. Co. v. Edison Portland Cement Co.*, 178 N. Y. S. 250.

¶41 (N.Y.Sup.) In examinations before trial, the court has no power to pass on the competency or admissibility of the evidence, and can consider only questions relating to the relevancy of the evidence and any privilege of the witness; latitude being desirable in examining an adverse party.—*Cooper v. Roggen*, 178 N. Y. S. 136.

¶41 (N.Y.Sup.) In executor's action to recover certain bonds wrongfully delivered by coexecutor to defendants, without consideration and with knowledge by defendants of wrongful character of transaction, order for examination of one of defendants before trial as to dealings on margin or speculative account, or purchase or sale of securities between defendants and coexecutor, held to give too wide a latitude in the examination, and it should have limited examination to the delivery of particular bonds, with circumstances thereof, consideration, defendants' knowledge of true facts, etc., leaving to judge presiding at examination to determine what questions were relevant thereto.—*Beckel v. Salomon*, 178 N. Y. S. 209.

¶41 (N.Y.Sup.) In an action for damages for false and fraudulent representations, if the representations claimed to have been made and relied on were false, defendant not intending to do as he represented he would, such false statement may be deemed the statement of a material existing fact, because it falsely represented the state of his mind, upon which issue the testimony of defendant's conduct thereafter is important, and as to which matters the defendant may be examined as a witness before the trial.—*East Rochester Const. Co. v. Eyer*, 178 N. Y. S. 262.

¶41 (N.Y.Sup.) In an action involving realty, where plaintiffs claimed that a deed was in fact a mortgage, held that, though they were entitled to examine defendants before trial, the examination should not extend to the receipts and disbursements made by defendants with respect to the realty, for plaintiffs would not be entitled to an accounting until they established their right to an accounting.—*Palmer v. Rotary Realty Co., Inc.*, 178 N. Y. S. 461.

¶47 (N.Y.Sup.) Where one defendant to an action for damages for conversion of stock had previously been sentenced on his conviction of larceny thereof, and the only special circumstances rendering his examination before trial necessary were those relating to his release on parole, the order for examination would be vacated, where his deposition was sought to be taken on separate trial of issues raised by answer of other defendants, in view of Prison Law, § 214, and Code Civ. Proc. §§ 862, 2008.—*Mackenzie v. Seaboard Nat. Bank*, 178 N. Y. S. 154.

¶55 (N.Y.Sup.) Affidavit for order for examination by plaintiff of defendant before trial, which failed to set forth facts required by Code Civ. Proc. § 872, subd. 1, is defective, and or-

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

der for examination obtained thereon will be vacated.—*Lord Const. Co. v. Edison Portland Cement Co.*, 178 N. Y. S. 250.

⚡55 (N.Y.Sup.) An affidavit for an order for examination of defendants before trial should, in accordance with the proper practice, meet the requirements of the Code, and not depend on the affidavit on which a former order was granted to supply its insufficiencies.—*Silverman v. Ware*, 178 N. Y. S. 520.

An affidavit for an order to examine defendants as witnesses before trial should be made by plaintiff or his attorney, and not by the attorney's managing clerk, who cannot supply evidence that deponent expects to use the deposition upon the trial of the action, and that the testimony is material and necessary.—*Id.*

⚡58 (N.Y.Sup.) Order for plaintiff's examination before trial, dated October 15th, returnable October 20th, and directing that service be made on or before October 18th, held defective, as failing to comply with Code Civ. Proc. § 873; neither it nor the affidavit on which it was granted stating any reason why the five-day minimum time for service before examination should be shortened.—*Eisenstein v. Eisenstein*, 178 N. Y. S. 293.

⚡63 (N.Y.Sup.) An order for examination of defendant as to whether defendants were to pay plaintiff commissions on sales, renewal orders, and mail orders, and the aggregate of renewal and mail orders between certain dates, did not warrant a question calling for names, addresses, dates, and individual amounts of all customers who sent mail orders to defendant within a specified period.—*Cooper v. Roggen*, 178 N. Y. S. 136.

Where the testimony of a defendant on examination before trial showed that he had received no letter from plaintiff agreeing an amount should be in full payment of his claim, and the order for defendant's examination before trial did not authorize the inquiry, plaintiff, a salesman suing defendant for commissions, cannot complain of the City Court's ruling sustaining defendant's objection to the question whether they had received the letter from plaintiff.—*Id.*

A defendant, on his examination before trial, should have been required to answer whether plaintiff personally said to him that he (plaintiff) would pay defendant a certain amount, an inquiry specified in the order for defendant's examination before trial.—*Id.*

In an action by a salesman to recover commissions, in view of the broad form of the order for the examination of defendants before trial, held, that they should be required to give the names, addresses, dates, and amounts of various orders received by them otherwise than through plaintiff salesman; there being nothing to indicate the information would be used for improper purposes, and the matter being relevant.—*Id.*

DISEASE.

See Animals, ⚡35.

DISLOYALTY.

See Criminal Law, ⚡250.

DISMISSAL AND NONSUIT.

See Appeal, ⚡781, 927; Principal and Agent, ⚡123; Trial, ⚡109, 159.

DISORDERLY CONDUCT.

See Criminal Law, ⚡250.

DIVORCE.

See Husband and Wife, ⚡279; Marriage, ⚡13, 36; Pleading, ⚡8; Witnesses, ⚡405.

II. GROUNDS.

⚡34 (N.Y.Sup.) The fact that incompatibility exists, and that a husband and wife find it impossible to live in harmony, does not meet the requirements for a judicial separation fixed by the statute.—*Averett v. Averett*, 178 N. Y. S. 405.

III. DEFENSES.

⚡39 (N.Y.Sup.) In view of Code Civ. Proc. § 1762 et seq., and Domestic Relations Law, § 8, in action by second wife for separation, invalidity of divorce which defendant obtained from his first wife is a good defense.—*Ashdown v. Ashdown*, 178 N. Y. S. 565.

⚡53 (N.Y.Sup.) Under Code Civ. Proc. § 1770, a defendant in an action for separation may set up as defense and counterclaim acts of adultery committed by the plaintiff prior to commencement of the action.—*Ames v. Ames*, 178 N. Y. S. 177.

⚡55 (N.Y.Sup.) In view of Code Civ. Proc. § 1758, trial court erred in denying motion for new trial, made by defendant in divorce action order of or entry of judgment in favor of plaintiff on ground of adultery, where motion was made on ground of newly discovered evidence and affidavit that plaintiff herself was guilty of adultery was uncontroverted.—*Kapitola v. Kapitola*, 178 N. Y. S. 734.

IV. JURISDICTION, PROCEEDINGS AND RELIEF.

(C) Pleading.

⚡101 (N.Y.Sup.) In an action for divorce for adultery, the court has power to permit defendant to plead as a counterclaim acts of adultery committed by plaintiff since the action was begun.—*Ames v. Ames*, 178 N. Y. S. 177.

⚡104 (N.Y.Sup.) In an action for absolute divorce, the plaintiff will not be permitted to serve a supplemental complaint setting up acts of adultery alleged to have been committed by defendant since joinder of issue.—*Ames v. Ames*, 178 N. Y. S. 177.

In an action by a wife for separation from her husband on the ground of cruel and inhuman treatment, she may serve a supplemental complaint alleging acts of cruel and inhuman treatment which occurred subsequent to the commencement of the action, in aid of the cause of action stated in the original complaint.—*Id.*

In an action for divorce for adultery, the court has power to permit defendant to plead as a counterclaim, as well as a defense, by supplemental answer, acts of adultery committed by plaintiff since the action was begun.—*Id.*

As a defendant cannot discontinue, and sue over, a husband in an action by his wife for

separation for cruel and inhuman treatment, is entitled to leave to serve a supplemental answer setting up acts of adultery committed by the wife prior to and subsequent to the commencement of the action.—Id.

(D) Evidence.

⚡125 (N.Y.Sup.) In wife's action for separation, where the entire proof rests practically upon the testimony of a wife, it will be deemed sufficient, where the defendant partially admits some of the accusations.—Averett v. Averett, 178 N. Y. S. 405.

⚡130 (N.Y.Sup.) In wife's action for separation on ground of cruel and inhuman treatment, evidence, though sufficient to show strained relations, causing bitterness and quarreling, held insufficient to justify judgment of separation, under the statute.—Averett v. Averett, 178 N. Y. S. 405.

(E) Dismissal, Trial or Hearing, and New Trial.

⚡151 (N.Y.Sup.) In action for divorce for adultery, motion for new trial, made by defendant before entry of judgment, on ground of newly discovered evidence to the effect that plaintiff herself was guilty of adultery, showed sufficiently that defendant wished to amend his answer by setting up plaintiff's adultery as a bar; the general prayer for relief included in the notice of motion being sufficient to cover such application.—Kapitola v. Kapitola, 178 N. Y. S. 734.

(F) Judgment or Decree.

⚡167 (N.Y.Sup.) Decree of separation can be revoked only by the court and by the method prescribed by Code Civ. Proc. § 1767, requiring joint application of the parties, accompanied by satisfactory evidence of their reconciliation.—Gewirtz v. Gewirtz, 178 N. Y. S. 738.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

⚡213 (N.Y.Sup.) Where defendant in an action for separation earns \$100 a month, and his wife has nearly \$1,400 in one bank and withdrew \$450 from another two weeks before applying for alimony, a motion for an allowance of temporary alimony and for counsel fees will be denied, with leave to renew on a proper showing of destitution.—Sawyer v. Sawyer, 178 N. Y. S. 472.

⚡213 (N.Y.Sup.) Where, within four or five weeks of the motion for alimony pendente lite, plaintiff wife secured \$700 of defendant husband's money, it did not appear that it had been exhausted by expenditure necessary and proper to plaintiff's station in life, she could not ask the court for more money.—Spatz v. Spatz, 178 N. Y. S. 567.

⚡214(3) (N.Y.Sup.) That defendant and his wife and their child 12 years old lived above one of the dramshops of defendant and kept but one servant affords a criterion of the proper amount of alimony pendente lite.—Spatz v. Spatz, 178 N. Y. S. 567.

⚡222 (N.Y.Sup.) Generally, the basis of a counsel fee in an action for divorce is necessity

prospective at the time of the application, and such fees will not be awarded to discharge past obligations, unless necessary in order to carry on the action.—Tranter v. Tranter, 178 N. Y. S. 521.

⚡227(1) (N.Y.Sup.) The court not being impressed that defendant wife will establish her defense, an allowance of only \$250 counsel fees will be made.—Gutmann v. Gutmann, 178 N. Y. S. 833.

⚡227(2) (N.Y.Sup.) Where the case presented a simple issue, an allowance of \$75 counsel fees pendente lite held adequate.—Spatz v. Spatz, 178 N. Y. S. 567.

⚡246 (N.Y.Sup.) Alimony provision of decree of separation can be annulled only by the court, and only by the method prescribed in Code Civ. Proc. § 1771, requiring application therefor and notice to adverse party.—Gewirtz v. Gewirtz, 178 N. Y. S. 738.

⚡277 (N.Y.City Ct.) To enforce payment of accrued alimony, the wife cannot bring an independent action, but must proceed by sequestration and contempt proceedings, under Code Civ. Proc. §§ 1771, 1772.—Phinney v. Andrus, 178 N. Y. S. 760.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

⚡328 (N.Y.Sup.) Nevada divorce decree, based upon constructive service, is not entitled to recognition in New York, under the policy of the New York laws.—Wolf v. Wolf, 178 N. Y. S. 726.

DOMICILE.

See Husband and Wife, ⚡304; Indictment and Information, ⚡81; Taxation, ⚡867.

⚡2 (N.Y.Sur.) There is a distinction between the meaning of the terms "domicile" and "residence"—"domicile" being a term which belongs particularly to the law of nations and to the interstate law, regulating a status in federal or confederated states, and relating to countries and states, not to localities within those countries or states; a once-acquired domicile not being affected by nonresidence, if the intent is to retain the old domicile.—In re Curtis, 178 N. Y. S. 286.

⚡4(1) (N.Y.Sur.) A person sui juris may freely at any time change a residence from any place to another, or he may have several residences.—In re Curtis, 178 N. Y. S. 286.

⚡6 (N.Y.Sur.) A person, intending to retain his old domicile, may reside almost indefinitely out of the locus of such domicile.—In re Curtis, 178 N. Y. S. 286.

⚡9 (N.Y.Sur.) While declarations of deceased persons, whose domicile or residence is indeterminate, are always competent to disclose their intention, they should always be taken to point to a particular moment.—In re Curtis, 178 N. Y. S. 286.

DRAFT ACT.

See Landlord and Tenant, ⚡331.

DRAINS.

See Adverse Possession, 79; Eminent Domain, 152; Judgment, 747; Quieting Title, 12.

I. ESTABLISHMENT AND MAINTENANCE.

27 (N.Y.Sup.) Under Laws 1869, c. 888, § 1, the owner need not join in petition for drainage of swamp lands; it being permissible to construe the word "and" as "or," to give a reasonable construction.—Whitney v. Considine Investing Co., 178 N. Y. S. 68.

28 (N.Y.Sup.) Petition under Laws 1869, c. 888, § 1, for drainage of swamp lands, required to state the owners of lands to be "affected," need not state who will be benefited, which can only be determined by the commissioners when assessing benefits; lands affected meaning those which it will be necessary to acquire for the drainage.—Whitney v. Considine Investing Co., 178 N. Y. S. 68.

32 (N.Y.Sup.) Want of venue in the official oath of commissioners in drainage proceedings, provided for by Laws 1869, c. 888, § 3, is not a jurisdictional defect, but a mere irregularity, curable if objected to, and waived in the absence of objection.—Whitney v. Considine Investing Co., 178 N. Y. S. 68.

Any delay in giving bond of treasurer of commission in a proceeding for drainage of swamp lands, provided for by Laws 1869, c. 888, § 3, was an irregularity, waived where all the parties proceeded to final order with knowledge when the bond was filed, and without objection.—Id.

Bond of commission's treasurer, in a drainage proceeding commenced before amendment of Laws 1869, c. 888, § 3, by Laws 1886, c. 636, § 3, being given after the amendment, properly ran to the people, instead of to the supervisor of the town.—Id.

Any defect in the map provided for in swamp drainage proceedings by Laws 1869, c. 888, §§ 6, 7, was a mere irregularity, which, not being pointed out when approved and ordered filed by the court, was waived.—Id.

35 (N.Y.Sup.) There was no lack of jurisdiction in drainage proceedings because application was to county judge, and order appointing commissioners was by him, as provided by Laws 1869, c. 888, §§ 1, 2, though this was after the adding, by Laws 1871, c. 303, of section 20, declaring all powers and jurisdiction vested by the act in the county judge to be vested in the county court; the intention being either that proceedings under the act should have the effect of court proceedings, though by and before the county judge, or to vest the court with concurrent jurisdiction.—Whitney v. Considine Investing Co., 178 N. Y. S. 68.

Assuming application to and order by the county judge, in swamp drainage proceedings, should have been to and by the County Court, the form may be disregarded, and it will be deemed, in the absence of proofs to the contrary, that it was a court proceeding and a court order, if at the time there was a term of the County Court in session.—Id.

II. ASSESSMENTS AND SPECIAL TAXES.

88 (N.Y.Sup.) Mere acquiescence will not create an estoppel in pais, and prevent the owner of the fee assailing title or interest under a certificate of sale of the land for years for drainage assessment.—Whitney v. Considine Investing Co., 178 N. Y. S. 68.

Under Laws 1869 c. 888, § 13, declaring a certificate of sale for years for assessment for swamp drainage presumptive evidence of all facts stated, it is not enough for one attacking the certificates as a cloud on title, that the record does not show compliance with requirements of the statute, but he must prove noncompliance.—Id.

The presumptive of regularity in swamp drainage proceedings, arising by provision of Laws 1869, c. 888, § 13, from certificate of sale for assessment, extends, if necessary, to presumption of a term of the County Court being in session at time of application and order, in form, to and by the county judge.—Id.

Description of land in publication of notice of sale for assessment for swamp drainage, under Laws 1869, c. 888, § 13, held sufficient; it referring to filed map approved by court, under which it could be readily located.—Id.

Provision of Laws 1869, c. 888, § 13, that certificate of sale for unpaid assessment for draining swamp lands shall authorize and empower the purchaser to take possession, does not mean that certificate shall in terms authorize purchaser, but merely that it shall constitute authority.—Id.

That commissioners exceed their authority under Laws 1869, c. 888, § 13, and in a certificate of sale for years of land for swamp land drainage assessment provide for a lease, and thereafter execute one, does not invalidate the certificate; but such provision and lease merely are void.—Id.

Under Laws 1869, c. 888, § 13, the rights of purchasers for years of land sold for assessment for swamp land drainage are those of a life tenant for such number of years; the land reverting at end of the period to the owner at the time of sale or his successor in interest.—Id.

DRAMSHOPS.

See Intoxicating Liquors.

DRAWBRIDGES.

See Bridges, 37, 44, 46.

DUMPING GROUNDS.

See Licenses, 50; Municipal Corporations, 221; Specific Performance, 25.

DUPLICATE WILLS.

See Wills, 175, 207.

EDUCATION LAW.

See Criminal Law, 1169.

EJUSDEM GENERIS.

See Sales, 85.

ELECTION OF REMEDIES.

See Master and Servant, **351**.

ELECTIONS.

See Associations, **18**; Mandamus, **74**, **143**, **169**; Schools and School Districts, **71**; Sheriffs and Constables, **2**, **5**.

IV. QUALIFICATIONS OF VOTERS.

72 (N.Y.Sup.) One is not entitled to registration in an election district, because of having taken a lease for a house therein providing for possession October 1st, where unable to get possession, because of an order in dispossess proceeding giving a tenant therein till October 14th, to get out.—*Gorman v. Doe*, 178 N. Y. S. 270.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

141 (N.Y.Sup.) If the substantial requirements of Election Law, § 123, providing for independent certificates of nomination, have not been satisfied, it is improper to authorize the name of an independent candidate for mayor to be printed on the ballot at the general election in the city.—In re Lynch, 178 N. Y. S. 30.

144 (N.Y.Sup.) An independent certificate of nomination for mayor of a city, where the witness did not sign his name on the same line and opposite the name of each voter's signature, but up and down the page perpendicular to the voters' signature, was not in compliance with Election Law, § 123.—In re Lynch, 178 N. Y. S. 30.

Where a petition for independent nomination for mayor of a city is in two sections, they must be read together as one, and the witnesses covered by the character certificate in the first section must be deemed to be covered as to the second section also.—Id.

Election Law, § 123, requires only the signatures of the signers on an independent certificate of nomination, and whatever is capable of identifying the signer is sufficient, though the Christian name is omitted.—Id.

Registration and voting in a military camp by one in the military service during the particular year was a proper registration, within the meaning of Election Law, § 123, sufficient to qualify such voter as a witness to an independent certificate of nomination.—Id.

144 (N.Y.Sup.) As Election Law, § 190, enjoining upon the board of elections the duty of enforcing the election laws, it is the duty of the board to refrain from acting upon papers purporting to be certificates of nomination, which do not appear on the face thereof to be executed in the form and manner required by law.—In re McGrath, 178 N. Y. S. 231.

144 (N.Y.Sup.) A candidate who presents an independent certificate of nomination is not entitled to an order compelling the board of elections to print his name on the official ballot, without showing that the certificate was in due form, duly executed, and that the required number of nominators had registered.—In re Murphy, 178 N. Y. S. 230.

153 (N.Y.Sup.) Under Election Law, § 134, providing that questions raised by written ob-

jection to a certificate of independent nomination shall be passed on as provided in section 125, which relates to party devices, and declares that questions shall be determined upon application to the Supreme Court, board of elections of city of New York, with which was filed a written objection to a certificate of independent nomination on the ground that a sufficient number of nominators had not registered, has no jurisdiction to determine that question; its duties being wholly ministerial.—In re McGrath, 178 N. Y. S. 231.

As Election Law omits provision of earlier law that certificates of independent nomination to which no objection is filed are to be deemed valid, if apparently conforming to statute on their face, such rule does not apply to certificates of independent nomination, and they may be held invalid without objection.—Id.

153 (N.Y.Sup.) Duties of board of elections with respect to independent certificates of nomination are wholly ministerial, and such board has no power to go outside of, beyond, or behind the records, or to pass on questions involving matters which require evidence dehors the record.—In re Murphy, 178 N. Y. S. 236.

Under Election Law, §§ 122, 123, 128, 134, 190, the board of elections, while its duties are ministerial, and subject to judicial review under section 125, is bound to execute the election laws, and to count the number of nominators who have registered, and determine in the first instance whether the certificate is in due form.—Id.

153 (N.Y.Sup.) The board of elections of the city of New York has power to pass on the question as to whether the names of certain candidates to be voted for at the primary election shall be placed on the primary ballot.—Application of Cahill, 178 N. Y. S. 468.

154(1) (N.Y.Sup.) Under Election Law, § 125, on application for order adjudging an independent nomination certificate for mayor to be insufficient and void, as not meeting the requirements of section 123, the Supreme Court must take such decision and order as justice may require.—In re Lynch, 178 N. Y. S. 30.

155 (N.Y.Sup.) An independent certificate of nomination for mayor of a city, where the witness did not sign his name on the same line and opposite the name of each voter's signature, but up and down the page perpendicular to the voters' signatures, was not in compliance with Election Law, § 123, though the defect might be cured, if responsibility for the witness' signature could be fixed, by re-signing his name properly after the certificate had been declared insufficient, on application for order to that effect; proper proof being made that the witnesses had actually witnessed bona fide signatures of qualified voters.—In re Lynch, 178 N. Y. S. 30.

The defect in an independent certificate of nomination for mayor of a city, that it does not appear that certain witnesses to signatures are freeholders in the county or residents thereof for the last preceding five years, may be cured by the affidavits of the witnesses that they do possess the qualification of residence.—Id.

The omission of a petition for independent nomination for mayor of a city to embrace a character certificate as to three witnesses to

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the signatures of voters is excusable, and can be cured in the form required by law.—Id.

Election Law, § 123, requires only the signatures of the signers on an independent certificate of nomination, and whatever is capable of identifying the signer is sufficient, though the Christian name is omitted, while any error in form or failure to disclose identity can be cured as an excusable omission, on submission of proper proofs by the signer.—Id.

⚡158 (N.Y.Sup.) While the duties of the board of elections are, under Election Law, §§ 123, 124, 128, purely administrative, jurisdictional defects in a certificate of independent nomination are not waived by the receipt and filing of the petition by the board.—In re Murphy, 178 N. Y. S. 236.

VII. BALLOTS.

⚡166 (N.Y.Sup.) Under Town Law, § 68, Election Law, § 316, as amended by Laws 1913, c. 821, and Laws 1917, c. 703, section 318, as amended by Laws 1901, c. 95, section 331, as amended by Laws 1909, c. 22, and section 366, as amended by Laws 1913, c. 821, there should be no separate ballot for candidates for town offices, at a general election notwithstanding section 341, as amended by Laws 1913, c. 821.—People ex rel. Shea v. Gilbert, 178 N. Y. S. 327.

ELECTRICITY.

⚡16(1) (N.Y.) Where trolley wire of defendant traction company running under bridge of railroad company was so placed that no one standing on the bridge or even bending over the parapet could reach it, *held*, that defendant was not liable for injury to a boy who in crossing the bridge swung a wire about eight feet long bringing it in contact with the trolley wire.—Adams v. Bullock, 125 N. E. 93, 227 N. Y. 208.

Since defendant traction company in using an overhead trolley was in the lawful exercise of its franchise, negligence cannot be imputed to it because it used the overhead wire system and not another.—Id.

ELEVATORS.

See Master and Servant, ⚡405.

EMINENT DOMAIN.

See Judgment, ⚡747.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

⚡8 (N.Y.Sup.) Statutes giving the right of eminent domain will be strictly construed.—People v. Fisher, 178 N. Y. S. 184.

II. COMPENSATION.

(D) Persons Entitled and Payment.

⚡152(1) (N.Y.Sup.) Where land, sold for a term of years under Laws 1869, c. 888, § 13, for swamp land drainage assessment, is condemned, the purchaser for years is entitled to the income of the award for such years, and at end thereof the corpus goes to the reversioners.—Whitney v. Considine Investing Co., 178 N. Y. S. 68.

⚡153 (N.Y.Sup.) An award for damage to buildings by reason of intended regulation of a street is payable to the owners of the property at the time the street is regulated or graded, and not when the city acquires title to the land.—In re Leist, 178 N. Y. S. 268.

Where a city condemns land in widening a street, and title passes, the right to an award of damages thereafter is personal property, which does not pass to the grantee of owner of abutting land entitled thereto.—Id.

A grantee, having a right to claim, on ground of estoppel, that title had passed on condemnation before deed was given to her with covenants, did not pass such right, where she conveyed by deeds of bargain and sale, without full covenants.—Id.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

⚡167(4) (N.Y.Sup.) Statutes giving the right of eminent domain will be strictly construed, and proceedings thereunder must be in strict conformity with the statute, and every jurisdictional provision thereof complied with.—People v. Fisher, 178 N. Y. S. 184.

⚡169 (N.Y.Sup.) Governor's statements, to members of forest purchasing board during informal conversations, that certain land should be acquired at once, *held* insufficient consent to acquisition of the land under Laws 1908, c. 130, § 47, requiring governor's "consent," where no record was made of the conversations, and no entry made in any book or record showing governor's consent to acquisition of such land; parol consent being insufficient to comply with the statute, though statute does not expressly require written consent.—People v. Fisher, 178 N. Y. S. 184.

Laws 1908, c. 130, § 44, requiring Governor's consent to acquisition of land by forest purchasing board, is mandatory.—Id.

Under Laws 1908, c. 130, § 47, providing for filing of certificate describing lands appropriated by state for purpose of making them a part of Adirondack or Catskill parks, and service of notice of filing of such certificate upon owner, all jurisdictional steps necessary to acquisition of land by forest purchasing board must have been taken before the filing and service of such notice.—Id.

EQUITY.

See Attorney and Client, ⚡192; Conversion; Costs, ⚡103; Discovery; Injunction; Judgment, ⚡120, 123, 130; Quieting Title; Reformation of Instruments; Set-Off and Counterclaim, ⚡8; Specific Performance; Trusts.

ESTATES.

See Descent and Distribution; Executors and Administrators; Life Estates; Perpetuities; Tenancy in Common; Wills.

ESTOPPEL.

See Corporations, ⚡617; Drains, ⚡88; Eminent Domain, ⚡153; Marriage, ⚡36.

EVIDENCE.

See Criminal Law, §510, 511; Depositions; Discovery; Pleading, §11, 22, 345, 427; Trial, §159; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.
For review of rulings relating to evidence, see Appeal.

I. JUDICIAL NOTICE.

§1 (N.Y.Sup.) Courts and judges may take judicial notice of various matters in the progress of a litigation.—*Mager v. Wuytack*, 178 N. Y. S. 300.

§5(2) (N.Y.Sup.) Courts are not bound to take judicial notice of matters of fact, as that X-ray apparatus is in general use in hospitals at Barbadoes and in South American ports.—*Leone v. Booth S. S. Co.*, 178 N. Y. S. 620.

§14 (N.Y.Sup.) Court will not take judicial notice of fact that counsel's absence was due to sickness.—*Mager v. Wuytack*, 178 N. Y. S. 300.

§14 (N.Y.Sup.) Court will take judicial notice that hernia is a disease arising out of natural causes, as well as from accident.—*Cavalier v. Chevrolet Motor Co. of New York*, 178 N. Y. S. 489.

§23(1) (N.Y.Sup.) It is a well-known fact that the colonial government as a matter of policy studiously avoided granting the river bed.—*West Virginia Pulp & Paper Co. of Delaware v. Peck*, 178 N. Y. S. 663.

§29 (N.Y.Sup.) If a penal statute is applicable to a civil suit for libel, the court must take judicial notice of the statute and its terms.—*Schieffelin v. Hylan*, 178 N. Y. S. 652.

§32 (N.Y.Sup.) Under Greater New York Charter, § 1556, as amended by Laws 1917, c. 382, courts may now take judicial notice of ordinances.—*Cohen v. A. Goodman & Sons*, 178 N. Y. S. 528.

§43(1) (N.Y.Sup.) In a summary proceeding by the Public Service Commission, pursuant to Public Service Commissions Law, § 74, to enjoin a gas company from charging more than 95 cents per 1,000 feet for gas, the Appellate Division held not under obligation judicially to notice certain facts occurring subsequent to the rendition of the judgment for the Commission appealed from.—*Public Service Commission for First Dist. v. Brooklyn Borough Gas Co.*, 178 N. Y. S. 93.

II. PRESUMPTIONS.

§76 (N.Y.Sup.) Failure of defendant in a civil action to testify is not in or of itself evidence against him, failure to produce evidence in one's possession not making evidence, the only effect being to warrant the court or jury to make the deliberative inference, rather than the probative inference, that the evidence, if produced, would not be favorable to the defendant, and no presumption is created for or against either party.—*Price v. Price*, 178 N. Y. S. 561.

§85 (N.Y.Sup.) In action for price, involving admissibility of declarations of buyers' employé to bind buyer, presumption that employment, shown to have existed at time of sale,

continued and existed at time of declarations, was overcome by unimpeached and uncontradicted evidence that employment had terminated at time declarations were made.—*Levy v. Wallach*, 178 N. Y. S. 216.

V. BEST AND SECONDARY EVIDENCE.

§158(15) (N.Y.Sup.) Where the public records showing ownership of property were obtainable, and could have been introduced in evidence, it was reversible error to permit a witness to testify over objection as to the contents of the records.—*Dinneen v. Martin*, 178 N. Y. S. 384.

VII. ADMISSIONS.

(D) By Agents or Other Representatives.

§244(7) (N.Y.Sup.) In an action for the purchase price of goods, where defense was that goods were not according to sample, it was error to permit witness to detail conversations had with defendant's salesman in regard to quality of goods; defendant corporation not being bound by his statement.—*Isaacson v. J. L. Blum Co.*, 178 N. Y. S. 333.

(E) Proof and Effect.

§258(1) (N.Y.Sup.) Employer was not bound by declarations of employé, regardless of proof that employment had not terminated at the time the declarations were made, in absence of proof that employé was at such time engaged in executing authority conferred upon him, and that the declarations related to business then pending so that they constituted part of *res gestæ*.—*Levy v. Wallach*, 178 N. Y. S. 216.

IX. HEARSAY.

§323(4) (N.Y.Sup.) Where article in question was not generally upon the market, and it was therefore practically impossible to prove its market value, there was no error in admitting in evidence a publication purporting to give the sales and quotations each day; there being proof on both sides as to reliability of publication.—*Burns Mfg. Co. v. Clinchfield Products Corporation*, 178 N. Y. S. 483.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(C) Separate or Subsequent Oral Agreement.

§442(4) (N.Y.Sup.) The written contract being merely defendant's letter agreeing, in consideration of plaintiff's suggesting and putting into operation his plan of leasing or selling phonograph "which is furnished with the Root Popular Music Assortment," to pay him a commission on all moneys collected for said rental and sale, defendant, to show the full agreement, could introduce the details of plaintiff's plan as worked out by himself in writing.—*O'Neil v. McKinley Music Co.*, 178 N. Y. S. 459.

Conversations between the parties, prior to defendant signing a letter agreeing, in consideration of plaintiff's plan of leasing or selling the phonograph furnished with a certain music assortment, to pay him a commission on money collected for said rental and sale, are admissible; they not varying the terms of the letter,

but merely augmenting the effect of the writings, which plaintiff had made, in disclosing the full nature of the plan.—Id.

↪442(6) (N.Y.Sup.) Where a written contract for the sale of thread "as sample spools delivered" was complete, and established conclusively that the thread was to be half right and half left twist, parol evidence that the thread was sold "as is," without any such agreement, is inadmissible, and, where improperly admitted, the issue raised by such evidence should not be submitted to the jury.—*Bloom v. Abram Bloom Co.*, 178 N. Y. S. 264.

XIV. WEIGHT AND SUFFICIENCY.

↪590 (N.Y.Sup.) An instruction that jury, in considering weight of testimony of certain employes, might consider that they had testified on a previous trial, when not employed, was improper; such fact being immaterial.—*Rosen v. Druss*, 178 N. Y. S. 259.

EXECUTION.

See Bankruptcy, ↪433; Contempt, ↪22; Costs, ↪174; Executors and Administrators, ↪508.

X. SUPPLEMENTARY PROCEEDINGS.

↪387 (N.Y.Sup.) Affidavit of judgment creditor's attorney for examination of third party as to his indebtedness to judgment debtor, stating merely that third party had personal property of and was indebted to judgment debtor, and that "the sources of deponent's knowledge and the grounds of his belief" as to such property were a statement signed by judgment debtor "now in deponent's possession," but not setting out the statement, held insufficient as basis for order of examination, under Code Civ. Proc. § 2441, requiring proof by affidavit or other competent written evidence that third person had property of or was indebted to judgment debtor.—*Van Senden v. Pratt*, 178 N. Y. S. 835.

↪419 (N.Y.Sup.) If a contempt consisted solely of a disobedience of an order to appear and be examined, defendant could not be fined the amount of a judgment to be paid to plaintiff without showing that the failure to obey the order to appear resulted in loss to plaintiff of the amount of the judgment; but the fine should be limited to the costs and expenses of plaintiff, and an additional sum for punishment not exceeding the statutory limit under Judiciary Law, § 773.—*Weddle v. Grzeczczak*, 178 N. Y. S. 563.

If defendant withdraws money from a bank in violation of an injunction, a fine for contempt for the amount of a judgment in favor of plaintiff was proper, if the judgment was lost to the plaintiff following the violation of the injunction.—Id.

In order to reach the conclusion, in a contempt proceeding against defendant for withdrawing money from a bank in violation of an injunction, that loss of a judgment to plaintiff followed, authorizing fine in amount of judgment, there must be evidence that the money on deposit belonged to the defendant, so that the plaintiff could satisfy the judgment there-

from and that the defendant was a party to its withdrawal.—Id.

EXECUTORS AND ADMINISTRATORS.

See Courts, ↪201; Death, ↪2; Descent and Distribution, ↪41; Discovery, ↪41; Insurance, ↪448, 560, 624; Judgment, ↪12, 286; Marriage, ↪50; Parent and Child, ↪3; Taxation, ↪900; Trusts, ↪166, 167, 283; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

↪22(1) (N.Y.Sur.) Where the designation of the widow as temporary administrator in an intestate proceeding is vacated on the filing of a formal will for probate, a solvent and uninterested executor, instead of the widow, will be appointed temporary administrator pending the contest in the proceedings to probate the will.—*In re Shonta's Estate*, 178 N. Y. S. 762.

↪22(3) (N.Y.Sur.) On the filing of a formal will, with petition for probate, after the designation of the widow as temporary administratrix in proceedings based on intestacy, in which no letters have been issued, the Surrogates' Court has inherent power, even under the Practice Act, to vacate the designation and stay the proceedings until the issue of testacy is determined, and is bound to do so on its own motion, without petition under section 2569.—*In re Shonta's Estate*, 178 N. Y. S. 762.

Upon an application in contested probate proceedings for the appointment of a temporary administrator, the court is not at liberty to look at the particular provisions of the will for the purpose of weighing the equitable or moral rights of the beneficiaries.—Id.

↪26(1) (N.Y.Sur.) Under Code Civ. Proc. § 2576, where executors deposited bonds in amount of \$50,000 to reduce penalty of bond, and thereafter filed bond in sum of \$86,000, they will not, after having received in addition more than \$100,000, be permitted to collect the coupons of the deposited bonds, without giving an additional bond, without giving proof in accounting proceeding, in which all interested parties are before court, that estate has been so reduced that original bond will be sufficient to satisfy the law, if security so withdrawn is also reckoned in the estate.—*In re Lubin's Estate*, 178 N. Y. S. 777.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

↪89 (N.Y.Sup.) An executrix, authorized by the will to operate testator's business, was required only to exercise such a degree of care in realizing on the accounts due the business as is exercised by the ordinarily prudent business man, though she has the burden to prove that claims were not lost through her negligence.—*In re Friedlander*, 178 N. Y. S. 50.

↪93(2) (N.Y.Sup.) An executrix, who under the will was authorized to continue testator's business as long as it was deemed for the best interests of the estate, was accountable only for good faith in the exercise of the discretion

vested in her, and was not responsible for errors of judgment.—In re Friedlander, 178 N. Y. S. 50.

§97 (N.Y.) Where attorneys contracted with a father as administrator for 50 per cent. of any recovery by settlement of verdict for death of a child, the Special Term, in their proceedings to enforce lien on the proceeds of settlement, was not under duty to approve as reasonable such a contract, leading to the result that, though the attorneys had merely investigated the accident and served summons, they could claim \$500 or half the settlement.—In re Reisfeld, 124 N. E. 725, 227 N. Y. 137.

Where a father fixed the terms of the retainer of attorneys to sue for the death of his child before his appointment as administrator, by prosecuting the action after appointment he approved and continued the arrangement.—Id.

§122(2) (N.Y.Sur.) The general power of temporary administrators, under Code Civ. Proc. § 2597, "to secure and preserve the estate," implies the further power to do whatever is requisite to perfect a chose in action.—In re Kean, 178 N. Y. S. 60.

Where an order of the surrogate, not appealed from, authorized temporary administrators to arrange with firms, etc., for sale of preferred stock held by them as collateral, and authorized pledges to effect such sale and to apply proceeds to reduction of debit balances due and owing to them by estate, such preferential payments were not claims against estate in the first instance, but against the stock pledged as collateral.—Id.

Where unappealed order of surrogate authorized temporary administrators to arrange to sell preferred stock pledged as collateral, and authorized pledges to make such sale and apply proceeds on their debit balances, parties plaintiff in an action against decedent in his lifetime for a money judgment, now pending against his executors, on settlement of accounts of such administrators and executors, under Code Civ. Proc. § 2768, subd. 3, defining "debts" and "creditor," might object to such preferential payments; but where account indicated that such sale and payment realized a profit to estate, and consequently to creditors, they could not be injured, if ultimately securing judgment in their action.—Id.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(B) Presentation and Allowance.

§227(4) (N.Y.Sur.) A claim disallowed by the executor will be considered on its merits, though proof of claim was served prior to the publication of notice to present claims, where the attorneys for the executor and claimant are both in court.—In re Whittemore, 178 N. Y. S. 780.

(D) Priorities and Payment.

§272 (N.Y.Sur.) The expenses of administration and the debts of an estate are a primary charge on the personal estate, and land cannot be resorted to, except under statutory authority.—In re Rhodes' Estate, 178 N. Y. S. 782.

VII. DISTRIBUTION OF ESTATE.

§291 (N.Y.Co.Ct.) With the assent of the executor, an asset specifically bequeathed becomes the property of the legatee.—Buck v. Kelly, 178 N. Y. S. 676.

§298 (N.Y.Sur.) Residuary funds, if given for life only, should not be paid without security.—In re Hillis, 178 N. Y. S. 348.

§308 (N.Y.Sur.) Account of executors would be charged with money transferred to a general devisee, a legatee of testator, in advance of the payment of the claims of creditors.—In re Kean, 178 N. Y. S. 60.

XI. ACCOUNTING AND SETTLEMENT.

(B) Proceedings for Accounting.

§469(1) (N.Y.Sur.) Where the will of a non-resident was probated within the county, and one of the executors resides in the county, the Surrogate's Court has jurisdiction to settle accounts of such executor under Code Civ. Proc. § 2510, subd. 3.—In re Yuill's Estate, 178 N. Y. S. 871.

§472 (N.Y.Sur.) Where ordinary application is made by creditors to compel executors to account, an answer of an executor, asking the court, before directing any accounting, to construe an agreement of guaranty entered into by the deceased and the executor, and to determine the extent of the separate liability of the estate and its interest in certain security, will be denied, as all the issues may be raised by objections and heard and determined at the same time.—In re Loeb's Estate, 178 N. Y. S. 364.

(D) Compensation.

§495(1) (N.Y.Sur.) Where testatrix's executor, personally being insufficient to pay in full legacies not charged on realty, together with the debts and expenses of administration, himself advanced difference of about \$20,000 between personal estate and amount of legacies and debts, he is entitled to commissions only on the amount of personal property left by testatrix and distributed by him, and not on the amount voluntarily paid by him.—In re Rhodes' Estate, 178 N. Y. S. 782.

§495(3) (N.Y.Sur.) Where testatrix's real estate has not been delivered to devisees, nor distributed, and has not been converted into money, there can be no commissions paid the executor upon it.—In re Rhodes' Estate, 178 N. Y. S. 782.

(E) Stating, Settling, Opening, and Review.

§508(3) (N.Y.Sur.) An executor is personally liable to a legatee for the amount which the surrogate's decree settling executor's account directs him to pay the legatee, and such amount may be collected by execution against executor's individual property.—In re Haaren's Estate, 178 N. Y. S. 775.

§509(8) (N.Y.Sur.) Decree of Surrogate's Court, settling the account of the executors, will not be modified, in the absence of a clear showing of fraud, mistake of fact, or clerical error.—In re Noe's Estate, 178 N. Y. S. 774.

§510(8) (N.Y.Sur.) On appeal from decision of the surrogate on petition of a surviving ex-

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ecutor to render and settle his account, the executor having sought instruction as to all of the legacies in the will, the Appellate Division has power to pass on the question whether the legacies made by a particular clause of the will must be charged upon the entire estate.—In re Herborn, 178 N. Y. S. 582.

⚡513(10) (N.Y.Sur.) Surrogate's decree, settling the accounts of executors under Code Civ. Proc. § 2743 (now § 2735), held conclusive on each party to the proceeding, including an executor who subsequently, in a proceeding for construction of the will, seeks to make out that testator's widow is not entitled to a life policy and the residuary estate outright; as established by the prior decree.—In re Hillis, 178 N. Y. S. 348.

⚡513(11) (N.Y.Sur.) Where decree of Surrogate's Court, settling account of executors, directed payment of certain amount to deceased's creditor on receipt by executors of the proceeds of sale of deceased's real estate, the amount drew interest from date of entry of decree, under Code Civ. Proc. § 1211.—In re Noe's Estate, 178 N. Y. S. 774.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

⚡521 (N.Y.Sur.) A decree entered in accounting proceedings in a probate court in a sister state allowing certain accounts against estate of testatrix wherever situated as expenses in due administration is ineffectual against New York administrators with will annexed, as no state can exercise direct jurisdiction over persons or property without its territory, and application for payment by New York administrators will be denied.—In re Eaton's Estate, 178 N. Y. S. 825.

EXEMPTIONS.

See Schools and School Districts, ⚡102; Taxation, ⚡382, 876.

EXTRADITION.

See Habeas Corpus, ⚡85, 92.

II. INTERSTATE.

⚡30 (N.Y.Sup.) Where one, while a few days in New Jersey, married a woman there and immediately returned to New York with her, and several days later the woman had epileptic fits and admitted that she and her parents had deceived and defrauded the husband as to her physical condition, and had fraudulently sworn in New Jersey as to her health in connection with obtaining a marriage license, and asked the husband to take her back to her parents' home in New Jersey, which he did after bringing an action in New York for annulment of the marriage, remaining in New Jersey only a few minutes, the husband could not be considered a "fugitive from justice" when he returned to New York, assuming that leaving his wife in New Jersey was wife desertion, and a statutory offense in New Jersey; the husband not being conscious of any guilt at any time.—People ex rel. Plumley v. Higgins, 178 N. Y. S. 728.

⚡32 (N.Y.Sup.) Where indictment does not set forth facts or acts constituting a crime under the statutes upon which it is based, it is the duty of courts to refuse extradition.—People ex rel. Plumley v. Higgins, 178 N. Y. S. 728.

EYES.

See Master and Servant, ⚡385.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

See Arrest, ⚡63, 64; Trial, ⚡253.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

⚡13 (N.Y.Sup.) If plaintiff and companions had trespassed upon defendant's land, erected tent thereon, and refused to move at defendant's request, without reason or explanation, there was prima facie reason and probable cause for their arrest, in view of Penal Law, § 2036.—Johnson v. May, 178 N. Y. S. 742.

Probable cause does not depend upon guilt or innocence of party arrested.—Id.

FEDERAL BOILER INSPECTION ACT.

See Master and Servant, ⚡285, 286.

FEDERAL OPERATION OF RAILROADS.

See Railroads, ⚡5½.

FEDERAL SAFETY APPLIANCE ACT.

See Master and Servant, ⚡111.

FINDINGS.

See Judgment, ⚡123.

FINES.

See Execution, ⚡419.

FIREMEN.

See Master and Servant, ⚡375.

FIRES.

See Master and Servant, ⚡375.

FLASH BOARDS.

See Navigable Waters, ⚡22.

FOOD.

See Sales, ⚡162, 164; Statutes, ⚡219.

⚡5 (N.Y.Sup.) A salad dressing, which is a compound under a secret formula of vinegar, mustard, salt, and other ingredients, none of which are harmful in any way, cannot be said to be adulterated, under Agricultural Law, § 201.—People v. Durkee, 178 N. Y. S. 614.

§15 (N.Y.Sup.) The proviso following the three subdivisions relating to misbranding in Agricultural Law, § 201, is not an added prohibition, but qualifies and limits the prohibitions already contained in the section; that is, the acts before mentioned are prohibited unless they are saved by the proviso, a "proviso" being a clause making what precedes conditional on what follows.—*People v. Durkee*, 178 N. Y. S. 614.

A salad dressing, "Durkee's Salad Dressing and Meat Sauce," a compound under a secret formula of vinegar, mustard, salt, and other ingredients, none of which are harmful in any way, cannot be said to be misbranded, under Agricultural Law, § 201, in that it is not sold under its own distinctive name, and that the ingredients of which it is composed are not stated in the label.—*Id.*

FOREIGN CORPORATIONS.

See Corporations, §657-691.

FORFEITURES.

See Bail, §79; Corporations, §619; Insurance, §448, 747; Intoxicating Liquors, §245, 250.

FORGERY.

See Banks and Banking, §148.

FRANCHISES.

See Taxation, §124½.

FRAUD.

See Appeal, §888; Arrest, §13, 35; Bankruptcy, §423; Discovery, §41; Executors and Administrators, §509; Frauds, Statute of; Marriage, §58; Mortgages, §34; Pleading, §8, 237; Release, §16, 57; Sales, §355; Trial, §109; Trusts, §283; Wills, §405.

FRAUDS, STATUTE OF.

See Principal and Agent, §152.

VII. SALES OF GOODS.

(B) Acceptance of Part of Goods.

§89(3) (N.Y.Sup.) Where it was shown that receipt was given for goods delivered and that part of the goods were used in making up hats, acceptance of the goods was conclusively shown.—*Isaacson v. J. L. Blum Co.*, 178 N. Y. S. 333.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§116(5) (N.Y.Sup.) Under Real Property Law, § 242, a lease for more than a year, executed by an agent for the lessor without written authority, is void, though under section 250 a contract for the letting or sale of property may be made by an agent without written authority.—*Siemers v. Heuchel*, 178 N. Y. S. 649.

§116(10) (N.Y.Sup.) Where there was never any possession of the property by a lessee for five years from an agent for the lessors not

authorized in writing, and no rent was ever paid by him, and there were no other acts that might constitute a ratification by the lessors of the lease, void under Real Property Law, § 242, the lease could be ratified only by a writing; verbal approval or acceptance not being sufficient.—*Siemers v. Heuchel*, 178 N. Y. S. 649.

IX. OPERATION AND EFFECT OF STATUTE.

§123(2) (N.Y.Sup.) A lease for five years, executed by the agent for the lessors without written authority, being void under Real Property Law, § 242, it was not good for one year, where the lessee never had possession; and even if possession had been obtained, such possession alone would have created merely a tenancy at will, without any fixed term.—*Siemers v. Heuchel*, 178 N. Y. S. 649.

GARAGES.

See Covenants, §103; Livery Stable and Garage Keepers.

GAS.

See Evidence, §43; Gas, §14; Judgment, §543, 715; Pleading, §350.

§1 (N.Y.Sup.) Where the Public Service Commission made an order to limit the service of a natural gas company in a city, which order was annulled by the court, the annulment relegated the parties to the status before the order was made, which showed applications for gas connections, refusals, and complaints filed with the commission, and under Public Service Commissions Law, § 74, it can interfere by mandamus to compel the gas company to make the connections.—*Public Service Commission, Second Dist. v. Iroquois Natural Gas Co.*, 173 N. Y. S. 24.

§13(3) (N.Y.Sup.) Mandamus will issue against a natural gas company, at suit of the Public Service Commission and the city served, to compel it to connect its mains in streets of the city with buildings fronting on such streets on request of the owners, subject to all reasonable regulations, though in the winter there is some difficulty in supplying enough gas for all present connections, the new connections amounting to only about a 6 per cent. increase.—*Public Service Commission, Second Dist. v. Iroquois Natural Gas Co.*, 178 N. Y. S. 24.

§14(1) (N.Y.Sup.) Where maximum rate for gas of 95 cents per 1,000 feet specified by the Public Service Commission was actually in effect, the gas company could not enforce any new rate established by it on declaration of the invalidity of the rate as fixed by the commission until 30 days after it had given notice to the Commission of change of rate, as required by Public Service Commissions Law, § 66, subd. 12, and until it had published the same.—*Public Service Commission for First Dist. v. Brooklyn Borough Gas Co.*, 178 N. Y. S. 93.

The order of the Public Service Commission of July 8, 1913, prohibiting a gas company charging in excess of 95 cents per 1,000 feet for gas, and the company's written acceptance of such order, constituted in effect the filing

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with the commission of notice of change of rate, as required by Public Service Commissions Law, § 86.—Id.

⚡14(1) (N.Y.Sup.) The judicial power does not extend to the fixation of a rate for gas.—Bronx Gas & Electric Co. v. Public Service Commission, First Dist., 178 N. Y. S. 172.

The Public Service Commission has no authority to fix any rate for gas in excess of the price of \$1 per 1,000 cubic feet fixed by Laws 1906, c. 125, because, although the statute may be unconstitutional as a matter of fact, in so far as it fixes too low a rate for the earning of profits by company, it is nevertheless valid as a restriction on Public Service Commission's power to fix any other rate.—Id.

In action against Public Service Commission, First District, and other public officials, to restrain their enforcement of Laws 1906, c. 125, fixing maximum rate for gas in plaintiff's territory, and to prevent interference with a higher rate fixed by it as a reasonable rate, seeking relief by having statutory rate declared confiscatory because of increased cost of production, and to have court fix a reasonable rate, where commission demurred to first cause of action and answered second, the facts alleged in first cause of action did not empower court to grant an injunction.—Id.

⚡14(1) (N.Y.Sup.) In gas company's action for a decree that Laws 1906, c. 125, fixing \$1 per 1,000 cubic feet as maximum price for gas furnished to the general public, and Laws 1905, c. 736, fixing 75 cents for that quantity as the maximum price for gas furnished to the city of New York, are at present confiscatory and unconstitutional, where company makes out a sufficiently convincing prima facie case to justify preliminary injunction, it may be granted, with appropriate incidental relief, on company's bond to protect consumers.—Bronx Gas & Electric Co. v. Public Service Commission, 178 N. Y. S. 218.

In action by gas and electric company to have Laws 1906, c. 125, fixing \$1 per 1,000 cubic feet as maximum for gas furnished to the general public, and Laws 1905, c. 736, fixing 75 cents for that quantity as the maximum for gas furnished to the city of New York, declared confiscatory and unconstitutional, the question whether plaintiff's total business, which includes its electrical department, is or is not conducted at a loss, cannot be injected into the case.—Id.

Assuming correctness of the figures of a gas company, suing to have Laws 1906, c. 125, fixing \$1 per 1,000 cubic feet as maximum price for gas furnished to the general public, and Laws 1905, c. 736, fixing 75 cents for 1,000 cubic feet as the maximum price for gas furnished to the city of New York, declared confiscatory and unconstitutional, show that statutory rate has been confiscatory since January 1, 1917, a sufficient period of loss is shown, at least until all the evidence is in, and the court may grant pendente lite relief.—Id.

In suit by gas company to enjoin enforcement of statutory maximum rates to consumer and to city of New York, wherein it seeks primarily the fixation of a new rate, and the other relief is merely incidental thereto, and it desires no relief, unless a new rate is fixed,

its motion for injunction will be denied in toto, as courts are without power to fix a rate.—Id.

GATES.

See Bridges, ⚡37.

GERMAN LANGUAGE.

See Injunction, ⚡77.

GIFTS.

I. INTER VIVOS.

⚡32(1) (N.Y.) A promissory note, executed and given to a nephew as a gift, is unenforceable.—Dougherty v. Salt, 125 N. E. 94, 227 N. Y. 200.

GOVERNMENT OPERATION OF RAILROADS.

See Railroads, ⚡5½.

GRAND JURY.

See Criminal Law, ⚡510; Replevin, ⚡12.

GUARANTY.

See Executors and Administrators, ⚡472; Indemnity.

II. CONSTRUCTION AND OPERATION.

⚡36(2) (N.Y.Sup.) Where guaranty covered accounts due to one personally, there could be no recovery for accounts carried by him for a disclosed principal.—Painter v. Fletcher, 178 N. Y. S. 266.

GUARDIAN AND WARD.

See Infants, ⚡82.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

⚡10 (N.Y.Sur.) Petition of the father of a boy under the age of 14, and presumptively legitimate, to be appointed his guardian, may be granted by Surrogate's Court, under Code Civ. Proc. §§ 2510, 2643, 2649, though the mother, who was married to another in 1915, opposes the application.—In re Mancini, 178 N. Y. S. 57.

⚡13(7) (N.Y.Sur.) An order appointing father of a boy under age of 14 years, presumptively legitimate, as his guardian, should provide that the mother, though since married to another, should have access to the boy at such times and in such manner as may be proper for his best interests.—In re Mancini, 178 N. Y. S. 57.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

⚡3 (N.Y.Sup.) Under Laws 1919, c. 410, amending Penal Law, § 2193, and providing that time spent by person convicted of crime in prison or jail prior to conviction and before sentence shall be calculated as part of

the term of sentence, and deducted under provisions of Prison Law, art. 9, one convicted is not, where the period of his incarceration in penitentiary, coupled with incarceration pending trial, has equaled amount of sentence, entitled to discharge on habeas corpus, but the matter must be reported to the Governor, and deduction approved by him before it can be effected; hence the act can in no way be attacked as infringing the pardoning power.—*People ex rel. Gabriel v. Warden of New York County Penitentiary, Wards Island, 178 N. Y. S. 595.*

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§85(2) (N.Y.Sup.) On habeas corpus in an extradition proceeding, evidence may be taken to aid the court in determining the facts bearing upon the legal questions involved, and the questions sometimes are mixed questions of fact and of law.—*People ex rel. Plumley v. Higgins, 178 N. Y. S. 728.*

§92(2) (N.Y.Sup.) The questions presented on habeas corpus in an extradition case are as to the identity of the alleged fugitive, whether the crime was committed in the foreign state under its laws, whether the indictment or information charges a crime under such foreign laws, and whether the person apprehended is within the fair and legal sense of the term a fugitive from justice.—*People ex rel. Plumley v. Higgins, 178 N. Y. S. 728.*

On habeas corpus by one sought to be extradited by New Jersey to answer a charge of willful wife desertion, New York court, in determining whether a crime was committed at all in New Jersey, could determine the fact whether or not relator had willfully deserted his wife in New Jersey.—*Id.*

HARMLESS ERROR.

See Appeal, §1048-1083; Criminal Law, §1169.

HERNIA.

See Evidence, §14.

HIGHWAYS.

See Bridges; Canals, §17; Municipal Corporations, §654, 705, 706.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§17 (N.Y.Sup.) The rule that it will be assumed that the same name at all times designates the same person or thing is especially applicable where the description by metes and bounds of a highway when originally laid out is given in terms of the then ownership of adjoining real estate.—*In re Amethyst St., Unionport Road, and Rhinelander Ave. in City of New York, 178 N. Y. S. 225.*

When a highway is once shown to exist, it is presumed to continue until it is shown to exist no longer.—*Id.*

(C) Alteration, Vacation, or Abandonment.

§79(2,3) (N.Y.Sup.) When a highway is once shown to exist, it is presumed to continue until it is shown to exist no longer; when a highway is once established, it continues until discontinued according to law.—*In re Amethyst St., Unionport Road, and Rhinelander Ave. in City of New York, 178 N. Y. S. 225.*

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

§113(4) (N.Y.) A contractor for construction of state highway, who deposited a certified check with his bid, which was to become the property of the state if he failed to execute the contract, and bound himself to enter into a contract in and by which he agreed that his information "regarding all the conditions affecting the work to be done and labor and materials to be furnished for the completion of this contract * * * was secured by personal investigation and research and not from the estimates of the state commissioners of highways," was not entitled to a return of the check on the ground of mutual mistake and a misunderstanding, in that the estimates exhibited by the state commissioner indicated that the supply of stone necessary could be obtained at a certain place at a certain price; it later being discovered that stone could not be got at such place and could only be obtained at a much higher cost.—*Application of Semper, 124 N. E. 743, 227 N. Y. 151.*

HOMICIDE.

See Criminal Law, §511, 945, 949, 1023; Insurance, §438, 448, 624.

II. MURDER.

§30(1) (N.Y.Sup.) If a conspiracy was entered into to murder six persons, and three of them were murdered by different members of the conspiracy, all the conspirators were principals in the commission of each murder, within Penal Law, § 2, and thereunder those aiding or abetting in their commission were "connected with the commission" of all the crimes, whether present or absent when each crime was committed, and became accessories before the fact, and liable as "principals," though not actually participating in any of the homicides.—*People v. Vollero, 178 N. Y. S. 787.*

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HOSPITALS.

—See Counties, **153**, 173; Livery Stable and Garage Keepers, **4½**; Mandamus, **3**; Taxation, **734**, 876.

HUSBAND AND WIFE.

See Criminal Law, **43**; Divorce; Extradition, **30**; Habeas Corpus, **92**; Marriage; Pleading, **8**; Wills, **627**.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

14(2) (N.Y.Sup.) Where deed to husband and wife does not otherwise provide, the grantees become seised in fee as tenants by the entirety, and the survivor takes the whole.—*D'Elisa v. Rittondo*, 178 N. Y. S. 838.

Though joint will of husband and wife provided that survivor should enjoy realty for life, and that upon survivor's death it should be equally divided among children, *held*, that wife, on death of husband, became sole owner of realty held by the entirety.—*Id.*

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

51 (N.Y.Sup.) Where decree of separation had been rendered providing for alimony to wife, so-called agreement of separation between husband and wife entered into upon husband's default in payment of alimony, whereby wife agreed to accept the alimony due her in full satisfaction of her support, maintenance, and alimony for the past and in the future, did not affect status of parties, being without consideration, since parties were already separated, and since husband was already bound to pay wife the sum paid, and being void as against public policy, under Domestic Relations Law, § 51, prohibiting contract relieving husband from obligation to support wife.—*Gewirtz v. Gewirtz*, 178 N. Y. S. 738.

V. WIFE'S SEPARATE ESTATE.**(B) Rights and Liabilities of Husband.**

138(2) (N.Y.Sup.) The mere fact that wife owned premises on which work was performed under a contract raised no presumption that the husband, who executed the contract, was the agent of the wife in making the contract.—*Dinneen v. Martin*, 178 N. Y. S. 384.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

278(1) (N.Y.Sup.) An agreement between a husband and wife for an immediate separation and for a separate allowance to the wife for her support is valid.—*Hann v. De Freest*, 178 N. Y. S. 414.

279(1) (N.Y.City Ct.) Where husband defaults in payments under a separation agreement, divorced wife may assign her cause of action therefor.—*Phinney v. Andrus*, 178 N. Y. S. 760.

279(1) (N.Y.Sup.) Where there is a valid existing separation agreement between a husband and wife, under which provision is made

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for her support, she has no cause of action against the husband for separation and alimony in excess of the amount provided for in the agreement.—*Gutmann v. Gutmann*, 178 N. Y. S. 833.

279(2) (N.Y.Sup.) Where a husband and wife made a valid separate maintenance agreement, and later the husband obtained a divorce against the wife for a subsequent adultery with H., in an action by the divorced wife, now the wife of H., upon the maintenance agreement, for unpaid payments, an allegation of such subsequent adultery constitutes no defense.—*Hann v. De Freest*, 178 N. Y. S. 414.

279(6) (N.Y.Sup.) Where monthly sum agreed to be paid by husband in separation agreement was regularly paid until the person to whom payment was to be made refused to receive payment, husband was not in default; no demand having been made on him for payment of alimony since said refusal.—*Gutmann v. Gutmann*, 178 N. Y. S. 833.

Where separation agreement fixes monthly amount to which defendant wife is entitled, and plaintiff husband is not in default under such agreement as to payment, defendant's motion for alimony during pendency of action will be denied.—*Id.*

281 (N.Y.Sup.) Where a husband and wife made an agreement for separate maintenance, followed immediately by separation, and the husband did not deny the execution of the agreement, but admitted making payments thereunder for a period of six years, he cannot, in a suit for unpaid installments, subsequently set up his lack of knowledge that the agreement stated that they had theretofore separated, and alleged that the agreement was made while they were still living together, in order to attack its validity.—*Hann v. De Freest*, 178 N. Y. S. 414.

281 (N.Y.City Ct.) Where, husband defaults in a payment under a separation agreement, and wife assigns her cause of action, the assignee need not join the wife as a party in a suit by him against the husband.—*Phinney v. Andrus*, 178 N. Y. S. 760.

Under allegation that wife had duly performed all conditions of the agreement, in action by assignee of claim of wife against husband for payments due her under a separation agreement, which was made a part of the complaint, plaintiff could show that wife had not remarried at time payment became due.—*Id.*

IX. ABANDONMENT.

304 (N.Y.Sup.) A resident in New York, who while in the service of the United States married a woman in New Jersey, and thereafter took up his residence in New York, and, upon learning that the woman had fraudulently induced the marriage, returned her with her consent to New Jersey, remaining there only a few minutes, he was not, a resident of New Jersey at the time he left the woman there, and did not violate the laws of New Jersey, prohibiting a resident of that state from deserting his wife.—*People ex rel. Plumley v. Higgins*, 178 N. Y. S. 728.

Where a resident of New York married a woman in New Jersey, and returned to his

home in New York, where a day or two later she had epileptic fits and admitted that she and her parents had fraudulently sworn in New Jersey as to her health in obtaining the marriage license, and asked that he take her to her parents' home, which he did after bringing a suit in New York for annulment of marriage, remaining in New Jersey only a few minutes, he had not "willfully" deserted her, within the meaning of New Jersey statute.—Id.

ICE.

See Municipal Corporations, ¶773, 821.

IDENTITY.

See Highways, ¶17; Names, ¶18.

ILLEGITIMATE CHILDREN.

See Bastards.

INCOME TAX.

See Schools and School Districts, ¶102.

INDEMNITY.

See Guaranty.

¶11 (N.Y.) Where a tenant desired to make alterations, and secured the consent of the landlord on condition the tenant would pay all claims of builders, mechanics, etc., to secure performance of which a bond was given by the tenant, the landlord cannot recover from the tenant, or the surety on its bond, merely because claims have not been paid, nor can the landlord voluntarily pay claims, no liens having been filed or threatened, and then recover from the tenant or its surety.—Schwartz & Co. v. Almwel Co., 124 N. E. 892, 227 N. Y. 184.

INDICTMENT AND INFORMATION.

See Schools and School Districts, ¶160.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

¶81(7) (N.Y.Sup.) A recital in a New Jersey indictment that accused was "late of city of Camden, in said county of Camden," did not sufficiently allege the residence of accused to be in Camden at the time of alleged commission of crime.—People ex rel. Plumley v. Higgins, 178 N. Y. S. 728.

INFANTS.

See Criminal Law, ¶1169; Guardian and Ward; Mandamus, ¶172; Marriage, ¶58; Master and Servant, ¶378; Parent and Child; Schools and School Districts, ¶160; Tenancy in Common, ¶19, 38.

II. CUSTODY AND PROTECTION.

¶16 (N.Y.Sup.) Where an infant girl was committed from New York county as a juvenile delinquent to the state training school for girls, and the managers of the home found that she was not benefited, and in accordance with State Charities Law, § 205, returned her to the custody of the sheriff of New York county, held

that, notwithstanding the Children's Court refused to resentence the girl, asserting that it was without authority under sections 204, 205, the sheriff, who returned the girl to the home, may be compelled to retake her into his custody.—Newton v. Knott, 178 N. Y. S. 201.

VII. ACTIONS.

¶82 (N.Y.Sup.) Where guardian ad litem appointed for infant defendant was irresponsible financially, it was proper for defendant to call the court's attention thereto, and move for an order revoking the appointment, since guardian's responsibility for costs, under Code Civ. Proc. § 469, gave defendant an interest in the matter.—Backerman v. Coccola, 178 N. Y. S. 423.

Since court has no power to require guardian ad litem to give security for costs, under Code Civ. Proc. § 3268, and since the requirement that a responsible person be appointed guardian ad litem under section 469 is primarily for the protection of the infant, an irresponsible guardian ad litem should not be allowed to continue to act merely upon giving security for costs.—Id.

¶87 (N.Y.Sup.) That plaintiff in action for foreclosure of mortgage was not of age when action was begun *held*, at most, an irregularity, which lapse of time has cured.—D'Elisa v. Ritondo, 178 N. Y. S. 838.

INJUNCTION.

See Corporations, ¶294; Courts, ¶480; Evidence, ¶43; Gas, ¶14; Judgment, ¶543; Landlord and Tenant, ¶134; Pleading, ¶350; Trade-Marks and Trade-Names, ¶57, 58.

II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Property, Conveyances, and Incumbrances.

¶56 (N.Y.Sup.) Equity will restrain a party from making disclosures of secrets communicated to him in a confidential employment, whether the secrets be trade secrets, or secrets of title, or any other secrets of the party important to his interest.—Eastman Kodak Co. v. Warren, 178 N. Y. S. 14.

(C) Contracts.

¶60 (N.Y.Sup.) Covenant of employé, employed from week to week, not to work for competitor for certain period after leaving employer's service, will be enforced by enjoining employé from working for competitor, where employer cannot secure a substitute and has no adequate remedy; but, where a substitute can be obtained, employer does not need an injunction, since he can secure adequate relief by way of damages.—Eastman Kodak Co. v. Warren, 178 N. Y. S. 14.

(E) Public Officers and Boards and Municipalities.

¶77(1) (N.Y.Sup.) The Supreme Court will not enjoin the mayor of New York City and other officials from prohibiting, until the treaty of peace with Germany is ratified, the per-

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formance of opera in the German language in the city; the performances actually given by complainant company having provoked riotous conduct by bystanders, requiring the efforts of a large body of police to control.—*Star Opera Co. v. Hyland*, 178 N. Y. S. 179.

(G) Personal Rights and Duties.

⚡96 (N.Y.Sup.) Although the publication of moving pictures is a trade, it is not such a "trade," as was within the contemplation of the Legislature in the passage of Civil Rights Law, §§ 50, 51, and such statute does not prohibit the publication of a person's picture or name without his consent in a single set of films of actual events used at one time for distribution in different parts of the country before different audiences as a matter of current news.—*Humiston v. Universal Film Mfg. Co.*, 178 N. Y. S. 752.

Civil Rights Law, §§ 50, 51, do not prohibit the use upon the bill boards in front of a theater of the pictures and names of persons appearing in motion pictures of actual events without their consent.—*Id.*

⚡101(1) (N.Y.Sup.) The right of one who is conducting a theater to have the public allowed free, unobstructed access to such theater, and to have an unrestricted privilege to deal with them, is a property right, interference with which will be protected by injunction as against the acts of striking employes.—*Cook v. Wilson*, 178 N. Y. S. 463.

Although courts will not enforce performance of contracts for personal services, theatrical managers as individuals may, by injunction, restrain the members of an "actors' equity association" from conspiring to compel or induce employes to violate valid subsisting contracts, for the purpose of obtaining recognition of such association by theatrical managers.—*Id.*

⚡101(1) (N.Y.Sup.) Employes of common carriers, who refuse to accept freight hauled by nonunion truck drivers, will not be restrained from so doing in an action by a corporation owning trucks, there being no show of malice against the plaintiff, and freight being received from plaintiff's trucks operated by union employes; the object of the boycott being to compel plaintiff to recognize the union and to limit the regular day to 8 hours and pay double time for overtime, it appearing that three-fourths of the truck owners have recognized the union and agree to the hours of work and overtime pay; boycotting not being unlawful where the primary purpose is to better the condition of the boycotters as laborers, and not to do irreparable injury to the party boycotted.—*P. Reardon, Inc., v. Caton*, 178 N. Y. S. 713.

(H) Criminal Acts, Conspiracies, and Prosecutions.

⚡102 (N.Y.Sup.) When a right to an injunction and to damages given by statute is based on an act made criminal by the same statute, the law of strict construction should lead the court to interpret the act in favor of the party charged with crime, in an action to enjoin and for damages.—*Humiston v. Universal Film Mfg. Co.*, 178 N. Y. S. 752.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

⚡136(1) (N.Y.Sup.) An injunction pendente lite will not be granted to restrain the solicitation of the employes of a competitor, where the only inducements were higher wages, better conditions, and increased opportunities of advancement, and the employes were not under a contract for any definite period of employment, and no fraudulent or unlawful means were used for that purpose.—*Eastman Kodak Co. v. Warren*, 178 N. Y. S. 14.

⚡136(2) (N.Y.Sup.) An injunction pendente lite will be granted to restrain the disclosure of secrets of manufacture, although the negative covenant of employment in the contract of employment will not be enforced, pending the determination of the action.—*Eastman Kodak Co. v. Warren*, 178 N. Y. S. 14.

⚡136(3) (N.Y.Sup.) An injunction pendente lite will not be granted to enforce a negative covenant not to enter the employ of a competitor within the United States, except Alaska, during a period of two years after the employment shall cease, where it is not necessary to the protection of the covenant, or reasonable and equitable under the facts of the case.—*Eastman Kodak Co. v. Warren*, 178 N. Y. S. 14.

An injunction pendente lite will not be granted to enforce such a negative covenant not to enter the employ of a competitor, where the covenant has a substantial monopoly of the production of motion picture raw film stock the term of employment has expired, and the occupation of the employe is that of an emulsion coater, of which the covenant has many others in its employ and can readily secure a substitute.—*Id.*

⚡137(1) (N.Y.Sup.) Injunction should not issue before trial to restrain carrier from refusing to receive freight for shipment, where employes of carrier refused to accept freight from nonunion truckmen, and carrier was powerless because, if it should discharge its men, it could procure no one else to do the work, which was of great importance to the entire community.—*Reardon v. International Mercantile Marine Co.*, 178 N. Y. S. 722.

(B) Continuing, Modifying, Vacating, or Dissolving.

⚡171 (N.Y.Sup.) Conclusions of law in complaint will not be considered on motion to vacate temporary injunction granted ex parte.—*Eastman Kodak Co. v. Warren*, 178 N. Y. S. 14.

VII. VIOLATION AND PUNISHMENT.

⚡221 (N.Y.Sup.) Where provisions of preliminary injunction order, as modified, and the injunction order as made permanent, were substantially the same, notice of the provisions of one was notice of the provisions of the other.—*Kayser v. Fitzgerald*, 178 N. Y. S. 130.

⚡223(2) (N.Y.Sup.) On application to punish labor union officials and striking employe for disobedience of injunction by intimidation, threats, and an abuse of nonstriking employes, held, that defendants were guilty of criminal contempt in deliberately disobeying order of court.—*Kayser v. Fitzgerald*, 178 N. Y. S. 130.

VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.

Ⓒ251 (N.Y.Sup.) Evidence as to memorandum of decision in injunction suit as to damages of defendant therein, which contained no direction, and hence was not an order assessing damages under Code Civ. Proc. § 787, held insufficient to sustain judgment for such defendant in suit on the injunction bond.—*Aristo Hosiery Co. v. Moore*, 178 N. Y. S. 344.

INNUENDO.

See Libel and Slander, Ⓒ100.

INSANE PERSONS.

II. INQUISITIONS.

Ⓒ29 (N.Y.Sup.) Under Code Civ. Proc. § 2343, providing that where a person for whom a committee has been appointed becomes competent to manage himself and his affairs, the court may discharge the committee and restore the property, the wide discretion to do so should be exercised with great care and patience so as to protect the alleged lunatic against wrongful deprivation of his liberty and property, if he is competent to manage himself or his affairs.—*In re Chanler*, 178 N. Y. S. 460.

Where petitioner was duly committed to an asylum for the insane in the state of New York in 1897, and in proceeding in 1899 by two of his brothers a committee of his person and property was appointed, and in 1901 a competent court of Virginia, to which he had gone after his escape from the asylum in 1900, judicially declared him competent, and he had thereafter lived a sane, well-ordered life, in the enjoyment of social, religious and public esteem, outside of the state of New York, his motion under Code Civ. Proc. § 2343, to discharge the committee, would be granted.—*Id.*

V. PROPERTY AND CONVEYANCES.

Ⓒ62 (N.Y.) One who had been legal counsel and adviser to one subsequently declared an incompetent was not justified, on learning that another person had obtained from his client a power of attorney to act for him with reference to his property, to take the matter up with the authorities, believing there was a conspiracy to obtain control of the person and property of the client, and neither the client nor his committee should be required to repay to the attorney money expended by him in actions against him for malicious prosecution; there being nothing which would justify the court in reaching the conclusion that the incompetent, if restored to health, would pay the claim.—*In re Lord*, 124 N. E. 727, 227 N. Y. 145.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Judgment, Ⓒ883.

INSPECTION.

See Animals, Ⓒ35; Discovery, Ⓒ38; Master and Servant, Ⓒ285, 286.

INSTRUCTIONS.

See Criminal Law, Ⓒ822-829; Trial, Ⓒ251-253.

INSURANCE.

See Executors and Administrators, Ⓒ513; Sales, Ⓒ80.

I. CONTROL AND REGULATION IN GENERAL.

Ⓒ16 (N.Y.Sup.) Foreign insurance corporation, having certificate entitling it to do business in state and to guarantee performance of contracts other than insurance contracts, under Insurance Law, § 9, and section 70, subd. 4, was not required to limit its contract of guaranty to period during which it was authorized, at time of execution of contract, to transact business, under section 32, and was not precluded from making premium payable in installments due after expiration of such period; the continuance of company's liability after expiration of period not constituting "doing business" in state, within section 9.—*American Fidelity Co. v. Leahy*, 178 N. Y. S. 511.

IV. INSURABLE INTEREST.

Ⓒ114 (N.Y.Sup.) An insured, taking out insurance on his own life, may designate any person as beneficiary, regardless of the relationship between him and the beneficiary and whether or not the beneficiary has an insurable interest in insured's life.—*Welch v. Travelers' Ins. Co.*, 178 N. Y. S. 748.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) Grounds in General.

Ⓒ265 (N.Y.Sup.) An insured, taking out insurance on his own life, may designate any person as beneficiary, regardless of the relationship between him and the beneficiary, and whether or not the beneficiary has an insurable interest in insured's life; so that a statement in an application by one taking out insurance on his own life, to the effect that beneficiary was a cousin of insured, was not material to the risk and was but a representation, and not a warranty, under Insurance Law, § 58.—*Welch v. Travelers' Ins. Co.*, 178 N. Y. S. 748.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

Ⓒ318 (N.Y.Sup.) Where the schedule made a part of a burglary insurance policy details in question and answer form the representations of assured as to conditions affecting the risk, a provision that changes of condition of the property shall invalidate the policy must be deemed to refer to conditions set forth in the schedule, and where, in the schedule, no representations were made as to iron shutters,

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the removal of such shutters by insured's landlord and replacing with wire glass was not a change of material conditions.—*Zivitz v. Maryland Casualty Co.*, 178 N. Y. S. 211.

(E) Nonpayment of Premiums or Assessments.

⚡362 (N.Y.Sup.) Where owner did not question contractor's bond, or require contractor to furnish new bond upon expiration of period for which surety company was authorized to do business in the state, contractor, having enjoyed benefit of bond, could not refuse to pay premium upon ground that surety had no right to do business in the state.—*American Fidelity Co. v. Leahy*, 178 N. Y. S. 511.

XII. RISKS AND CAUSES OF LOSS.

(C) Guaranty and Indemnity Insurance.

⚡435 (N.Y.) Policy insuring against "loss and expense by reason of claims made upon the assured" by reason of injury due to ownership maintenance and use of a delivery automobile is unambiguous and limits the liability of insurer to accidents which happen while automobile is being used in the firm business of insured partners, and there can be no recovery against insurer for loss due to operation of automobile by another firm composed of insured partners and another.—*Hartigan v. Casualty Co. of America*, 124 N. E. 789, 227 N. Y. 175.

(D) Life Insurance.

⚡438 (N.Y.Sup.) Whether or not a provision as to quarreling or fighting applies to case of fatal injury to insured, yet where it clearly appears that the "quarreling" was all done by the person who killed insured, and was not provoked or participated in by insured, and the killing was an unprovoked, unwarranted criminal homicide, no defense is established under this policy provision.—*Welch v. Travelers' Ins. Co.*, 178 N. Y. S. 748.

⚡448 (N.Y.Sup.) Where life insurance policy permitted assignment or surrender without consent of beneficiary, and provided that payment was to be made to the beneficiary in case he survived insured, "otherwise to the estate of the insured," and the policy was taken out at the instance of insured himself, the insurance should not become forfeited, but should be paid to insured's estate, where the beneficiary disqualified himself by murdering the insured.—*Welch v. Travelers' Ins. Co.*, 178 N. Y. S. 748.

XIV. NOTICE AND PROOF OF LOSS.

⚡543 (N.Y.Sup.) Service of complaint by administrator of insured upon the insurer in an action against the beneficiary to have the policy reformed constituted written proof of death, although no judgment was asked against the insurer, especially where insurer refused to furnish printed blanks for such purpose.—*Welch v. Travelers' Ins. Co.*, 178 N. Y. S. 748.

⚡560(1) (N.Y.Sup.) An insurance company waived the defense that there was no written proof of death, where it failed to assert it in an action by administrator of insured against the beneficiary, who had murdered the insured, to reform the policy by substituting the estate of

insured as beneficiary, although insurer was not a party, for the purpose of obtaining a personal judgment against it.—*Welch v. Travelers' Ins. Co.*, 178 N. Y. S. 748.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

⚡598 (N.Y.Sup.) Under a life insurance policy, where the amount of the policy was to be paid 90 days after notice of death, interest should be charged from 90 days after service of a verified complaint upon the insurer in an equity action against the beneficiary to have the policy reformed, to substitute the estate of the insured as beneficiary; named beneficiary having murdered insured.—*Welch v. Travelers' Ins. Co.*, 178 N. Y. S. 748.

⚡603 (N.Y.Mun.Ct.) A general release by a tenant to his landlord for damages sustained by the tenant because of a sprinkler leakage covered by insurance held to bar the insurer's claim of subrogation under its policy, and to constitute a violation thereof by the insured tenant.—*Franklin Fire Ins. Co. of Philadelphia v. Weinberg*, 178 N. Y. S. 539.

XVIII. ACTIONS ON POLICIES.

⚡624(5) (N.Y.Sup.) Where administrator brought action against beneficiary in a policy on deceased's life, to substitute the estate of deceased as beneficiary, the beneficiary having murdered the deceased, and it was adjudged administrator was entitled to such relief, such beneficiary was not a necessary party in an action by the administrator against the insurer to recover the amount of the policy.—*Welch v. Travelers' Ins. Co.*, 178 N. Y. S. 748.

⚡646(6) (N.Y.Sup.) In action on life policy, burden was upon insurer to establish its defense that insured was killed while quarreling or fighting, within the meaning of the policy.—*Welch v. Travelers' Ins. Co.*, 178 N. Y. S. 748.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

⚡697 (N.Y.Mun.Ct.) The various lodges of a fraternal benefit association, whether subordinate or superior, form one organization, although individual lodges may have distinctive rights and liabilities.—*Marks v. U. S. Grand Lodge, Order of B'nai Abraham*, 178 N. Y. S. 536.

Where the charter of a subordinate lodge of a fraternal benefit society provided that the lodge could not be dissolved voluntarily so long as 10 of its members in good standing objected thereto, a member who had seceded from the order, together with the majority of the members of a subordinate lodge, could not avail himself of such provision and claim that no dissolution had taken place, although a dissenting member might have done so.—*Id.*

(D) Forfeiture or Suspension.

⚡747 (N.Y.Mun.Ct.) A member of a subordinate lodge of a fraternal insurance society, who with other members seceded from the order and established a rival lodge, thereby forfeited his membership, and his widow could

not thereafter claim benefits under the insurance contract.—*Marks v. U. S. Grand Lodge, Order of Brith Abraham*, 178 N. Y. S. 536.
 Ⓒ754 (N.Y.Mun.Ct.) That the grand lodge of a fraternal benefit association calls upon a subordinate lodge for assessment in a larger amount than is actually due does not excuse a member of the subordinate lodge from paying or tendering the amount legally due.—*Marks v. U. S. Grand Lodge, Order of Brith Abraham*, 178 N. Y. S. 536.

INSURRECTION.

See Criminal Law, Ⓒ250.

INTEREST.

See Executors and Administrators, Ⓒ513;
 Insurance, Ⓒ598.

I. RIGHTS AND LIABILITIES IN GENERAL.

Ⓒ18(1) (N.Y.Sup.) On recovery on an account, where the interest was determinable by simple computation, it should be considered as liquidated, and interest allowed.—*Painter v. Fletcher*, 178 N. Y. S. 266.

INTOXICATING LIQUORS.

VIII. CRIMINAL PROSECUTIONS.

Ⓒ225 (N.Y.Sup.) There having been an insufficient service under Liquor Tax Law, § 33, subd. 2, of warrant for search and seizure, so that seizure was illegal, restoration of the liquor will be ordered.—*Seizure of Russo's Liquors*, 178 N. Y. S. 303.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

Ⓒ245 (N.Y.Sup.) The proceeding in rem for search and seizure, leading to a forfeiture, provided for by the Liquor Tax Law, must be strictly followed.—*Seizure of Russo's Liquors*, 178 N. Y. S. 303.

Ⓒ249 (N.Y.Sup.) Under Liquor Tax Law, § 83, subd. 2, requiring a copy of the warrant for search and seizure to be delivered to the person apparently in possession of the liquors, and another copy to be posted in a conspicuous place, service is insufficient; the paper delivered as a copy having no date or signature.—*Seizure of Russo's Liquors*, 178 N. Y. S. 303.

Ⓒ250 (N.Y.Co.Ct.) In a proceeding to seize and forfeit intoxicating liquor under Liquor Tax Law, § 33, it must be proved by plaintiff that the liquors seized were kept stored or deposited for the purpose of unlawful sale or distribution and a single gift of liquor is not alone sufficient to prove unlawful purpose; intent to conceal an unlawful traffic not being shown.—*People v. Thirty-One Cases of Lager Beer*, 178 N. Y. S. 546.

In a proceeding, under Liquor Tax Law, § 33, to seize and forfeit certain liquors, evidence, merely showing that the liquor seized was found at defendant's residence, held not sufficient to establish that it was kept, stored, or deposited for the purpose of unlawful sale or distribution.—Id.

ISLANDS.

See Adverse Possession, Ⓒ115.

JANITORS.

See Master and Servant, Ⓒ375.

JEWELRY.

See Wills, Ⓒ565.

JEWS.

See Marriage, Ⓒ58.

JOINT ADVENTURES.

Ⓒ4(1) (N.Y.Sup.) Where plaintiff, and the company formed from his partnership securities business by an individual defendant, became joint adventurers in the enterprise of securing credit for a Mexican oil-producing company, defendants' company could not exclude plaintiff from the enterprise, by refusing to exercise an option to finance the oil company further than had been done, for the purpose of securing the entire benefit of any profits to itself; a joint adventure being subject to the same rules as a technical partnership, and one adventurer being unable to terminate it and continue the enterprise for his own benefit, or to exclude the other.—*Brown v. Leach*, 178 N. Y. S. 319.

Copartners and joint adventurers owe the duty of utmost good faith to one another, and until the enterprise is abandoned a copartner or joint adventurer cannot act for himself, and if he does so, and obtains profits, he must account to his copartner, or coadventurer.—Id.

JOINT TENANCY.

See Tenancy in Common.

JOINT WILLS.

See Mortgages, Ⓒ11; Wills, Ⓒ627.

JUDGES.

See Drains, Ⓒ35; Justices of the Peace.

JUDGMENT.

See Courts, Ⓒ202; Execution; Pleading, Ⓒ218, 333-350.

For judgments in particular actions or proceedings, see also the various specific topics.
 For review of judgments, see Appeal.

I. NATURE AND ESSENTIALS IN GENERAL.

Ⓒ12 (N.Y.Sup.) Under Code Civ. Proc. § 763, providing that, if a party die after an accepted offer to allow judgment to be taken, or after a verdict, report, or decisions, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment in the names of the original parties, and section 765, providing that the entry of a judgment against a party who dies before a verdict, report, or decision is actually rendered is not authorized, a motion for an order adjudging

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that the equitable relief to which a claimant against the estate of a deceased person is entitled be ascertained at Special Term, is not a request for final judgment, notwithstanding the motion in form asks therefor, so as to authorize entry of final judgment against a deceased executrix.—*Thorburn v. Mitchell*, 178 N. Y. S. 692.

Under Code Civ. Proc. § 763, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, but before final judgment is entered, an order denying the motion of a defendant executrix, since deceased, to set aside service of summons, is not such a decision or interlocutory judgment as is contemplated by the statute.—*Id.*

Where a defendant executrix dies while an order extending her time to plead is in force, she is not in default, so as to authorize entry of final judgment against her in the names of the original parties, under Code Civ. Proc. § 763, even if such section be applicable to cases of default in appearance or pleading.—*Id.*

Where an executrix dies while an order extending her time to plead as defendant in a suit against the estate is in force, the failure of her successors to appear and appeal from an affirmation of a denial of application by deceased executrix to set aside a service of summons does not constitute an election to be in default, so as to make applicable Code Civ. Proc. § 763.—*Id.*

The entry of a judgment against a deceased executrix, under Code Civ. Proc. § 763, is not justified, where she is the sole residuary legatee under the will of decedent, against whose estate the action is brought, and where her personal executors, who are her successors in interest, have not been served with summons.—*Id.*

IV. BY DEFAULT.

(A) Requisites and Validity.

§120 (N.Y.Sup.) It was the practice in a court of chancery to enter an order to take a bill pro confesso; but under the present Code procedure no order for judgment is required, and it is sufficient for the court to sign the judgment, whereupon the clerk will enter it.—*Tyler v. Jahn*, 178 N. Y. S. 689.

§123(1) (N.Y.Sup.) The practice of making a decision on default stating findings of fact and conclusions of law in actions of an equitable nature is of statutory origin, necessary only where required by statute, as where an issue of fact has been tried before the court without a jury, or in rendering judgments on default and on the pleadings in matrimonial actions; and if the allegations of the complaint, admitted by failure to answer, are insufficient to support the judgment, the findings would not aid them under Code Civ. Proc. § 1022.—*Tyler v. Jahn*, 178 N. Y. S. 689.

§130 (N.Y.Sup.) On entering a judgment on default, where defendants were personally served with summons, attorneys may insert recitals in the judgment setting forth the allegations of the complaint, which, with a recital that defendants had failed to answer, will constitute a judicial recognition of the facts on which the judgment is based, thus conforming to the former English chancery practice,

although findings by the court are unnecessary.—*Tyler v. Jahn*, 178 N. Y. S. 689.

(B) Opening or Setting Aside Default.

§143(2) (N.Y.Sup.) On motion to open plaintiff's default, she must show, not only reasonable excuse for her negligence in failing to appear when her case was reached in regular order, as required by Code Civ. Proc. § 724, but also must set forth facts showing a meritorious case; an affidavit of merits being insufficient.—*Dewey v. Morris*, 178 N. Y. S. 372.

§150 (N.Y.Sup.) Order of Appellate Division, providing for the service of an answer and the trial of the issues arising thereon, must be construed as one actually opening the default.—*D'Elisa v. Ritondo*, 178 N. Y. S. 838.

§158 (N.Y.Sup.) Where the moving papers on defendant's motion for order opening his default after inquest and setting the case for trial present good excuse for the default, but there is no affidavit of merits, nor statement of facts presented from which the court can determine whether defendant has a meritorious defense, there is no warrant for granting motion.—*Lawson v. Noll*, 178 N. Y. S. 337.

VI. ON TRIAL OF ISSUES.

(B) Parties.

§243 (N.Y.) Where trustee was not a party to the action, the court had no jurisdiction to order allowance of alimony out of funds in trustee's hands.—*Farnham v. Farnham*, 124 N. E. 894, 227 N. Y. 155.

VII. ENTRY, RECORD, AND DOCKETING.

§286 (N.Y.Sur.) Transcript of Surrogate's Court decree adjudging certain amount due from executor to legatee, in form substantially complying with Code Civ. Proc. §§ 1246, 2551, and docket of the judgment docketed thereon in the Supreme Court, will not be vacated because of failure of transcript or judgment to recite that decree was against executor in his representative capacity, and not personally, since such judgment, even if it had contained such a recital, could have been enforced against executor's individual property under section 2553, being against him personally.—*In re Haaren's Estate*, 178 N. Y. S. 775.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

§543 (N.Y.Sup.) Despite Public Service Commissions Law, § 74, judgment of the New York Special Term of the Supreme Court in an action in equity by a gas company against the Public Service Commission to have declared unconstitutional, as confiscatory, Laws 1910, c. 604, amending Laws 1908, c. 125, to fix a maximum rate for gas of 80 cents per 1,000 feet throughout the borough of Brooklyn, which judgment, through adoption of the findings of the referee, determined that the rate of 95 cents per 1,000 feet fixed by Public Service Commission by its order of July 8, 1913, was without force, held conclusive on the Kings County Spe-

cial Term of the Supreme Court in a summary proceeding taken by the Public Service Commission against a gas company to enjoin the collection of more than 95 cents per 1,000 feet for gas, the rate fixed by the commission's order of July 8, 1913.—Public Service Commission for First Dist. v. Brooklyn Borough Gas Co., 178 N. Y. S. 93.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

⚡590(2) (N.Y.) After a judgment fixing a school teacher's salary, she cannot relitigate her rights for the period covered by such judgment.—Sullivan v. Board of Education of City of New York, 125 N. E. 99, 227 N. Y. 240.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(C) Matters Concluded.

⚡715(2) (N.Y.Sup.) Judgment of the New York Special Term of the Supreme Court, in an action by a gas company to have declared unconstitutional Laws 1916, c. 604, amending Laws 1906, c. 125, to fix a maximum rate of 80 cents per 1,000 feet for gas throughout the borough of Brooklyn, and determining that the Public Service Commission, under Public Service Commissions Law, § 72, had no authority to enforce a 95-cent rate for gas after the abrogation of the statute, *held* conclusive, in a summary proceeding, pursuant to Public Service Commissions Law, § 74, as to the power of the commission to fix a new rate of 95 cents.—Public Service Commission for First Dist. v. Brooklyn Borough Gas Co., 178 N. Y. S. 93.

⚡721 (N.Y.) Where judgment adjudicated that plaintiff was a regular teacher prior to 1911 and was entitled to a salary of \$1,900 under the schedules then prevailing, she was entitled to \$1,900 salary for the year 1913, although her status was really only that of a critic teacher; Laws 1911, c. 902, § 1, providing that the salary to which the present member is entitled under the schedule now existing shall not be reduced, referring to a schedule in existence down to that time, and not to a schedule which would become effective after it was adopted.—Sullivan v. Board of Education of City of New York, 125 N. E. 99, 227 N. Y. 240.

(D) Judgments in Particular Classes of Actions and Proceedings.

⚡747(½) (N.Y.Sup.) Final order in condemnation proceeding for part of land sold for years for drainage assessment does not bar action by owner of fee to cancel the certificate of sale for assessment and to determine ownership of award; title not being involved in a condemnation proceeding.—Whitney v. Considine Investing Co., 178 N. Y. S. 68.

⚡750 (N.Y.Sur.) A finding of the surrogate in a transfer tax proceeding, affirmed by the Appellate Division, that decedent was not domiciled in the state, is *res judicata* on subsequent review of a finding of the appraiser that she was not doing business in the state.—In re Green's Estate, 178 N. Y. S. 353.

XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

⚡883(6) (N.Y.Sup.) Plaintiff, who has a judgment against an insolvent member of a partnership, cannot, either at law or in equity, have the judgment set off against a judgment, which the firm has against the plaintiff and his partner, since to do so would be inequitable; the creditors of the firm of which the insolvent partner is a member being entitled to preserve unimpaired their right to collect the judgment against plaintiff and his partners.—Edelman v. Schwartz, 178 N. Y. S. 587.

JUDICIAL POWER.

See Constitutional Law, ⚡70.

JUDICIAL SALES.

See Drains, ⚡88; Judgment, ⚡747.

JURY.

See Trial, ⚡305-315.

II. RIGHT TO TRIAL BY JURY.

⚡25(6) (N.Y.Mun.Ct.) Where plaintiff, at the close of his testimony in an action in the Municipal Court of the City of New York, was permitted to amend his complaint to conform to the proof, and he rested, defendant's demand for a jury trial, served and filed with its amended answer to the amended complaint, came too late, under Municipal Court Code, § 118.—Guttman v. J. H. M. Const. Co., 178 N. Y. S. 443.

JUSTICES OF THE PEACE.

See Appeal, ⚡1114.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

⚡190 (N.Y.Sup.) Inability of counsel for defendant to be present on account of sickness was a valid excuse, within Code Civ. Proc. § 3064, authorizing opening by appellate court of default judgment rendered by a justice of the peace, on appeal by a defendant, who shows that manifest injustice has been done, and "renders a satisfactory excuse for his default."—Mager v. Wuytack, 178 N. Y. S. 300.

Discretion given county judge by Code Civ. Proc. § 3064, to vacate default judgment rendered by justice of the peace, where manifest injustice has been done and a good excuse is given by defendant, is not an arbitrary discretion.—Id.

Mere statement by attorney for defendant, on appeal to County Court from default judgment rendered by justice of the peace, under Code Civ. Proc. § 3064, that the attorney who was to have represented defendant before the justice had been unable to be present because of sickness, was insufficient to warrant opening of default such statute requiring defendant on such appeal to show that manifest injustice has been done and to render a satisfactory excuse for his default, and legal evidence that the attorney had been sick being necessary, thereunder.—Id.

LABOR DISPUTES.

See Injunction, 101, 137, 223; Master and Servant, 338, 339.

LANDLORD AND TENANT.

See Accord and Satisfaction, 11; Drains, 88; Elections, 72; Frauds, Statute of, 116, 123; Insurance, 608; Mortgages, 497; Municipal Corporations, 721; Principal and Agent, 152.

V. TENANCIES FROM YEAR TO YEAR AND MONTH TO MONTH.

114(1) (N.Y.Sup.) The holding of a tenant at will may become one for a year, if it may be inferred that such is the parties' intention, and payment of an aliquot part of the yearly rent, without contrary explanation, is sufficient evidence of such intention.—*Siemers v. Heuchel*, 178 N. Y. S. 649.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.**(A) Description, Extent, and Condition.**

125(1) (N.Y.Sup.) Where the tenant's family was annoyed by bugs, but only two were found, and the landlord sent a vermin exterminator, who found two, and after his visits one was found, the tenant was not justified in abandoning the premises, and had no right of action for breach of implied warranty of tenantability.—*Michtom v. Miller*, 178 N. Y. S. 395.

(B) Possession, Enjoyment, and Use.

134(2) (N.Y.Sup.) Where defendant, owning several properties, including an uncovered yard, inclosed by a brick wall, and a platform and scales in a brick building, having a door opening on inclosed space, leased all the properties to plaintiff, with a covenant that defendant would not use premises, except for storage of merchandise, etc., or obstruct the lights, or make any alterations without plaintiff's consent, and plaintiff leased the yard to defendant for same term for storing of trucks, etc., omitting the restrictive covenants in defendant's lease to it, there was no intention to prevent a merger of the lesser estate granted to defendant in its larger title of fee simple absolute.—*Partola Mfg. Co. v. Congress Warehouse & Forwarding Corporation*, 178 N. Y. S. 161.

134(8) (N.Y.Sup.) Where there was no intention to prevent a merger of a lesser estate leased by plaintiff to defendant in defendant's larger title of fee simple absolute, an injunction pendente lite restraining defendant from continuing to construct a roof over uncovered yard leased to it, and from constructing a brick wall along side wall of an office building, formerly leased by defendant to plaintiff, will be denied, because defendant's acceptance of the lease merged all that it contained in defendant's fee, and there was no violation of any of plaintiff's rights.—*Partola Mfg. Co. v. Congress Warehouse & Forwarding Corporation*, 178 N. Y. S. 161.

(D) Repairs, Insurance, and Improvements.

157(6) (N.Y.Sup.) Tenant could not deduct from rent for month the cost of a door installed for her own convenience without landlord's consent.—*Upright Co. v. Delson*, 178 N. Y. S. 389.

161(1) (N.Y.Sup.) Accumulation of copper sulphate underneath railroad freight station on leased land, resulting from the waste from operation of battery system of a telegraph company located in a portion of the freight station, belonged either to such company or to the owner of the soil, not to the lessee railroad.—*Salisbury v. Segal*, 178 N. Y. S. 599.

(E) Injuries from Dangerous or Defective Condition.

167(2) (N.Y.Sup.) Where show window extended into building entrance, in which there was a stairway leading down to subway station, owner having rented store with show window to storekeeper, who displayed goods in window, had duty as storekeeper's landlord of maintaining entrance and passageway in reasonably safe condition, so as not to subject persons passing by and entering building for purpose of examining window display to unnecessary risk of injury; such persons being storekeeper's invitees.—*Murphy v. Broadway Improvement Co.*, 178 N. Y. S. 860.

169(11) (N.Y.Sup.) In action by plaintiff, in control of one floor of a building, for damages due to water coming through the ceiling from the floor above, for which defendant had a lease, *held*, it was a question for the jury whether defendant was in exclusive control of the floor above, and whether a sublease of part of the floor above to another concern was bona fide.—*Lichtenstein & Lieberman v. Greater New York Feather Co.*, 178 N. Y. S. 342.

169(11) (N.Y.Sup.) In action for injuries to person from fall down stairway in building entrance, while examining window display of defendant's tenant, question whether defendant failed to maintain and light premises as a reasonably prudent person would have done *held* for jury, under the evidence.—*Murphy v. Broadway Improvement Co.*, 178 N. Y. S. 860. In action for injuries to plaintiff, who fell down stairway in building entrance while examining display window of defendant's tenant, which extended into entrance, question of plaintiff's contributory negligence *held* under the evidence for the jury.—*Id.*

(F) Eviction.

171(3) (N.Y.Sup.) Where the tenant's family was annoyed by bugs, but only two were found, and the landlord sent a vermin exterminator, who found two, and after his visits one was found, the tenant was not justified in abandoning the premises.—*Michtom v. Miller*, 178 N. Y. S. 395.

VIII. RENT AND ADVANCES.**(A) Rights and Liabilities.**

194(2) (N.Y.Sup.) Though tenant left premises without giving the landlord the key, or indicating that she intended to surrender lease expiring in a month, where the landlord on the

day following procured a key and entered into possession, and within a few days thereafter gave possession to a new tenant, *held*, there could be no recovery of rent for the last month covered by the lease.—*Upright Co. v. Delson*, 178 N. Y. S. 389.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

↪296(1) (N.Y.Sup.) Tenant's indebtedness under a former lease is no ground for recovery of possession held by tenant under a new lease.—*Wellington v. Tobin*, 178 N. Y. S. 386.

↪298(1) (N.Y.Sup.) In landlord's summary proceedings, lease from party, who was not shown to have been either owner of fee or leasehold, was no defense.—*Wilton Holding Corporation v. Fix*, 178 N. Y. S. 381.

X. RENTING ON SHARES.

↪331(1) (N.Y.Sup.) Where plaintiff contracted to farm defendant's land on shares, and later, after he had raised crops, was drafted into military service, and the contract was terminated under agreement that the produce should be sold and the proceeds divided, which agreement defendant carried out to the extent of selling the produce, realizing a considerable sum, but failed to disclose or pay to plaintiff his share, in spite of demand, plaintiff is entitled to an accounting.—*Bardwell v. Black*, 178 N. Y. S. 642.

LARCENY.

See Replevin, ↪12.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

↪55 (N.Y.Sup.) Evidence *held* insufficient to sustain conviction of larceny of a pig of tin.—*People v. Connelly*, 178 N. Y. S. 1.

LEASE.

See Landlord and Tenant.

LIBEL AND SLANDER.

See Arrest, ↪48; Evidence, ↪29; New Trial, ↪21; Pleading, ↪362, 364; Trial, ↪251; Witnesses, ↪270.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

↪10(2) (N.Y.Sup.) Newspaper publications, charging plaintiff's introduction of legislation while a member of Congress preventing consummation of recommendations by Immigration Commissioner for establishment of government commissary at Ellis Island, to supersede system under which a private contractor was given exclusive commissary privileges by means of a "rider" or "joker" to an appropriation bill, and that plaintiff had been the contractor's attorney, and after his election had sought government favors for him, and questioning plaintiff's fitness for his office, etc., *held* not libelous per se.—*Bennett v. Commercial Advertiser Ass'n*, 178 N. Y. S. 305.

↪16 (N.Y.Sup.) An article holding one up to contempt and ridicule is libelous per se.—*Clark v. Variety*, 178 N. Y. S. 698.

III. JUSTIFICATION AND MITIGATION.

↪61 (N.Y.Sup.) Isolated incidents, which tend to show the bad character of the libeled person, cannot be alleged nor proved in an action for the libel.—*Schieffelin v. Hyman*, 178 N. Y. S. 652.

IV. ACTIONS.

(A) Right of Action and Defenses.

↪74 (N.Y.Sup.) Defendant *held* not chargeable with the publication of a letter written by him, published in an article on the affairs of the South American republic of which he had been president, written by a newspaper reporter whose affidavits showed that he received the documents at his own request from defendant, and that defendant did not request or suggest publication thereof.—*Valentine v. Gonzalez*, 178 N. Y. S. 289.

(B) Parties, Preliminary Proceedings, and Pleading.

↪86(1) (N.Y.Sup.) In an action for libel, the letter, set out in the complaint, speaks for itself, and its meaning cannot be enlarged or changed by means of the innuendo.—*Schieffelin v. Hyman*, 178 N. Y. S. 652.

↪93 (N.Y.Sup.) In an action for libel, denial by the affirmative defenses of plaintiff's allegation of actual malice and the facts tending to prove such malice is proper in the defense of privilege, qualified privilege, and mitigation of damages, but without relevancy to a defense of justification.—*Schieffelin v. Hyman*, 178 N. Y. S. 652.

↪94(1) (N.Y.Sup.) In an action for libel, denial by the affirmative defenses for plaintiff's allegation of actual malice and the facts tending to prove such malice is without relevancy to a defense of justification.—*Schieffelin v. Hyman*, 178 N. Y. S. 652.

↪95 (N.Y.Sup.) In an action for libel, denial by the affirmative defenses of plaintiff's allegation of actual malice and the facts tending to prove such malice is proper in mitigation of damages.—*Schieffelin v. Hyman*, 178 N. Y. S. 652.

↪100(1) (N.Y.Sup.) In an action for libel, denial in the affirmative defenses of the amount of damages ordinarily raises no issue.—*Schieffelin v. Hyman*, 178 N. Y. S. 652.

↪100(7) (N.Y.Sup.) In an action for libel, plaintiff need not prove the innuendo which was denied by the answer, for the letter, set out in the complaint, speaks for itself, and its meaning cannot be enlarged or changed by means of the innuendo, and he need not prove that the charges were wholly false or malicious, or that there was actual ill will towards him, or that defendant furnished copies of the letter to newspapers.—*Schieffelin v. Hyman*, 178 N. Y. S. 652.

(C) Evidence.

↪104(3) (N.Y.Sup.) In a libel action, plaintiff, to prove express malice, may show that defendant attacked the officials of an organization of which he was president, although not

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named in the articles, if he first shows that defendant knew that plaintiff was one of such officials; but such matter cannot be shown if the articles written concerning the organization were just general in character against the organization.—*Clark v. Variety*, 178 N. Y. S. 698.

(D) Damages.

⚡120(1) (N.Y.Sup.) Punitive damages may be recovered for publication of an article libelous per se, although actual damages are not established.—*Clark v. Variety*, 178 N. Y. S. 698.

LICENSES.

See Corporations, ⚡872; Negligence, ⚡32; Theaters and Shows, ⚡3.

II. IN RESPECT OF REAL PROPERTY.

⚡50 (N.Y.Ct.Cl.) A release granting and conveying to the state and its contractors the right to enter upon releasor's lands and to deposit thereon dirt, etc., upon condition "that the top surface of the spoil to be deposited as aforesaid shall not extend above the elevation of the natural ground contiguous with the limit line of the deposited material," did not require the state to so fill and grade releasor's lands as that, when completed, there would be a gradual slope from the upper limit to the water surface of river being dredged.—*Tripp v. State*, 178 N. Y. S. 873.

A release of damages, granting the state the right to deposit dirt upon releasor's land, on condition "that the spoil when deposited shall be leveled and trimmed to substantially even and continuous planes," did not require that the state make a lawn upon the spoil area, and it was sufficient that the spoil was substantially level, even, and smooth.—*Id.*

LIENS.

See Attorney and Client, ⚡190-192; Mechanics' Liens; Sales, ⚡479; Waters and Water Courses, ⚡203.

LIFE ESTATES.

See Drains, ⚡88; Executors and Administrators, ⚡298; Perpetuities, ⚡6; Wills, ⚡533, 552, 610, 627, 634, 820, 866.

⚡5 (N.Y.) Where the will gave to the widow the use of a legacy for life, with a right to use the principal, with remainder over, and the legacy was paid to her by the executors, she became the trustee for the benefit of the remaindermen.—*Peck v. Smith*, 125 N. E. 91, 227 N. Y. 228.

LIMITATION OF ACTIONS.

See Adverse Possession.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

⚡60(10) (N.Y.Sup.) Right of an owner in possession to maintain action to remove cloud is a continuing one, never barred by statute of

limitations, while he remains such owner in possession.—*Whitney v. Considine Investing Co.*, 178 N. Y. S. 68.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

⚡20 (N.Y.Sup.) If notice of pendency was filed in the clerk's office, to show that the action in the Municipal Court had been begun, the Supreme Court has no jurisdiction to order it canceled of record; it not appearing from the papers that Supreme Court has acquired jurisdiction over the parties.—*Ellis v. Caplan*, 178 N. Y. S. 503.

LIVERY STABLE AND GARAGE KEEPERS.

See Bailment, ⚡1; Covenants, ⚡103; Mandamus, ⚡3; Negligence, ⚡89.

⚡4½ (N.Y.Sup.) Under section 20 of the building zone resolution, as amended on June 6 and June 20, 1919, a garage cannot be lawfully erected or extended for use for more than five cars within 200 feet of a hospital maintained as a charitable institution, regardless of how the measurement may be made.—*People ex rel. Sondern v. Walsh*, 178 N. Y. S. 192.

⚡4½ (N.Y.Sup.) Under section 20 of the building zone resolution, as amended June 6, 1919, providing that no garage for more than five cars may be erected within 200 feet from nearest exit from or entrance to a public school, the measurement should be made along sidewalk from in front of garage at its nearest entrance to the next means of exit or entrance in public school building.—*People ex rel. Sondern v. Walsh*, 178 N. Y. S. 194.

⚡4½ (N.Y.Sup.) Building Zone Resolution July 25, 1916, § 4, subd. 15, held to prohibit erection of public garage in business district, notwithstanding existence of garage on opposite side of street not in business district, since section 7, subd. (e), permitting erection of garage "in any portion of a street between two intersecting streets in which portion there exists a garage," refers by use of words "in which portion" to that portion within business district.—*People ex rel. Small v. Leo*, 178 N. Y. S. 239.

⚡4½ (N.Y.Sup.) Under Greater New York Charter, as amended by Laws 1916, c. 503, and other amendatory acts, and Building Zone Resolution of Board of Estimate and Apportionment of City of New York, § 20, the board of appeals of the city had power to grant permit to erect and maintain a garage in the borough of Brooklyn, even though there was a technical violation in the manner in which the consents of property owners were executed, in that they were not duly acknowledged as required by Zoning Resolution, § 7, subd. 9, but were merely in the form of an affidavit sworn to before a notary.—*People ex rel. McAvoy v. Leo*, 178 N. Y. S. 513.

Under Building Zone Resolution of Board of Estimate and Apportionment of City of New York, § 20, board of appeals of the city held

vested with power to grant permit for a garage in a specific exceptional case, even though there had been no consents of property owners procured and filed at all, being empowered to vary any provision of the resolution in harmony with its general purpose and intent that the public health, safety, and general welfare be secured, and substantial justice done.—Id.

LUNATICS.

See Insane Persons.

MAJORITY.

See Religious Societies, ¶21.

MALICIOUS PROSECUTION.

See Trial, ¶253.

MANDAMUS.

See Counties, ¶153; Gas, ¶13.

I. NATURE AND GROUNDS IN GENERAL.

¶3(1) (N.Y.Sup.) Where superintendent of buildings has issued permit for erection of garage within distance of hospital, maintained as a charitable institution, forbidden by section 20 of building zone resolution, as amended June 6 and June 20, 1919, an application for mandamus directing him to revoke permit will be denied in advance of a review of his action by the board of appeals.—People ex rel. Sondern v. Walsh, 178 N. Y. S. 192.

¶3(1) (N.Y.Sup.) Where superintendent of buildings has issued a permit for erection of a garage within the distance from a public schoolhouse forbidden by section 20 of building zone resolution, as amended June 6, 1919, an application for a mandamus directing him to revoke the permit will be denied, in advance of a review of his action by the board of appeals.—People ex rel. Sondern v. Walsh, 178 N. Y. S. 194.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

¶42 (N.Y.Sup.) Mandamus will not lie to compel a surrogate to grant an application for the examination of a witness in a probate proceeding before trial.—People ex rel. Lewis v. Fowler, 178 N. Y. S. 500.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

¶74(3) (N.Y.Sup.) Mandamus is a proper remedy to compel the printing of official ballots without the names of candidates for an office in which there is no vacancy to be filled at that election.—People ex rel. Lempp v. Board of Elections, 178 N. Y. S. 516.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

¶143(1) (N.Y.Sup.) Where objections were filed to a certificate of independent nomination for office of justice of the Municipal Court of

New York City, and the board of elections declined to place the candidate's name on the ballot, *held*, the application for an order requiring placing of the name on the ballot should not have been dismissed as premature by the Special Term, the matter being one of public interest, even though the applicant did not show that a sufficient number of his nominators had registered and the time for registration had not expired, for public policy required the court to entertain the application in advance of the completion of registration, to the end that all questions might be promptly decided.—In re McGrath, 178 N. Y. S. 231.

¶168(2) (N.Y.Sup.) Under Election Law, § 123, subd. 6, providing that the name of no person signing a certificate of independent nomination can be counted, unless such person shall be registered on one of the days of registration, a candidate named in such certificate is not entitled to have granted his application for an order compelling the board of elections to place his name on the ballot without proof that a sufficient number of his nominators had registered.—In re McGrath, 178 N. Y. S. 231.

¶169 (N.Y.Sup.) An application by a candidate who presented an independent certificate of nomination for an order compelling the board of elections to place his name on the official ballot should not, where the time was short, be dismissed by the Special Term, although the period of registration had not expired, and it was not shown that a sufficient number of nominators had registered; but the Special Term should entertain the application, and, after determining whether it was in proper form, ascertain whether sufficient number of nominators had registered.—In re Murphy, 178 N. Y. S. 230.

¶172 (N.Y.Sup.) On application to the Special Term for an order directing the issuance of a writ of mandamus to compel a sheriff to take into his custody a girl abandoned at the New York Training School for Girls, the question of the jurisdiction of the Children's Court of New York, which originally sentenced the girl to the home, but refused to resentence her after she had been returned by the manager, cannot be determined; that being a question for the determination of the Children's Court.—Newton v. Knott, 178 N. Y. S. 201.

MANUFACTURES.

See Principal and Agent, ¶146; Sales, ¶85.

MARRIAGE.

See Bastards, ¶3, 12; Criminal Law, ¶43; Divorce; Husband and Wife.

¶13 (N.Y.Sup.) Where wife, having secured divorce by constructive service without knowledge of husband, subsequently returned to husband, who, on hearing of divorce, had refused to recognize its validity, her living with him thereafter in the acknowledged relation of husband and wife constituted a common-law remarriage, as effective as a ceremonial remarriage.—In re Sheedy, 178 N. Y. S. 863.

¶32 (N.Y.Sup.) Supreme Court has no power to require city clerk of city of New York to amend a marriage license and record there-

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of in his office, so as to correctly state name of applicant, where mistake was that of applicant in not giving true name; the court, in absence of statutory authority, having no power, on a motion, to direct the correction of records in the office of the city clerk.—In re Bjune, 178 N. Y. S. 498.

⚡36 (N.Y.Sup.) An action for separation being statutory (Code Civ. Proc. § 1762 et seq.), and a marriage contracted by one whose husband or wife by a former marriage is living being void, unless the former marriage has been annulled or dissolved (Domestic Relations Law, § 6), in action by second wife for separation, invalidity of divorce which defendant obtained from his first wife is a good defense, and defendant is not estopped to assert it, for the doctrine of estoppel cannot be applied to establish a matrimonial relation under conditions inhibited by law.—Ashdown v. Ashdown, 178 N. Y. S. 565.

⚡40(5) (N.Y.Sur.) The presumptions favor the validity of a last marriage, of which children were born, and their legitimacy.—In re Cassidy's Estate, 178 N. Y. S. 366.

⚡50(1) (N.Y.Sur.) Valid common-law marriage held to have existed between decedent and his administratrix, whose letters an aunt of decedent seeks to revoke to get possession of the small estate of approximately \$600; the administratrix, though previously married, having left her former husband in Australia in 1894, and never having seen or heard from him since, while decedent and the administratrix have a son, who should not be bastardized, if it can be avoided.—In re Cassidy's Estate, 178 N. Y. S. 366.

⚡54 (N.Y.Sup.) Where defendant's former husband, at the time of ceremonial marriage to plaintiff, had absented himself for a period of over 5 years, without being known to her to be living, and she contracted marriage with plaintiff in good faith, based on due investigation, the marriage to plaintiff was voidable, but not void, under Domestic Relations Law, §§ 6, 7.—Wolf v. Wolf, 178 N. Y. S. 726.

Alleged common-law marriage cannot be held voidable merely, where it does not appear that at the time of such marriage defendant's former husband had absented himself for 5 years.—Id.

⚡58(1) (N.Y.Sup.) Where plaintiff was 17 years of age, when she married without the consent of her parents, she may have the marriage annulled, where it was never consummated and she and her husband separated immediately after the ceremony, unless she is guilty of laches.—Price v. Price, 178 N. Y. S. 561.

⚡58(7) (N.Y.Sup.) It is not fraud, for which marriage by civil ceremony can be annulled, that the man promised that there should later be a Jewish ceremony, and refused to fulfill his promise; there being no misrepresentation of an existing fact.—Schachter v. Schachter, 178 N. Y. S. 212.

⚡60(2) (N.Y.Sup.) Where, prior to her marriage to plaintiff, defendant's former husband had absented himself for more than 5 years without being known to her to be living, and she contracted marriage with plaintiff in good faith, and after plaintiff found out that the former husband was living he continued to live

with defendant for over 10 years, and delayed 13 years before bringing suit to annul marriage, marriage will not be annulled; defendant's former husband not having been heard from within 7 years.—Wolf v. Wolf, 178 N. Y. S. 726.

⚡60(7) (N.Y.Sup.) In order to entitle one to annulment of marriage on the ground that she had not attained the age of legal consent, and that plaintiff's parents did not consent to the marriage, and that the marriage was not consummated, plaintiff must establish her case by a fair preponderance of the evidence.—Price v. Price, 178 N. Y. S. 561.

In an action to annul a marriage on the ground that plaintiff had not attained the age of legal consent, that plaintiff's parents did not consent to the marriage, and that the marriage was not consummated, evidence held insufficient to warrant a decree for plaintiff.—Id.

⚡62 (N.Y.) Where testator, who devised all his property in trust to a trustee to use the income therefrom for support of his widow and son and upon the death of survivor distribute remainder among his heirs at law and next of kin, died, leaving him surviving as his only heir, his son, defendant, the son's wife, in suit by testator's widow and nephews under Code Civ. Proc. § 1747, to procure judgment annulling defendant's marriage to the son, was not entitled to an allowance of alimony during the pendency of suit and counsel fees payable out of funds in hands of trustee not a party to the action, though an adjudication in defendant's favor would entitle son of defendant's deceased husband to property held in trust.—Farnham v. Farnham, 124 N. E. 894, 227 N. Y. 155.

MASTER AND SERVANT.

See Commerce, ⚡27; Evidence, ⚡89, 258; Injunction, ⚡60, 101, 136, 137; Railroads, ⚡5½; Release, ⚡16; Seamen, ⚡11.

I. THE RELATION.

(A) Creation and Existence.

⚡3(1) (N.Y.Sup.) Agreement whereby employer agreed to hire employé for a year, until a certain date, as designer, at \$70 per week, and to give him 10 per cent. of the net profits of the year's business, held not void as unilateral and wanting mutuality, being for the employé to serve for a year and for the employer to pay.—Stadler v. Samuels, 178 N. Y. S. 324.

(B) Statutory Regulation.

⚡16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⚡ number sections 346-420, at the end of this topic, where the matter in this and future index-digests will be found.

(C) Termination and Discharge.

⚡40(2) (N.Y.Sup.) In action for wrongful discharge of designer, employed under contract authorizing his discharge if he should prove unsatisfactory, evidence as to whether employer employed or needed another designer following discharge was material upon question of

whether alleged dissatisfaction was the real cause of the discharge.—*Rosen v. Druss*, 178 N. Y. S. 259.

In action for wrongful discharge of designer, employed under contract authorizing his discharge if he should prove unsatisfactory, where employer alleged dissatisfaction because of errors in calculation of quantity of goods, requiring the raising of prices on price tickets after the goods had been made up, evidence that prices had been raised because of advance in cost of material was admissible upon question of whether alleged dissatisfaction was real.—*Id.*

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§80(13) (N.Y.Sup.) In accountant's suit on implied contract of employment, based on requests by defendant, in conjunction with other importers, where defense was that no such request had been made, and that his services were voluntary, and were rendered by reason of his connection with one of the other importers, evidence held to create issue of fact for the jury.—*Salway v. Fred Hollander & Co.*, 178 N. Y. S. 387.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of § number sections 346-420, at the end of this topic, where the matter in this and future index-digests will be found.

(B) Tools, Machinery, Appliances, and Places for Work.

§111(1) (N.Y.Sup.) One of the class for whose special benefit the federal Safety Appliance Act was enacted can recover damages from party violating it, regardless of whether party in default was negligent in the general sense of want of care.—*Ford v. McAdoo*, 178 N. Y. S. 631.

(H) Actions.

§250¾. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of § number sections 346-420, at the end of this topic, where the matter in this and future index-digests will be found.

§285(7) (N.Y.Sup.) In an action under the federal Boiler Inspection Acts, for the death of a brakeman alleged to have been caused by contact with an unguarded hook on the tender of the locomotive, whether the hook was proximate cause of death held to be a question for the jury.—*Ford v. McAdoo*, 178 N. Y. S. 631.

§286(12) (N.Y.Sup.) In an action for the death of a brakeman, thrown under the train when his clothing came into contact with an unguarded hook on the tender of the locomotive, where there was evidence that the hook could have been guarded when not in use, the question whether the locomotive was equipped with a safe and suitable boiler and appurtenances, as required by section 2 of the federal Boiler Inspection Act (U. S. Comp. St. § 8631), and the

acts amendatory thereof, was for the jury.—*Ford v. McAdoo*, 178 N. Y. S. 631.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§301(4) (N.Y.Sup.) P. not having been engaged as an independent contractor to deliver goods for D., but having let its truck and driver to D. with which D. could make its own deliveries, D. alone was the driver's superior, responsible to a third person for injury from the driver's negligence in making a delivery, even if the ultimate liability as between D. and P. was, under their contract, on P.; that liability not inuring to the benefit of the injured person.—*Finegan v. H. C. & A. I. Piercy Contracting Co.*, 178 N. Y. S. 785.

§302(6) (N.Y.Sup.) An automobile owner is not liable to one run down by it while used by the driver for his own business and pleasure, in disobedience of the owner's explicit instructions, though he hired the driver without investigating the false assertion that he was a licensed chauffeur.—*Rothenberg v. Hartman*, 178 N. Y. S. 400.

V. INTERFERENCE WITH THE RELATION BY THIRD PERSONS.

(A) Civil Liability.

§338 (N.Y.Sup.) The master's right to employ persons willing to enter employment cannot be interfered with by threats, intimidation, or coercion by persons participating in a strike, whether they act singly or as a result of an organization or conspiracy.—*Kayser v. Fitzgerald*, 178 N. Y. S. 130.

To constitute "intimidation of employees" by persons participating in a strike, it is not necessary that there should be any direct threat or actual violence; but it is sufficient if the attitude assumed is intimidating.—*Id.*

§339 (N.Y.Sup.) It is unlawful for an association of actors to conspire to procure other actors to break valid existing contracts with the managers of theaters, regardless of the means or persuasion employed, whether legal or illegal.—*Cook v. Wilson*, 178 N. Y. S. 463.

VI. WORKMEN'S COMPENSATION ACTS.

(A) Nature and Grounds of Master's Liability.

§351 (N.Y.Sup.) Where an administratrix of her deceased husband brought an action to recover damages provided for by Code Civ. Proc. §§ 1903, 1904, for his negligent death, in which action she was defeated on the merits, she did not thereby make an election barring her claim, under the Workmen's Compensation Law for the benefits thereby given to the widow and minor dependents; the parties and the subject-matter involved being different.—*In re Balais*, 178 N. Y. S. 519.

§364 (N.Y.Sup.) Claim for injuries received by patrolman of New York City while removing a bulb from an electric fixture in ceiling of police station, work detailed to him by his superior officer, comes within Workmen's Compensation Law, § 2, groups 42, 44; the term

"employer" including (section 3, subds. 3, 4) a municipal corporation, and the term "employee" meaning a person engaged in one of the occupations enumerated in section 2.—*Ryan v. City of New York*, 178 N. Y. S. 402.

—364 (N.Y.Sup.) One appointed as a laborer under Military Law, § 188, on a farm owned by a cavalry organization of the state National Guard is not an employee of the city of New York, so as to render it liable under the Workmen's Compensatory Act for his injuries, though under section 189 his compensation was paid by the city.—*Muller v. City of New York*, 178 N. Y. S. 416.

—365 (N.Y.Sup.) Claimant millwright, while engaged at a terminus of a run between Vermont and New York in ripping a piece of timber, to be used, when ripped, in repairing a caboose which had been operated on the run that day, was not engaged in interstate commerce, and his claim for resulting injuries would come within Workmen's Compensation Law, in view of section 21, providing that the presumption is, in the absence of substantial evidence to the contrary, that the claim comes within provisions of the Compensation Law.—*Fish v. Rutland R. Co.*, 178 N. Y. S. 439.

—368 (N.Y.Sup.) Contract with defendant through an agent at an employment office in the city of New York for services to be performed wholly in Pennsylvania does not give employee a right to compensation under the New York Workmen's Compensation Law.—*Perlis v. Lederer*, 178 N. Y. S. 449.

—373 (N.Y.Sup.) Where carpenter, hanging doors, bruised the palm of his hand in pressing screwdriver, the bruise resulting in a felon, the injury was the result of an "accident," within Workmen's Compensation Law.—*Woodruff v. Howes Const. Co.*, 178 N. Y. S. 418.

—374 (N.Y.Sup.) An award for the loss of claimant's leg is not justified when all the evidence shows that amputation of the leg, which was fractured by a fall, was made necessary, not by the accident, but because of cancer of the bone.—*Brady v. Holbrook, Cabot & Rollins Corporation*, 178 N. Y. S. 504.

—375(1) (N.Y.Sup.) An associate member of a volunteer fire department, who was killed while assisting in extinguishment of a fire under chief engineer of fire department, having full control, under Laws 1859, c. 62, §§ 23, 24, Laws 1883, c. 117, tit. 6, §§ 2, 4, Village Law, § 208, Penal Law, § 1901, and for whose death village made payment under General Municipal Law, § 205, providing therefor in case of death of active member of volunteer fire company, was not killed by accident arising out of or in course of his employment, nor incidental thereto, though fire was on his employer's premises and broke out 20 minutes after he had ceased working.—*In re Cole*, 178 N. Y. S. 451.

—375(1) (N.Y.Sup.) Where an apartment building janitress, who received a small wage and the free use of an apartment, was injured by falling plaster as she was about to sit down to breakfast in her own apartment, the accident was not within the scope of her employment within the Workmen's Compensation Law.—*In re Lauterbach*, 178 N. Y. S. 480.

—378 (N.Y.Sup.) In view of Workmen's Compensation Law, §§ 10, 21, compensation for the death of a boy 16 years of age, who had never worked out before, is properly awarded though somewhat at fault in the use of an elevator in a building not occupied by employer.—*Smith v. H. J. Bartle Mfg. Corporation*, 178 N. Y. S. 589.

(B) Compensation.

—385(1) (N.Y.Sup.) Where claimant had worked for the employer only a short time, and the greater part of the work was piece work, the Industrial Commission was justified in determining his average weekly wage, under Workmen's Compensation Act, § 14, subd. 3, by determining the average weekly earnings of employees in the same class.—*Shaw v. American Body Co.*, 178 N. Y. S. 369.

—385(11¼) (N.Y.Sup.) Where injured eye, with the aid of a proper glass, is nearly normal for many purposes, there is no "loss of an eye," within the Workmen's Compensation Law.—*Valentine v. Sherwood Metal Working Co.*, 178 N. Y. S. 494.

(C) Proceedings.

—403 (N.Y.Sup.) The burden was on employer railroad, if it claimed that planks which claimant was engaged in ripping at the time of injury were used in repairing a caboose engaged in interstate commerce, to prove an actual application.—*Fish v. Rutland R. Co.*, 178 N. Y. S. 439.

—405(4) (N.Y.Sup.) Evidence held insufficient to support finding that claimant, while engaged in the regular course of his employment, while operating a machine, was injured on the left side of his body, as a result of which he sustained injuries, consisting of a large indirect reducible left inguinal hernia.—*In re Matoris*, 178 N. Y. S. 408.

—405(4) (N.Y.Sup.) Evidence that a workman, while doing his ordinary work, felt a severe pain in his right side, and that next day a physician found a "right inguinal hernia (traumatic)," is insufficient to show that he was accidentally injured in the course of his employment, since "inguinal" refers to groin, not side, and "traumatic" contemplates some wounding of the body.—*Cavalier v. Chevrolet Motor Co. of New York*, 178 N. Y. S. 489.

—405(4) (N.Y.Sup.) Evidence in support of a claim under the Workmen's Compensation Law for the death of a boy employed by the occupant of a building held to justify a finding that employer acquiesced in the use of an elevator in an adjoining building, and that deceased was engaged in his work at the time of the accident causing his death on the elevator.—*Smith v. H. J. Bartle Mfg. Corporation*, 178 N. Y. S. 589.

—405(6) (N.Y.Sup.) A finding by the Industrial Commission that an employee's weekly wages were in excess of \$30, on basis of which the commission made an award of \$20 a week for a permanent loss of the use of his right hand, held warranted by the evidence.—*Shaw v. American Body Co.*, 178 N. Y. S. 369.

—405(6) (N.Y.Sup.) That there is no evidence of the period of disability for which compensation was made is a reason for reversal of award; claimant having been cured before

award was made.—In re Matoris, 178 N. Y. S. 408.

⚡419 (N.Y.Sup.) The commission may reopen the claim and make a larger award, especially where previous award is for an incorrect amount.—Fish v. Rutland R. Co., 178 N. Y. S. 439.

MECHANICS' LIENS.

See Appeal, ⚡1212; Mortgages, ⚡568.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(A) Waiver of Right to Lien.

⚡211(1) (N.Y.Co.Ct.) A note is a mere unconditional promise to pay, and, although accepted for work done and materials furnished, is not a security, barring the filing of a lien at any time within four months after completion of the work.—Margulies v. Seigel, 178 N. Y. S. 544.

⚡213 (N.Y.Co.Ct.) A note is a mere unconditional promise to pay, and, although accepted for work done and materials furnished, is not a security, barring the filing of a lien at any time within 4 months after completion of the work, nor does a mortgage in lieu of payment give such right, unless legally delivered and actually accepted as payment.—Margulies v. Seigel, 178 N. Y. S. 544.

VII. ENFORCEMENT.

⚡260(2) (N.Y.Co.Ct.) The right to foreclose a mechanic's lien is not lost because the lienor is obliged to commence his action before the whole amount of the contract price is due.—Margulies v. Seigel, 178 N. Y. S. 544.

⚡291(1) (N.Y.Co.Ct.) A contractor, who files a notice of mechanic's lien within four months after the completion of the work and the furnishing of the material, and before maturity of the first of a series of notes given for contract price, may maintain an action to foreclose the lien and recover judgment for amount due on any such notes at the time of trial.—Margulies v. Seigel, 178 N. Y. S. 544.

⚡291(2) (N.Y.Sup.) A mechanic's lienor, which by its answer had made itself a necessary party under Lien Law, § 44, to any judgment in action to foreclose and enforce another lien, was not in legal default, in the absence of service of a notice of trial upon its attorney, though it had not appeared on trial.—Reedy Elevator Co. v. Monok Co., 178 N. Y. S. 594.

MILITARY LAW.

See Master and Servant, ⚡364.

MILITARY SERVICE.

See Elections, ⚡144.

MILITIA.

See Master and Servant, ⚡364.

MILK.

See Contracts, ⚡116.

MINORS.

See Infants.

MISBRANDING.

See Food, ⚡15.

MORTGAGES.

See Appeal, ⚡1194; Courts, ⚡201; Discovery, ⚡41; Infants, ⚡87; Mechanics' Liens, ⚡213; Pleading, ⚡8, 9; Tenancy in Common, ⚡19, 38.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

⚡11 (N.Y.Sup.) Though joint will of husband and wife provided that survivor should enjoy realty for life, and that upon survivor's death it should be equally divided among children, held, that wife, on death of husband, became sole owner of realty held by the entirety, so that a mortgage given thereon by her to a daughter as a wedding gift was valid.—D'Elisa v. Rittondo, 178 N. Y. S. 838.

⚡32(3) (N.Y.Sup.) A deed, though absolute in form, is to be considered as a mortgage, if it was given under an agreement that it should be security for a debt.—Palmer v. Rotary Realty Co., 178 N. Y. S. 813.

⚡32(6) (N.Y.Sup.) The court is more inclined to treat a deed absolute in form as a mortgage, where given in consideration of an existing mortgage indebtedness, than where given on an original advance.—Palmer v. Rotary Realty Co., 178 N. Y. S. 813.

⚡34 (N.Y.Sup.) While a mere oral promise or agreement to give a defeasance, if made at time of giving an absolute deed and not performed, will not make the transaction a mortgage, yet if the grantee give such promise before the making of the deed, and evades its performance after receiving the deed, equity will relieve against the fraud and enforce the agreement.—Palmer v. Rotary Realty Co., 178 N. Y. S. 813.

⚡37(2) (N.Y.Sup.) A deed, though absolute in form, may in equity be shown by parol to have been intended as a mortgage.—Palmer v. Rotary Realty Co., 178 N. Y. S. 813.

⚡38(1) (N.Y.Sup.) In suit to establish that a deed absolute in form was intended as a mortgage and was obtained by fraudulent representations and promises, evidence held to show the deed was a mortgage.—Palmer v. Rotary Realty Co., 178 N. Y. S. 813.

⚡38(2) (N.Y.Sup.) Evidence to show that an absolute deed was intended as security, and so was a mortgage, must be clear and convincing.—Palmer v. Rotary Realty Co., 178 N. Y. S. 813.

One asserting a deed in form to be a mortgage must prove the claim by a clear preponderance of the evidence.—Id.

X. FORECLOSURE BY ACTION.

(I) Judgment or Decree and Execution.

⚡497(2) (N.Y.Sup.) Tenant, who was made party defendant in foreclosure action, was concluded by judgment therein as to any rights

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as a tenant prior to entry of judgment.—*Will-ton Holding Corporation v. Fix*, 178 N. Y. S. 381.

(L) Disposition of Proceeds and Surplus.

⚡568 (N.Y.Sup.) Where mortgage was assigned for the purpose of foreclosure, and an action brought by a firm as attorneys for assignee, the property being bid in by assignee, who assigned his claim to a corporation, to which deed was given, the mortgagee cannot maintain summary proceedings in the foreclosure action for an order directing the attorneys to turn over to her a deed for the property and account for the rents, issues, and profits; the attorneys having no title.—*Lask v. Silverman*, 178 N. Y. S. 427.

⚡568 (N.Y.Sup.) A mechanic's lien against mortgaged property sold on foreclosure, not established by action as required by Lien Law, § 41, relative to enforcement of mechanics' liens, cannot be enforced by the lienor in a surplus money proceeding, a special proceeding, against surplus money arising out of the foreclosure sale and in the hands of the county treasurer, except that, where an adversary judgment creditor of the mortgagor waived notice of and consented to all necessary proceedings for drawing and paying the money to the lienor, and permitted him to prove his claim as an uncontested claim, he has admitted the claim, and waived the objection that it has not been established.—*Grosvenor v. Budde*, 178 N. Y. S. 485.

(N) Fees and Costs.

⚡582 (N.Y.Sup.) Where property sold under a judgment in foreclosure brings more than \$10,000, the referee to sell may not be allowed additional compensation, under Code Civ. Proc. § 3297, unless he has performed some unusual and exceptional labor, even though he has been unreasonably annoyed by attorney for owner of equity.—*James v. Peppard Realty Co.*, 178 N. Y. S. 585.

MOTIONS.

See Attachment, ⚡293; Discovery, ⚡61; Insane Persons, ⚡29; Judgment, ⚡12; Pleading, ⚡218, 343, 350, 352, 364, 365; Trusts, ⚡167; Venue, ⚡63.

⚡55 (N.Y.) That justice of Extraordinary Special and Trial Term signed order in question when he was not in the courthouse is unimportant, in view of the fact that the motions were submitted to the court at the place and during the time when it was actually held as such.—*Saranac Land & Timber Co. v. Roberts*, 125 N. E. 102, 227 N. Y. 188.

MOVING PICTURES.

See Attorney and Client, ⚡130; Injunction, ⚡96.

MUNICIPAL CORPORATIONS.

See Animals, ⚡74; Appeal, ⚡927; Counties: Elections, ⚡141, 144, 154, 155; Eminent Domain, ⚡153; Evidence, ⚡32; Gas, ⚡13; Livery Stable and Garage Keepers, ⚡4½; Master and Servant, ⚡364, 375;

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Railroads, ⚡96; Schools and School Districts; Specific Performance, ⚡25; Street Railroads.

V. OFFICERS, AGENTS, AND EMPLOYÉS.

(B) Municipal Departments and Officers Thereof.

⚡185(7) (N.Y.Sup.) Where a police officer is entitled to hearing upon charges made against him, the cause of removal after such a trial must be confined to the charges shown and heard, and should not extend to matters within the personal knowledge of the mayor.—*People ex rel. Menzie v. Davis*, 178 N. Y. S. 436.

⚡185(8) (N.Y.Sup.) Under Ithaca City Charter, §§ 15, 21, providing that the mayor should have the power to summarily hear, try, and determine any complaint for misconduct or neglect of duty against an officer of the city appointed by the mayor, and that police officers are subject to removal when found to be incompetent, a police officer could not be removed without a trial in the usual form of law upon evidence given publicly under the sanction of an oath, and where such a hearing is not given the removal may be annulled, under Code Civ. Proc. § 2140.—*People ex rel. Menzie v. Davis*, 178 N. Y. S. 436.

⚡212 (N.Y.Sup.) The rules and regulations of the department of correction have the force and effect of statutes.—*City of New York v. Fox*, 178 N. Y. S. 805.

(C) Agents and Employés.

⚡218(9) (N.Y.Sup.) Where a statute makes no provision for a hearing, but confers the power of removal of a city employé subject to no limitation, except the requirement that the reasons therefor be stated in writing and filed, and opportunity for explanation given, the act of removal is executive, and is not reviewable on certiorari; but where removal is only to be had after a hearing and finding of misconduct, the act of removal is reviewable on certiorari.—*People ex rel. Menzie v. Davis*, 178 N. Y. S. 436.

VI. PROPERTY.

⚡221 (N.Y.Sup.) Under Village Law, § 89, subd. 23, authorizing village to purchase lands for dumping grounds "in any such village," village had no power to purchase land outside of the village for use as dumping ground.—*Gibson v. Village of Massena*, 178 N. Y. S. 850.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent and Exercise of Power.

⚡601 (N.Y.Sup.) Under New York City Building Zone Resolution, § 6, providing that any use existing in any building at the date of the resolution's passage may be changed or extended throughout the building, if no structural alterations are made, etc., held, that a two-story structure designed throughout for a dyeing and cleaning establishment, but the top floor of which had been temporarily partitioned to make dwelling rooms, may be changed by

moving the partitions and using the entire building for dyeing and cleaning purposes, since the word "use" is not confined to the act of using, but may be also employed to describe that property or thing which renders it suitable for a purpose, and building designed for business purposes remains available for that purpose despite temporary use for another purpose.—*People ex rel. Wohl v. Leo*, 178 N. Y. S. 851.

☞621 (N.Y.Sup.) Although an owner's application to the board of appeals to review a decision of the superintendent of buildings, which denied him permission to extend the business use to the upper story of a building, was based upon Building Zone Resolution, § 7, giving the board discretionary power to modify section 6, on which the superintendent based his decision, yet such application does not preclude the owner from having the board appeals decision reviewed upon certiorari, on the ground that section 6 did not authorize the order entered by the superintendent and affirmed by the board of appeals.—*People ex rel. Wohl v. Leo*, 178 N. Y. S. 851.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

☞654 (N.Y.Sup.) On motion for an order directing commissioners of estimate to ascertain damages caused to petitioner's property by closing a road, question being whether such road was a public street, facts held to show that it was a public street.—*In re Amethyst St., Unionport Road and Rhinelander Ave. in City of New York*, 178 N. Y. S. 225.

☞705(1) (N.Y.Sup.) The owner of an automobile, proceeding along the street in the same direction as a fleet of coal trucks, which, after passing one of such trucks, struck plaintiff, who had attempted to cross the street before the truck, in disregard of the automobile, which was in plain view, was not guilty of any negligence rendering it liable, though it did not sound horn.—*Gobes v. Cutting Larsen Co.*, 178 N. Y. S. 338.

☞705(10) (N.Y.Sup.) Plaintiff, who attempted to cross a street ahead of a coal truck, and was struck by an automobile plainly visible and approaching from a distance and at a rate rendering the attempt palpably dangerous, was negligent, and cannot recover from the owner of the automobile.—*Gobes v. Cutting Larsen Co.*, 178 N. Y. S. 338.

☞705(10) (N.Y.Sup.) Pedestrian who in crossing street failed to look to the north in passing the line of south-bound traffic, was negligent.—*Chiappone v. Greenebaum*, 178 N. Y. S. 854.

☞706(5) (N.Y.Sup.) In action for injuries to pedestrian, struck by automobile truck while crossing street, involving question of truck driver's negligence in failing to give warning on approach and in driving on wrong side of street, verdict for defendant held clearly against weight of evidence.—*O'Neill v. Ewert*, 178 N. Y. S. 506.

☞706(5) (N.Y.Sup.) In action for injuries to pedestrian, struck by automobile at street in-

tersection while crossing street, after having waited for street car to pass, involving question of negligence of defendant's chauffeur, driving in opposite direction from that in which car was traveling, in view of possible danger to persons who would naturally cross street after car had passed, evidence held to sustain verdict for plaintiff.—*Busacca v. McLoughlin Supply Co.*, 178 N. Y. S. 849.

☞706(5) (N.Y.Sup.) In action for death of pedestrian, struck while crossing street by automobile, the chauffeur of which at time had been unable to see pedestrian, because of standing automobiles, until pedestrian was within a very few feet of automobile's path, evidence held insufficient to show negligence of chauffeur.—*Chiappone v. Greenebaum*, 178 N. Y. S. 854.

☞706(6) (N.Y.Sup.) In action for death of pedestrian, struck at street crossing by automobile truck claimed to have been driven at excessive rate of speed, it was proper for jury to consider ordinance regulating speed of vehicles upon question of truck driver's negligence.—*Cohen v. A. Goodman & Sons*, 178 N. Y. S. 528.

☞706(6) (N.Y.Sup.) In action for injuries sustained by plaintiff pedestrian, while crossing an intersecting street, due to auto truck approaching from opposite direction, skidding when chauffeur turned to the right into intersecting street, but did not keep as near the right-hand curb as possible, as required by Code of Ordinances of City of New York, c. 24, art. 2, § 11, held, question of negligence was for the jury.—*Anderson v. Schorn*, 178 N. Y. S. 603.

☞706(7) (N.Y.Sup.) In an action by plaintiff, who was struck by defendant's automobile while attempting to cross streets at an intersection, question of plaintiff's negligence held for the jury.—*Paulsen v. Bierman*, 178 N. Y. S. 267.

☞706(7) (N.Y.Sup.) In action for injuries to pedestrian, struck by defendant's automobile while crossing street, question of pedestrian's contributory negligence held, under the evidence, for the jury.—*Becker v. Golden E. Service Co.*, 178 N. Y. S. 376.

☞706(7) (N.Y.Sup.) Pedestrian, who continued to cross street at street intersection, after having noticed automobile truck approaching at distance of 60 feet, and who was struck by truck after it had changed its course, was not negligent as a matter of law, in failing to look a second time or accelerating speed, where, if truck had continued on its course, he would have been beyond danger after proceeding only 5 or 6 feet.—*O'Neill v. Ewert*, 178 N. Y. S. 506.

☞706(8) (N.Y.Sup.) In action for death of pedestrian, struck by automobile while crossing street, where circumstances were such that pedestrian must have noticed portion of street in which automobile was traveling, it was error to permit jury to predicate negligence on violation of ordinance requiring automobiles to keep to the right and as near curb as practicable, since violation of such ordinance could have had no direct connection with the accident.—*Cohen v. A. Goodman & Sons*, 178 N. Y. S. 528.

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(C) Public Buildings, Parks, and Other Public Places and Property.

⇒721(4) (N.Y.Sup.) The city of New York, under Greater New York Charter, §§ 613, 621, 622, and section 244a, as added by Laws 1914, c. 466, embodying a provision of Laws 1859, c. 349, and acts amendatory thereto, under which Central Park was acquired and authorizing maintenance of museums therein, notwithstanding sections 612, 627, may lawfully lease arsenal building in Central Park to a corporation chartered by Laws 1911, c. 152, § 2, to promote methods of safety and sanitation and for museum purposes.—Williams v. Gallatin, 178 N. Y. S. 148.

XII. TORTS.

(A) Exercise of Governmental and Corporate Powers in General.

⇒734 (N.Y.Mun.Ct.) A municipality, controlling a building as a governmental function merely, and not through any choice on its part, incurs no liability for a personal injury sustained because of the exercise of such functions.—Goldfarb v. City of New York, 178 N. Y. S. 541.

In an action for personal injuries sustained by plaintiff while standing on the sidewalk in front of a building occupied by the board of health of the city of New York, due to the fall of a pane of glass from one of the windows, striking plaintiff, there was no liability upon the part of the city, where the building was maintained for the health department under the mandatory provisions of Public Health Law, § 120, and under the supervision of the city in the exercise of its governmental functions.—Id.

(C) Defects or Obstructions in Streets and Other Public Ways.

⇒773 (N.Y.Sup.) In an action against a city for personal injuries resulting from plaintiff's falling on a sidewalk on which snow and ice had accumulated during that and the preceding two days, the temperature being below freezing all the time, instructions which allowed the jury to impute negligence to the city authorities because of their failure to cover the icy surface with sand or ashes, or other protection, or remove the ice and snow, were erroneous; the city being under no legal obligation to remove the snow and ice until a subsequent thaw.—Myers v. City of Beacon, 178 N. Y. S. 294.

⇒809(2) (N.Y.Sup.) Contractor in charge of sidewalk over which it was constructing subway was not liable for injuries from defect in sidewalk, in absence of notice of defect, either direct or implied from existence of defect for a sufficient length of time to charge it with implied notice.—Cocheo v. Degnon Contracting Co., 178 N. Y. S. 345.

⇒809(2) (N.Y.Sup.) Sewer contractors, who had erected concrete works and cofferdam along river at foot of a street, were not negligent in failing to erect a fence or guard across the street to prevent children going upon the concrete work.—Shalata v. Rodgers, 178 N. Y. S. 494.

⇒819(6) (N.Y.Sup.) In action against subway contractor for injuries from defect in side-

walk of which it was in charge, *held*, that there was no proof of the existence of the defect for a sufficient length of time to charge contractor with implied notice of existence thereof.—Cocheo v. Degnon Contracting Co., 178 N. Y. S. 345.

⇒821(7) (N.Y.Sup.) In an action against a city for personal injuries resulting from snow and ice that had accumulated upon a sidewalk on the day of the accident and the two preceding days, during which there was no thaw, and where plaintiff admitted it was snowing at the time she fell, and there was no evidence of any slope or defect in the walk, the city's negligence was a question for the jury.—Myers v. City of Beacon, 178 N. Y. S. 294.

⇒821(18) (N.Y.) In an action by a pedestrian injured by tripping in the street, whether a contractor was negligent in placing a cleat four inches thick over a hole in a board pavement over an excavation in a city street beveled only on one end *held* for jury.—Hoykendorf v. Bradley Contracting Co., 125 N. E. 95, 227 N. Y. 204.

MURDER.

See Homicide.

MUSEUMS.

See Municipal Corporations, ⇒721.

MUTUAL BENEFIT INSURANCE.

See Insurance, ⇒646-754.

NAMES.

See Elections, ⇒144, 155; Highways, ⇒17.

⇒18 (N.Y.Sup.) It will be assumed, in the absence of inherent improbability or proof to the contrary, that the same name at all times designates the same person or thing.—In re Amethyst St., Unionport Road and Rhineland-er Ave. in City of New York, 178 N. Y. S. 225.

NATURALIZATION.

See Aliens, ⇒67, 68.

NAVIGABLE WATERS.

See Canals; Evidence, ⇒23.

I. RIGHTS OF PUBLIC.

⇒3 (N.Y.Sup.) Barge Canal Act, § 3, canalizing Hudson river, *held* to revoke any consent given to construction of dam on river by Laws 1882, c. 406, and Laws 1900, c. 683.—West Virginia Pulp & Paper Co. of Delaware v. Peck, 178 N. Y. S. 663.

⇒22(3) (N.Y.Sup.) Where state gave its consent under Laws 1882, c. 406, and Laws 1900, c. 683, to location of dam in Hudson river, and thereafter canalized the river under Barge Canal Act, and with consent and acquiescence of dam owner adapted the canal to the dam, any change in the dam detrimental to the canal was unauthorized, and the removal by state of flashboards placed on dam after construction of dam,

and which impeded navigation, was not trespass.—*West Virginia Pulp & Paper Co. of Delaware v. Peck*, 178 N. Y. S. 663.
 ⚡26(2) (N.Y.Sup.) Where state gave its consent under Laws 1882, c. 406, and Laws 1900, c. 683, to location of dam in Hudson river, and thereafter canalized the river under Barge Canal Act, and with consent and acquiescence of dam owner adapted the canal to the dam, any change in the dam detrimental to the canal was unauthorized, and the removal by state of flashboards placed on dam after construction of dam, and which impeded navigation, was not trespass.—*West Virginia Pulp & Paper Co. of Delaware v. Peck*, 178 N. Y. S. 663.

II. LANDS UNDER WATER.

⚡36(3) (N.Y.Sup.) Public's right upon land between high and low water mark is to pass and repass when the tide is out, and to sail and fish over the foreshore when the tide is in, and to make such other reasonable use of foreshore as may be consistent with the rights of others using beach for legitimate purposes.—*Johnson v. May*, 178 N. Y. S. 742.
 ⚡37(4) (N.Y.Sup.) Question whether patents carried title to the thread of river, in absence of language indicating such a purpose, depends on the navigability of the river at place in question, the criterion as to navigability being the adaptability of river in its entirety for the purpose of transportation in about the locality of the place in question; it being unnecessary that it be deep enough to permit passage of boats at all portions of the stream.—*West Virginia Pulp & Paper Co. of Delaware v. Peck*, 178 N. Y. S. 663.
 Patentee does not by implication take the bed of the river to exclusion of state; every intentment being made in favor of state.—*Id.*
 ⚡37(7) (N.Y.Sup.) Colonial patent granting land "on both sides" of river, the description of which begins west of certain river and does not mention the river independently of one or both of its "sides," held to give patentee no title to bed of river.—*West Virginia Pulp & Paper Co. of Delaware v. Peck*, 178 N. Y. S. 663.

III. RIPARIAN AND LITTORAL RIGHTS.

⚡39(3) (N.Y.Sup.) Riparian owner has certain rights in the foreshore in front of his premises, entirely apart from his rights and privileges as one of the public resorting to the beach, one of which is that of access to and from the sea.—*Johnson v. May*, 178 N. Y. S. 742.

NEGLIGENCE.

See Animals, ⚡74; Appeal, ⚡1177; Bridges, ⚡37, 44, 46; Executors and Administrators, ⚡89; Judgment, ⚡143; Landlord and Tenant, ⚡167, 169; Master and Servant, ⚡111-302; Municipal Corporations, ⚡705, 706, 734-821; Officers, ⚡111; Pleading, ⚡52; Railroads, ⚡361; Seamen, ⚡11; Street Railroads, ⚡99-118; Witnesses, ⚡275.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(C) Condition and Use of Land, Buildings, and Other Structures.

⚡32(1) (N.Y.Sup.) The owner of private premises owes no duty of active vigilance to a mere licensee without invitation, express or implied, and does not owe him the duty of even ordinary care with respect to the condition of the premises.—*Murphy v. Broadway Improvement Co.*, 178 N. Y. S. 860.

The owner or occupant of premises, who induces others to come on premises by invitation, express or implied, owes to them the duty of using reasonable care to keep the premises in a safe condition, so they will not be unnecessarily and unreasonably exposed to danger.—*Id.*

⚡44 (N.Y.Sup.) It is not negligence for contractor to remove flooring and side supports from joists in making alterations contracted for, where a safe passageway remains, so that he has no reason to apprehend that any one will walk on the joists.—*Holland v. Turner*, 178 N. Y. S. 382.

II. PROXIMATE CAUSE OF INJURY.

⚡61(2) (N.Y.Sup.) One who sustains injury without any fault of his own may recover damages from one whose neglect of duty caused the injury, although the negligence of a third person, not subject to his control or direction, may have contributed thereto.—*Niagara Fire Ins. Co. v. Nathan*, 178 N. Y. S. 450.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

⚡71 (N.Y.Sup.) An experienced man, who walks across joists from which flooring and side supports have been removed, instead of using a safe passageway open to him, is negligent.—*Holland v. Turner*, 178 N. Y. S. 382.

(C) Imputed Negligence.

⚡89(1) (N.Y.Sup.) Where a third person, not connected with a garage or the owner of a car kept in such garage, took such car with intent to assist another person in obtaining a doctor for one who was critically ill, and there was a collision between the car taken and defendant's car, and the drivers of both cars were negligent, the owner of the car taken from the garage was entitled to recover damages from defendant, not being responsible for the consequences of the interloper's acts.—*Niagara Fire Ins. Co. v. Nathan*, 178 N. Y. S. 450.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

See Appeal, ⚡843, 977, 1177; Criminal Law, ⚡945-949, 1023; Divorce, ⚡55, 151.

II. GROUNDS.

(A) Errors and Irregularities in General.

⚡21 (N.Y.Sup.) A new trial was demanded in a libel case, where trial court in the pres-

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ence of the jury suggested that defendant's president should shake hands with plaintiff, and tell him he was sorry for the publication, and make a retraction in the next issue, and stated that plaintiff was not seeking mere damages, but vindication for his feelings, and that defendant had "kidded" in the same way as plaintiff had, etc.—*Clark v. Variety*, 178 N. Y. S. 698.

(F) Verdict or Findings Contrary to Law or Evidence.

—68 (N.Y.Sup.) Verdict by properly instructed jury upon clean-cut issue of fact should not be set aside by court, where there was nothing from which it could be inferred that jury were influenced by sympathy, passion, or prejudice.—*Jensen v. Muir*, 178 N. Y. S. 425.

—76(1) (N.Y.Sup.) The authority conferred upon the trial court by Code Civ. Proc. § 999, to set aside a verdict because it is for excessive damages, involves the exercise of a sound judicial discretion, but the power in a proper case must be exercised.—*Melish v. New York Consol. R. Co.*, 178 N. Y. S. 228.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

—161(4) (N.Y.) Where court granted a motion to set aside verdict for plaintiff and grant a new trial, on condition that an undertaking be filed, "conditioned for the payment of any judgment which may be recovered by the plaintiff" against defendant, surety on the undertaking was not liable, where plaintiff thereafter appealed from the part of the order setting aside the verdict, and the appellate court reversed the order and instructed the trial court to reinstate the verdict.—*Grafton v. U. S. Fidelity & Guaranty Co.*, 124 N. E. 742, 227 N. Y. 162.

—164 (N.Y.) Where the court did not reserve his ruling on the defendant's motion for a non-suit or for the direction of a verdict (Code Civ. Proc. §§ 1185, 1187), but denied the motion absolutely, he could not, after verdict in favor of plaintiff, dismiss the complaint, but could only grant a new trial.—*Dougherty v. Salt*, 125 N. E. 94, 227 N. Y. 200.

NOTES.

See Bills and Notes.

NOTICE.

See Animals, —74; Appeal, —842; Brokers, —35; Drains, —88; Eminent Domain, —169; Gas, —14; Injunction, —221; Lis Pendens, —20; Mechanics' Liens, —291; Municipal Corporations, —809, 819; Sales, —285, 333; States, —184; Trusts, —167; Venue, —63.

NUISANCE.

See Pleading, —52.

OATH.

See Drains, —32.

OFFICERS.

See Associations, —18; Corporations, —120, 181, 294, 306, 310, 320, 323, 619; Counties, —153, 171, 173; Courts, —55; Discovery, —38; Drains, —32; Elections, —153; Justices of the Peace; Libel and Slander, —10; Prisons, —11; Religious Societies, —21; Schools and School Districts, —106; Sheriffs and Constables.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

—111 (N.Y.Sup.) Public officers having the custody of public money are liable for a loss thereof, although occurring without their fault or negligence.—*City of New York v. Fox*, 178 N. Y. S. 805.

OIL.

See Joint Adventures, —4.

OPERA.

See Injunction, —77; Theaters and Shows, —8.

PARDON.

See Habeas Corpus, —3.

—2 (N.Y.Sup.) Under Laws 1919, c. 410, amending Penal Law, § 2193, and providing that time spent by person convicted of crime in prison or jail prior to conviction and before sentence shall be calculated as part of the term of sentence, and deducted under provisions of Prison Law, art. 9, one convicted is not, where the period of his incarceration in penitentiary, coupled with incarceration pending trial, has equaled amount of sentence, entitled to discharge on habeas corpus, but the matter must be reported to the Governor, and deduction approved by him, before it can be effected; hence the act can in no way be attacked as infringing the pardoning power.—*People ex rel. Gabriel v. Warden of New York County Penitentiary, Wards Island*, 178 N. Y. S. 595.

PARENT AND CHILD.

See Guardian and Ward; Infants; Schools and School Districts, —160.

—3(2) (N.Y.Sup.) A mother, as executrix of her deceased husband's will, held entitled to proper allowance for past expenses in the support of her infant children out of the income of a trust estate devoted by the will to their support, education, and maintenance.—*In re Friedlander*, 178 N. Y. S. 50.

PARTIES.

For parties on appeal and review of rulings as to parties, see Appeal.

For parties to particular proceedings or instruments, see also the various specific topics.

PARTNERSHIP.

See Joint Ventures, ¶4; Judgment, ¶833.

I. THE RELATION.

(A) Creation and Requisites.

¶22 (N.Y.Sup.) Where a father gave his sons an interest in the business, making them copartners, a written instrument was not essential to vest an interest in the sons.—*Cooper v. Nissinoff*, 178 N. Y. S. 411.

(C) Evidence.

¶55 (N.Y.Sup.) In seller's action for price, evidence held insufficient to show that the defendants were partners.—*S. Rosenfeld Co. v. Schechter*, 178 N. Y. S. 334.

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

(B) Individual Transactions.

¶97 (N.Y.Sup.) Copartners owe the duty of utmost good faith to one another, and a copartner cannot act for himself, and if he does so, and obtains profits, he must account to his copartners.—*Brown v. Leach*, 178 N. Y. S. 319.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(C) Application of Assets to Liabilities.

¶178 (N.Y.Sup.) The liability of partners is joint and several, but in marshaling the joint assets of the partnership and the individuals composing it, the partnership assets must first be used in the payment of partnership liabilities, and the individual assets in payment of individual liabilities.—*Edelman v. Schwartz*, 178 N. Y. S. 587.

PATENTS.

See Boundaries, ¶8; Navigable Waters, ¶37; Public Lands, ¶193.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Licenses and Contracts.

¶216 (N.Y.Sup.) In action for breach of contract whereby plaintiffs were appointed exclusive agents for defendant for the sale of a patented device, the contract to hold good so long as sales by plaintiffs amounted to an average of \$1,000 per month or more, where on plaintiffs' case their sales amounted to more than \$1,000 a month up to the time of defendant's breach, and defendant claimed that the sales amounted to less, an issue of fact was presented, which should have been submitted to the jury.—*Adams v. George H. Rives Mfg. Co.*, 178 N. Y. S. 214.

Under contract whereby plaintiffs were appointed exclusive agents for defendant for the sale of a patented device, the contract to hold good so long as sales by plaintiffs amounted to an average of \$1,000 per month, the minimum which was to control the continuance of the contract was the amount of sales made by plaintiffs to their customers, and not the amount paid by plaintiffs to defendant.—*Id.*

PAYMENT.

See Counties, ¶153; Husband and Wife, ¶279; Partnership, ¶178; Sales, ¶89, 411, 479; Wills, ¶733.

I. REQUISITES AND SUFFICIENCY.

¶21 (N.Y.Sup.) Checks, unless accepted and paid, constitute no payment of an indebtedness, and a buyer could not extinguish the seller's claim merely by sending a check, which was refused.—*James H. Rhodes & Co. v. S. Weissglass & Co.*, 178 N. Y. S. 378.

¶30 (N.Y.Sup.) Where seller agreed that buyers should apply goods toward his indebtedness to buyers, buyers, by applying and crediting the goods received towards the payment of seller's account, liquidated the debt for such goods, as much so as if amount of purchase price had been paid in cash.—*Quattrocchi v. Frankel*, 178 N. Y. S. 396.

PENAL LAWS.

See Evidence, ¶29.

PENALTIES.

See Animals, ¶35; Corporations, ¶181, 323; Guardian and Ward, ¶10, 13.

PERJURY.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

¶1 (N.Y.Sup.) To constitute the crime of perjury, under Penal Law, § 1620, not only must the testimony be false, but the witness must know it to be false, and must testify willfully and with a criminal intent.—*People v. Redmond*, 178 N. Y. S. 120.

¶12 (N.Y.Sup.) If witness who testified to facts told him by others believed what had been told him, his testimony, though false, was not willfully so, and therefore not perjury, under Penal Law, § 1620, notwithstanding section 1626.—*People v. Redmond*, 178 N. Y. S. 120.

A witness may be guilty of perjury in testifying that he does or does not remember a given fact, but that such testimony is willfully given is an element of the crime.—*Id.*

II. PROSECUTION AND PUNISHMENT.

¶31 (N.Y.Sup.) Under Penal Law, § 1627, affidavit of defendant in prosecution for perjury retracting testimony given during trial presumptively established falsity of testimony, in so far as it was contradicted by the affidavit.—*People v. Redmond*, 178 N. Y. S. 120.

Affidavit of defendant in prosecution for perjury that his testimony was based on statements made to him presumptively established that he testified to that which he did not of his personal knowledge know to be true.—*Id.*

¶33(2) (N.Y.Sup.) In prosecution for perjury, verdict of guilty held against weight of evidence, on the ground of insufficiency of evidence to show that the testimony given was willfully false.—*People v. Redmond*, 178 N. Y. S. 120.

PERPETUITIES.

See Wills, 853.

4(15) (N.Y.Sur.) There is no principle of public policy prohibiting the foundation of a public charity by way of trust to care for the poor relations of the founder, if the conveyance or limitation is drafted accurately in a technical way; such a trust not creating a perpetuity for a family or tending to a privileged class.—*In re Moller's Estate*, 178 N. Y. S. 682.

4(22) (N.Y.Sup.) Where separate trusts attempted to be created by the residuary clause of a will are void under the statute against perpetuities, such illegality does not destroy a legacy given to infants, as the court may disregard the illegal antecedent trust provisions by accelerating the remainders vested in such infants under the residuary clause.—*Maynard v. Maynard*, 178 N. Y. S. 329.

6(2) (N.Y.Sup.) An entire residuary estate may be held in trust for the use of one beneficiary for life, and on his or her death may then be divided into shares, each of which will be held in trust for a second separate life, or a part thereof.—*Mount v. Mount*, 178 N. Y. S. 168.

Where testatrix devised the net rents of real property in trust for the benefit of her grandniece for life, with remainder to her issue, and, if none, to become a part of the residuary estate, and where that operated to suspend the power of alienation of the property for two further lives, making three lives in all, the gift over was void, and the corpus of the property vested in decedent's heirs as of the time of her death.—*Id.*

6(6) (N.Y.Sup.) Where the interests of the beneficiaries in a trust fund are separate and distinct, they take as tenants in common, and the power of alienation of each share is suspended only for the number of lives during which the share or subshare is limited.—*Mount v. Mount*, 178 N. Y. S. 168.

Although trust property may be held by the trustee for convenience of investment in one undivided fund, if the beneficiaries' interests are separated into distinct shares, and held by them as tenants in common, each share is to be deemed a separate entity, and is entitled to its separate term for two lives.—*Id.*

PHONOGRAPHS.

See Injunction, 96.

PHYSICIANS AND SURGEONS.

See Corporations, 14; Seamen, 11.

PICTURES.

See Injunction, 96.

PLEADING.

See Costs, 275; Courts, 99, 189, 190; Trial, 25, 370.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal.

I. FORM AND ALLEGATIONS IN GENERAL.

8(1) (N.Y.Sup.) A complaint should be made up of allegations of ultimate facts, omitting conclusions of law.—*Lukach v. Blair*, 178 N. Y. S. 8.

8(3) (N.Y.Sup.) Bare allegations of conspiracy or fraud do not state a cause of action, being mere conclusions.—*Albany Sav. Bank v. Kingsbury-Leahy Co.*, 178 N. Y. S. 195.

8(3) (N.Y.Sup.) Mere allegations of fraud or conspiracy are valueless in stating a cause of action.—*Feil v. Feil*, 178 N. Y. S. 197.

8(5) (N.Y.Sup.) An allegation that certain amounts are still due and owing to plaintiff on notes sued on states a conclusion.—*Dukas v. Hennessy Realty Co.*, 178 N. Y. S. 420.

8(6) (N.Y.Sup.) In action by wife for separation, allegation in defendant's answer that divorce procured by him in Nevada from his first wife was without force and effect in Connecticut, where he married plaintiff, is a legal conclusion, not sufficiently supported by bare allegation that former wife failed to appear in the Nevada action.—*Ashdown v. Ashdown*, 178 N. Y. S. 565.

8(15) (N.Y.Sup.) Bare allegations of conspiracy or fraud do not state a cause of action, being mere conclusions.—*Albany Sav. Bank v. Kingsbury-Leahy Co.*, 178 N. Y. S. 195.

8(15) (N.Y.Sup.) Mere allegations of fraud or conspiracy are valueless in stating a cause of action.—*Feil v. Feil*, 178 N. Y. S. 197.

In an action to reform a deed given by a referee under foreclosure decree, allegation that the mortgagor caused title to be taken in the name of another to defraud plaintiffs held not an allegation of fact, but purely of a legal conclusion.—*Id.*

9 (N.Y.Sup.) If what a mortgagee and the mortgagor did with reference to foreclosure was not in and of itself a fraud upon parties who had procured reformation of the deed to the mortgagor, it was not made so, in an action by such parties to reform the referee's deed under foreclosure decree, by alleging it was induced by or through a desire to deceive and defraud.—*Feil v. Feil*, 178 N. Y. S. 197.

11 (N.Y.Sup.) A complaint should be made up of allegations of ultimate facts, omitting conclusions of law and mere evidentiary facts.—*Lukach v. Blair*, 178 N. Y. S. 8.

11 (N.Y.Sup.) A pleader should allege the ultimate facts which he must prove to sustain his cause of action, and not the evidence tending to establish those facts.—*Stabilimento Metallurgico Ligure v. Joseph*, 178 N. Y. S. 241.

22 (N.Y.Sup.) A pleader should allege the ultimate facts which he must prove to sustain his cause of action, and not the evidence tending to establish those facts, and should bear in mind that continued repetition of fact once well pleaded adds nothing to its force and value, and is condemned.—*Stabilimento Metallurgico Ligure v. Joseph*, 178 N. Y. S. 241.

34(3) (N.Y.Sup.) In an action by an assignee of a contract of sale of land for specific performance, on demurrer to the complaint it will be assumed, in the absence of any allegations in the complaint, that the plaintiff assumed the obligations which rested upon the

assignor.—*Schuyler v. Kirk Brown Realty Co.*, 178 N. Y. S. 568.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

⌚38½ (N.Y.Sup.) The office of a complaint is to inform the defendant with reasonable certainty of the cause of action that the plaintiff claims he has against him, that the defendant may be able to plead.—*Stabilimento Metallurgico Ligure v. Joseph*, 178 N. Y. S. 241.

⌚51 (N.Y.Sup.) A complaint stating that an Alabama corporation contracted to deliver steel rails, but failed to do so, and that such corporation transferred its assets and liability to a Texas corporation, and that the Texas corporation transferred its assets and liability to defendant, and that the Alabama corporation and Texas corporation had both repudiated the contract, and that defendant was the sole stockholder in the Alabama corporation and the Texas corporation, was bad, in that it contained allegations appropriate to three different causes of action.—*Stabilimento Metallurgico Ligure v. Joseph*, 178 N. Y. S. 241.

⌚52(1) (N.Y.Sup.) There are two causes of action, which, under Code Civ. Proc. § 481, subd. 2, and section 483, must be separately stated and numbered, unless allegations pertinent to one only are eliminated, where the complaint would warrant a recovery for nuisance or negligence.—*Glover v. Holbrook, Cabot & Rollins Corporation*, 178 N. Y. S. 517.

⌚52(2) (N.Y.Sup.) If the statement of facts in the complaint is such that there might be two distinct causes of action stated, and such was the purpose of plaintiff, the defendant is entitled to have each cause of action separately stated and numbered, under Code Civ. Proc. § 481, subd. 2, and section 483, notwithstanding section 519, which provides that allegations must be liberally construed, etc.—*Stabilimento Metallurgico Ligure v. Joseph*, 178 N. Y. S. 241.

⌚64(2) (N.Y.Sup.) In an action on a contract under which plaintiffs were to get commissions for selling iron and steel materials, allegations that defendant was indebted to the plaintiff for money laid out and expended and for charges and commissions in the purchase and sale of goods, rendered a count bad as stating two causes of action, where the contract did not provide for the purchase of merchandise nor expenditure of money in behalf of the defendant.—*Calame v. Joseph*, 178 N. Y. S. 245.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

⌚90 (N.Y.Sup.) An affirmative defense should not contain a denial of any allegation of the complaint which plaintiff must allege and prove before he can recover.—*Schieffelin v. Hylan*, 178 N. Y. S. 652.

Any denials which may be contained in an affirmative defense must form essential parts of the defense pleaded in avoidance of a cause of action otherwise confessed, and the denial of any essential allegation of the complaint which plaintiff must prove in the first instance cannot

be essential to an affirmative defense, for, if the denial is sustained, the cause of action itself fails.—Id.

The mere fact that the inclusion of certain denials in the affirmative defenses will not prevent plaintiff from testing the sufficiency of such defenses by demurrer does not in itself show such denials are properly pleaded, for they may be irrelevant.—Id.

(C) Traverses or Denials and Admissions.

⌚125 (N.Y.Sup.) Denial of the conclusion that a certain balance is due plaintiff raises no issue.—*Dukas v. Hennessy Realty Co.*, 178 N. Y. S. 420.

⌚129(1) (N.Y.Sup.) The general rule that allegations in a pleading that are not denied are to be deemed admitted is not applicable to courts of inferior jurisdiction, and where no provision is made in the statute for the serving of replies to such pleadings, the allegations in pleadings in such courts setting up defenses must be deemed to be denied.—*Kern v. Caledonian Ins. Co. of Scotland*, 178 N. Y. S. 340.

V. DEMURRER OR EXCEPTION.

⌚193(8) (N.Y.Sup.) A demurrer will not lie purely to the nature of the relief demanded, if from the facts alleged any cause of action may be predicated thereon.—*Bronx Gas & Electric Co. v. Public Service Commission*, First Dist., 178 N. Y. S. 172.

⌚204(3) (N.Y.Sup.) Where a complaint states several causes of action, defendant may demur to one and answer the others.—*Stabilimento Metallurgico Ligure v. Joseph*, 178 N. Y. S. 241.

⌚204(5) (N.Y.Sup.) Where each of six separate defenses begins, "Defendant repeats and realleges the foregoing allegations of this answer with the same force and effect as is more fully set forth herein and pleaded, and further alleges," thereby incorporating by reference into each defense all preceding allegations of answer, much of which incorporated matter has no connection with subsequent defenses, the sufficiency of any defense cannot be separately tested by demurrer.—*Simon v. Bank of British West Africa, Ltd.*, 178 N. Y. S. 190.

⌚205(1) (N.Y.Sup.) A general demurrer on the ground the complaint fails to state the facts necessary to a cause of action cannot be sustained, unless, admitting all the facts alleged, no cause of action whatever is stated.—*Bardwell v. Black*, 178 N. Y. S. 642.

⌚214(1) (N.Y.Sup.) Upon defendants' demurrer, allegations of complaint will be taken as true.—*White v. Slayback*, 178 N. Y. S. 421.

⌚216(1) (N.Y.Sup.) On demurrer to the complaint, only matters that appear or fail to appear in the complaint are to be considered.—*Schuyler v. Kirk Brown Realty Co.*, 178 N. Y. S. 568.

⌚218(3) (N.Y.Sup.) Where plaintiff, after defendants interposed separate demurrers to complaint, moved for judgment on the pleadings, denial of motion did not affirmatively dispose of demurrers, and where defendants thereafter served notice of trial on the demurrers, court properly rendered interlocutory judgment for defendants, sustaining demurrers.—*Wilson v. Birdsell*, 178 N. Y. S. 651.

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VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⇒236(1) (N.Y.Sup.) Generally court will permit a party to put his pleading in such shape as will enable him to raise and have determined at the trial any question affecting his interest, where application to amend is made in good faith, and where injustice will not be done to adverse party.—Kursheedt Mfg. Co. v. Rosenzweig, 178 N. Y. S. 430.

⇒237(8) (N.Y.Sup.) Where evidence failed to make out a cause of action in fraud as pleaded, but established cause of action for breach of contract, amendment of complaint, so as to make it conform to the proof, was proper.—Grono v. Ward, 178 N. Y. S. 341.

⇒258(1) (N.Y.Sup.) Where defendants' attorney had prevented plaintiff for nearly a year from having issues made, so that notice of trial could be served by amendments of answer which did not comply with orders of court, and by incorporating in amended answer defense to which demurrer had been sustained, a motion to allow defendant to serve a proposed amended answer was improperly granted; defendant not having shown good faith as required by General Rules of Practice, rule 23.—Kursheedt Mfg. Co. v. Rosenzweig, 178 N. Y. S. 430.

Conduct of defendant's attorney in failing repeatedly to observe orders of court in amendment of pleadings, and in incorporating in amended answer the defense to which a demurrer has been sustained, warrants conclusion, in absence of substantial proof to the contrary, that he is not proceeding in good faith, but that he has abused leniency of court for purpose of delaying cause to which he has no defense.—Id.

VII. SIGNATURE AND VERIFICATION.

⇒301(3) (N.Y.Sup.) Verification of answer of defendant foreign corporation, made on behalf of the corporation by its vice president, under Code Civ. Proc. § 525, and stating "that the sources of the deponent's information and the grounds of his belief as to all matters not stated on his own knowledge are the books and records of said corporation," held sufficient compliance with section 526, requiring verification by a person other than the party to set forth "the grounds of his belief as to all matters not stated upon his knowledge."—Davidson v. Penn-Virginia Coal & Coke Corporation, 178 N. Y. S. 203.

VIII. PROFERT, OYER, AND EXHIBITS.

⇒310 (N.Y.Sup.) Written instruments referred to in the complaint are not made part of it by the statement that they are incorporated in it, when in fact no copy thereof is attached.—Lukach v. Blair, 178 N. Y. S. 8.

⇒311 (N.Y.City Ct.) Any facts recited in a contract, made part of a complaint and referred to therein, are to be considered as alleged in the complaint.—Phinney v. Andrus, 178 N. Y. S. 760.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

⇒323(3) (N.Y.Sup.) Where the present ground for the application for a bill of particulars is failure of the party to furnish the bill previously directed by the order of the court, a showing of such disobedience in itself entitles applicant to relief; an affidavit verified by the attorney being sufficient.—Grolnick v. Mutual Life Ins. Co. of New York, 178 N. Y. S. 176.

X. FILING, SERVICE, AND WITHDRAWAL.

⇒333 (N.Y.Sup.) Plaintiff will be relieved from his default, resulting from the discussion between counsel of the legal propositions, and allowed to demur or reply to the counterclaim, as it may conclude; merits and good faith being shown.—Michigan Cent. R. Co. v. Acheson Graphite Co., 178 N. Y. S. 29.

XI. MOTIONS.

⇒343 (N.Y.Sup.) Where defendant demurred to plaintiff's complaint on the ground that it did not state facts sufficient to constitute a cause of action, plaintiff's motion for judgment on the pleadings, under Code Civ. Proc. § 547, was proper.—Bullville Milk Producers' Ass'n v. Armstrong, 178 N. Y. S. 612.

⇒345(1) (N.Y.Sup.) If in the pleadings there is an allegation of any material issue of fact on which evidence must be taken to warrant judgment, defendant's motion for judgment on the pleadings, under Code Civ. Proc. § 547, cannot be granted.—Feil v. Feil, 178 N. Y. S. 197.

An allegation in the pleadings in the nature of a conclusion is not a statement of a fact requiring the determination of a jury, and preventing the court from granting judgment on the pleadings on defendant's motion, under Code Civ. Proc. § 547.—Id.

⇒350(1) (N.Y.Sup.) The practice on motion for judgment on the pleadings, under Code Civ. Proc. § 547, is the same as on motion for judgment at the opening of trial.—Feil v. Feil, 178 N. Y. S. 197.

In an action to reform a deed, defendants' practice in moving for judgment on the pleadings, under Code Civ. Proc. § 547, after they had interposed demurrer to the complaint for insufficiency of the facts, was correct.—Id.

⇒350(3) (N.Y.Sup.) In action by gas company to enjoin Public Service Commission and other public officials from enforcing Laws 1906, c. 125, fixing maximum price of gas in plaintiff's territory, and to prevent interference with its collection of a higher rate fixed by it as a reasonable rate, seeking to declare statutory rate confiscatory, owing to increased cost of production, etc., and to fix a reasonable rate, where in commission demurred to first cause of action and answered the second, a decision on the merits was proposed by plaintiff's motion for judgment on the pleadings.—Bronx Gas & Electric Co. v. Public Service Commission, First Dist., 178 N. Y. S. 172.

⇒350(3) (N.Y.Sup.) A motion for judgment on the pleadings, in accordance with Code Civ. Proc. § 547, admits every material fact in the answer, and plaintiff is entitled to judgment only if the facts admitted are not sufficient to

raise any question of fact.—*Albany Sav. Bank v. Kingsbury-Leahy Co.*, 178 N. Y. S. 195.

On motion by plaintiff for judgment on the pleadings, only material allegations in the pleadings can be considered.—*Id.*

—350(3) (N.Y.Sup.) On motion for judgment on the pleadings, under Code Civ. Proc. § 547, only questions of law are involved.—*Feil v. Feil*, 178 N. Y. S. 197.

On their motion for judgment on the pleadings, under Code Civ. Proc. § 547, defendants are called upon to admit every material fact set out in the complaint, and are entitled to judgment if the complaint does not state facts sufficient to constitute a cause of action.—*Id.*

On motion for judgment on the pleadings under Code Civ. Proc. § 547, nothing but the material allegations of the complaint can be considered.—*Id.*

—350(3) (N.Y.Sup.) Under Code Civ. Proc. §§ 547, 976, where defendant demurred to complaint as insufficient on September 26th, and on September 27th served notice of argument on demurrer, and on October 4th plaintiff's attorney served notice of motion that on the pleadings and papers referred to in the complaint plaintiff would move at the next Special Term, beginning October 12th, for an order for judgment prayed for, and that the issue of law be disposed of on the motion, the court properly took action on plaintiff's motion for judgment on the pleadings, despite defendant's objection that he himself had already duly noticed the argument of the demurrer.—*Bardwell v. Black*, 178 N. Y. S. 642.

—350(3) (N.Y.Sup.) Upon plaintiff's motion for judgment on the pleadings, with no counter-motion, the court, on determining that defendant's demurrer is well taken, has no power, except to deny the motion, leaving the defendant to take such action in reference to his demurrer as would be proper, if the motion for judgment had not been made.—*Wilson v. Birdsall*, 178 N. Y. S. 651.

—352 (N.Y.Sup.) The sufficiency of an entire defense cannot be tested on a motion to strike out as irrelevant and redundant, because the defendant is entitled to have the sufficiency of his entire defense tested in an ordinary way by demurrer or motion for judgment.—*Schieffelin v. Hylan*, 178 N. Y. S. 652.

—362(2) (N.Y.Sup.) In an action for libel, a denial in the affirmative defenses that defendant published "of and concerning the plaintiff a letter, of which the following is a copy," will be stricken on plaintiff's motion, either as a denial of an essential part of plaintiff's cause of action, without place in the affirmative defense, or else as entirely meaningless, irrelevant, and redundant.—*Schieffelin v. Hylan*, 178 N. Y. S. 652.

In an action for libel, inclusion of the denial of the innuendo in the affirmative defenses does not aggravate plaintiff, and will not be stricken on motion.—*Id.*

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, the allegations of the affirmative defenses of privilege and qualified privilege that the mayor's letter was written on an occasion of "at least one of absolute [qualified]

privilege," etc., will be stricken as merely conclusions of law.—*Id.*

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, copy of report made by the Rainey Commission to the Secretary of the Treasury of the United States will be stricken as an exhibit, on account of its dating and time of publication, from the mayor's affirmative defenses of privilege and qualified privilege.—*Id.*

—364(2) (N.Y.Sup.) Where fifth defense pleaded allegations of failure of consideration in retaking of goods or documents, and nothing in preceding four defenses was necessary to complete fifth defense, and defendant in a subsequent paragraph repeated and realleged preceding allegations of his answer, and where preceding paragraphs incorporated into new defense were not material to it, plaintiff's motion to strike out certain defenses should be granted.—*Simon v. Bank of British West Africa, Ltd.*, 178 N. Y. S. 190.

—364(2) (N.Y.Sup.) In an action for libel, the denial in the affirmative defenses that the charges made against plaintiff were wholly false is irrelevant to the defenses of privilege and qualified privilege, and, since the defenses of justification and mitigation of damages must set forth the facts relied on, is also irrelevant and redundant as to such defenses, and therefore to be stricken on motion.—*Schieffelin v. Hylan*, 178 N. Y. S. 652.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, the allegation of each affirmative defense that defendant had at all times endeavored to perform his duty as mayor without fear or favor, and to the best of his ability, etc., should be stricken on plaintiff's motion as irrelevant.—*Id.*

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, allegation, in the mayor's affirmative defenses of privilege and qualified privilege, as to appointment of the Rainey Commission by the Secretary of the Treasury of the United States to investigate the drug-addict problem, held irrelevant, and to be stricken on motion.—*Id.*

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, allegations of the third affirmative defense of justification, reiterating practically all the allegations of fact contained in the affirmative defenses of privilege and qualified privilege, are irrelevant to the defense of justification, and will be stricken, despite the mayor's argument that he should be permitted to plead and prove the "story" of the case.—*Id.*

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, allegations of the affirmative defense of justification that the company of which plaintiff was president had pleaded guilty to indictments in the federal courts for

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violation of the Insecticide Law will be stricken as irrelevant.—Id.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, the allegation of the affirmative defense of mitigation of damages that the company of which plaintiff was president had pleaded guilty to indictments in the federal courts for violation of the Insecticide Law will be stricken as irrelevant to impeach plaintiff's character, or to show freedom from malice on the part of defendant mayor.—Id.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, acknowledgment of receipt of the alleged libelous letter from the person to whom it was addressed, made an exhibit by defendant's affirmative defenses, held irrelevant and to be stricken.—Id.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, exhibit to the mayor's affirmative defenses, listing sales of narcotics made by plaintiff's company to various drug store proprietors, etc., held not so irrelevant to the plea of justification as to be stricken on motion.—Id.

In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, creating criminals, copy of a report of the police department in relation to drug-using criminals, and copy of a report of a city physician in charge of a narcotic clinic, made exhibits to the mayor's affirmative defense of justification, will be stricken on motion as irrelevant.—Id.

An exhibit to an affirmative defense, consisting of copies of certain informations against plaintiff's company for violation of a statute, which violations have been stricken from the affirmative defense as irrelevant, must itself be stricken.—Id.

Ⓒ364(3) (N.Y.Sup.) In an action for libel against the mayor of the city of New York on account of a letter charging that plaintiff's company made and sold habit-forming drugs, defendant's fifth affirmative defense of privilege, under Penal Law, § 1350, substantially in the same form as the previous plea of privilege, except in its conclusion that it is under such act, will be stricken on plaintiff's motion as irrelevant and redundant.—Schieffelin v. Hyland, 178 N. Y. S. 652.

Ⓒ365(3) (N.Y.Sup.) In considering objections to affirmative allegations in the answer which are claimed to be irrelevant, the court should apply the rule that, where defendant has pleaded facts which might possibly be admissible, the court should not strike them on motion, but should leave the question of relevancy to be determined on trial, unless such allegations may prejudice plaintiff by putting before the jury irrelevant matters, injecting an atmosphere which no rulings on trial could eliminate.—Schieffelin v. Hyland, 178 N. Y. S. 652.

Plaintiff's motion to strike all the allegations contained in the separate affirmative defenses referring to annexed documents, including the

fact of annexation, effected, when granted, the striking of the document themselves; but if reference to such documents is stricken from one affirmative defense, if any reference remains to them in any other defense, the document itself cannot be stricken out.—Id.

Ⓒ368 (N.Y.Sup.) Where plaintiff relies upon two causes of action, but fails to separately state and number them, he should, on motion of defendant, be required to serve an amended complaint, either separately stating and numbering the alleged causes of action, or eliminating the one upon which he does not place reliance.—Cockayne v. Healey, 178 N. Y. S. 210.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

Ⓒ404 (N.Y.Sup.) While objection that pleading does not state facts sufficient to constitute a cause of action is not waived, though not taken by demurrer or answer, in view of Code Civ. Proc. § 499, yet the objection should be raised directly, so that a decision will effectually determine the issue at law presented, in view of section 547, furnishing a speedy and inexpensive method of determining the question.—Lord Electric Co. v. Oak Realty Co., 178 N. Y. S. 709.

Ⓒ427 (N.Y.Sup.) Where a defendant does not demur to a complaint, which states allegations appropriate to several causes of action, but answers, he cannot upon the trial object to the reception of evidence, on the ground that it was immaterial upon the theory which he supposed was the cause of action set forth, if such evidence was material on another, which plaintiff contended was the cause of action he intended to allege.—Stabilimento Metallurgico Ligure v. Joseph, 178 N. Y. S. 241.

PLEDGES.

See Executors and Administrators, Ⓒ122.

POLICE.

See Animals, Ⓒ74; Master and Servant, Ⓒ384; Municipal Corporations, Ⓒ185.

POLICE POWER.

See Municipal Corporations, Ⓒ601-621.

POOR RELATIONS.

See Charities, Ⓒ11; Perpetuities, Ⓒ4; Trusts, Ⓒ21.

POSTING.

See Carriers, Ⓒ151.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREMATURE DELIVERY.

See Sales, Ⓒ177.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Discovery, **63**; Evidence, **244**; Frauds, Statute of, **116**, **123**; Husband and Wife, **138**; Patents, **216**.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

104(2) (N.Y.Sup.) A salesman with authority to sell has no authority to warrant the merchandise sold, unless he has been given express authority to do so, or unless such authority can be implied from the fact that it is customary for agents to give a warranty on sales of merchandise of that description.—Eichler v. Kahnweiler, 178 N. Y. S. 257.

119(6) (N.Y.Sup.) Buyer, who relies on warranty made by seller's salesman, has the burden of proving the express authority of the salesman to warrant the goods, or the custom from which the implied authority to so do is presumed.—Eichler v. Kahnweiler, 178 N. Y. S. 257.

123(7) (N.Y.Sup.) In an action against vendors for failure to deliver, evidence of authority or ratification held sufficient to authorize the admission in evidence of the order given by plaintiff vendees to the vendors' claimed agent, so that it was error to dismiss the complaint.—Silberstein v. Mittelman, 178 N. Y. S. 230.

(B) Undisclosed Agency.

146(2) (N.Y.Sup.) An agent, acting for an undisclosed principal, who signed contract in his own name, is individually liable, though he described himself in the order constituting the memorandum of sale as a manufacturer's selling agent.—Levy v. Shour, 178 N. Y. S. 227.

(C) Unauthorized and Wrongful Acts.

152(3) (N.Y.Sup.) A lease for less than a year, executed by an agent without authority, verbal or written, is void.—Siemers v. Heuchel, 178 N. Y. S. 649.

(D) Ratification.

166(1) (N.Y.Sup.) There can ordinarily be no ratification of that of which a party is ignorant, as ratification implies at least a knowledge that there is or may be something to ratify.—Stumpp v. Farmers' Loan & Trust Co., 178 N. Y. S. 811.

166(4) (N.Y.Sup.) Where agent's authority was limited to soliciting orders subject to approval of seller, mere delivery of goods and acceptance of part of purchase price, without actual knowledge of the making of warranty by salesman, did not render seller liable for representations of salesman on ground of ratification.—Eichler v. Kahnweiler, 178 N. Y. S. 257.

PRINCIPAL AND SURETY.

See Bail, **79**; Guaranty; Indemnity; Insurance, **362**.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

66(1) (N.Y.) The liability of the surety in an undertaking in a court proceeding must be determined in connection with the purpose for which the undertaking was given.—Grafton v. U. S. Fidelity & Guaranty Co., 124 N. E. 742, 227 N. Y. 162.

PRISONS.

11 (N.Y.Sup.) Warden of city of New York workhouse, being responsible, under the rules and regulations of the department of correction, which have the force and effect of statutes, "for the proper care and delivery of clothing, money or valuables of inmates committed to his care," is liable on his bond for loss of inmates' money intrusted to care and stolen by prison keeper designated by warden, though warden was not personally negligent; such moneys being "public moneys," within rule making public officers having custody of public money liable for its loss, although occurring without their fault or negligence.—City of New York v. Fox, 178 N. Y. S. 805.

PROBATION OFFICER.

See Courts, **55**.

PROCESS.

See Corporations, **668**; Judgment, **12**.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY CUSTODIAN.

See War, **12**.

PUBLIC LANDS.

See Boundaries, **8**; Evidence, **23**; Navigable Waters, **37**.

IV. COLONIAL AND PROPRIETARY GRANTS.

193 (N.Y.Sup.) Colonial patent passed nothing by implication or not expressed in unequivocal language.—West Virginia Pulp & Paper Co. of Delaware v. Peck, 178 N. Y. S. 663.

PUBLIC SERVICE COMMISSIONS.

See Carriers, **7**, **151**; Evidence, **43**; Gas, **1**, **13**, **14**; Judgment, **543**, **715**; Pleading, **350**; Railroads, **52**, **96**.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Electricity; Gas; Railroads; Street Railroads.

QUANTUM MERUIT.

See Attorney and Client, **158**; Work and Labor.

QUARRELING.

See Insurance, **438**.

QUIETING TITLE.

See Limitation of Actions, ¶60.

I. RIGHT OF ACTION AND DEFENSES.

¶12(7) (N. Y. Sup.) Constructive possession following legal title to fee is sufficient, in absence of hostile possession, for maintenance of action for cancellation, as a cloud on title, of certificate of sale of the land for years for drainage assessment.—*Whitney v. Considine Investing Co.*, 178 N. Y. S. 68.

¶19 (N.Y.Sup.) The statutory action to determine claim to real property, under Code Civ. Proc. § 1638 et seq., is equitable in its nature, and although, under section 1642, it may assume the nature of an ejectment action, authorizing a jury trial, yet, whether a jury trial is required or not, the relief, such as the barring of claims under section 1645, is equitable in its nature, and the equity practice should be followed, except where the statute directs otherwise.—*Tyler v. Jahn*, 178 N. Y. S. 689.

RAILROADS.

See Canals, ¶17; Commerce, ¶27; Landlord and Tenant, ¶161; Sales, ¶149; Street Railroads; Taxation, ¶124½.

I. CONTROL AND REGULATION IN GENERAL.

¶5½ [New, vol. 6A Key-No. Series] (N.Y.Sup.) Contention that, as employer's railroad was being operated by the Director General, the award to claimant employé should have been against the Director General cannot be sustained; the railroad company having described itself as employer in the report of the injury which it filed with the commission.—*Fish v. Rutland R. Co.*, 178 N. Y. S. 439.

II. RAILROAD COMPANIES.

¶14 (N.Y.Sup.) In proceedings against a railroad company, under Railroad Law 1890, § 12, now section 22, to determine the manner and point of proposed crossings of its line by another company's new line, defendant has the right to question the regularity of plaintiff's organization.—*Western New York & P. Traction Co. v. Erie R. Co.*, 178 N. Y. S. 491.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

¶52 (N.Y.Sup.) A proposed extension of a railroad company's electric line for about 7 miles, the existing system forming a continuous line of about 76 miles, held an "extension," within the meaning of Railroad Law 1890, § 90, now section 170.—*Western New York & P. Traction Co. v. Erie R. Co.*, 178 N. Y. S. 491.

Where the Railroad Law regulating the construction of an extension of a railroad company's electric line was complied with prior to the passage of the Public Service Commissions Law, requiring a certificate of the Public Service Commission for an extension, the company had the right to construct the ex-

tension without the consent of the commission.—*Id.*

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

¶96 (N.Y.Sup.) The Public Service Commission cannot go back of a resolution of the board of estimate and apportionment, reciting that there is a necessity for the extension of a street in the city of New York over the tracks of a railroad.—*In re Eighty-Fourth Street in Borough of Queens, City of New York*, 178 N. Y. S. 617.

On application by the city of New York to extend a street across the tracks of a railroad, the question of fact before the board of estimate and apportionment is, under Railroad Law, § 90, whether in view of the locality of other facilities for crossing with proper safety within reasonable access to travel in that place, and of other streets of the vicinage where safe crossings could be ordered, the volume of public travel now and presently convinces the board that the crossing is reasonably needful.—*Id.*

Findings by the board of estimate and apportionment, on application by the city of New York to extend a street over a railroad, that "the public interest" required a continuance of a street, was a finding that there was a "necessity," within the meaning of Railroad Law, § 90, for the extension of the street, although the word "necessary" was not used, the principal consideration of the "necessity" being the public welfare; but mere convenience should not satisfy the term, in view of the fact that a part of the cost of crossing is upon the railroad.—*Id.*

Action of the Public Service Commission, extending a street across the tracks of a railroad, under Railroad Law, § 90, will not be reversed on appeal, where its determination had sufficient support, and there are no facts that indicate any abuse of the discretion reposed in such board.—*Id.*

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

¶142 (N.Y.Sup.) In proceedings under Railroad Law 1890, § 12, now section 22, to determine the manner and point of proposed crossings of defendant's steam railroad by plaintiff's electric line, held, that plaintiff was a properly organized consolidated railroad corporation, with all the rights belonging to such a company, including that of crossing existing lines; the essential requirements of the laws of New York and Pennsylvania having been observed.—*Western New York & P. Traction Co. v. Erie R. Co.*, 178 N. Y. S. 491.

X. OPERATION.

(G) Injuries to Persons on or near Tracks.

¶361 (N.Y.Sup.) Failure of a railroad company to comply with the requirement of railroad Law, § 52, to fence its road to prevent live stock going thereon, is evidence of negligence in favor of one suing for the death of a child, struck by a train on an unfenced track onto which he had strayed.—*Di Caprio v. New York Cent. R. Co.*, 178 N. Y. S. 626.

RAPE.

See Criminal Law, ¶822, 829.

II. PROSECUTION AND PUNISHMENT.**(B) Evidence.**

¶54(2) (N.Y.Sup.) In a prosecution for rape, under a count charging sexual intercourse with a female not defendant's wife and under the age of 18 years, under Penal Law, § 2010, the court's refusal to charge that disclosures by the complainant of the alleged fact that the defendant had sexual intercourse with her are not to be taken as the corroborative evidence required by section 2013 was error.—*People v. Abraitis*, 178 N. Y. S. 255.

In a prosecution for rape, under Penal Law, § 2010, under a count charging sexual intercourse with a female under 18 years of age, not defendant's wife, it was error for the court to refuse to charge that the fact that defendant was "keeping company" with complainant, and "was at the place where the alleged offense is stated to have taken place, is not of itself the corroboration as required by the statute" (section 2013).—*Id.*

RATE.

See Gas, ¶14.

REAL ACTIONS.

See Quieting Title.

RECORDS.

See Courts, ¶116; Evidence, ¶158; Lis Pendens, ¶20; Marriage, ¶32; Records, ¶11.

¶11 (N.Y.Sup.) The Supreme Court has no general jurisdiction over the records in the county clerk's office, and cannot give directions concerning them, except in connection with actions or special proceedings between parties over whom it has acquired jurisdiction.—*Ellis v. Caplan*, 178 N. Y. S. 503.

REFERENCE.

See Arbitration and Award; Mortgages, ¶582.

REFORMATION OF INSTRUMENTS.

See Pleading, ¶8, 9, 350.

I. RIGHT OF ACTION AND DEFENSES.

¶17(2) (N.Y.Sup.) When there is no mistake about grantor's intention, but only in the writing, the mistake of the scrivener, no matter how it occurred, ought to be corrected.—*Delap v. Leonard*, 178 N. Y. S. 102.

Where grantor, conveying land to stepdaughter without consideration, instructed lawyer to provide for reversion to grantor upon stepdaughter's death before certain age, deed conveying, by mistake of lawyer, a life estate to stepdaughter, with remainder to her children, if any, and reversion to grantor upon her death without children, will be reformed, so as to convey estate grantor intended to convey.—*Id.*

REFORMATORIES.

See Infants, ¶16; Mandamus, ¶172.

RELATIVES.

See Charities, ¶11; Perpetuities, ¶4; Trusts, ¶21.

RELEASE.

See Insurance, ¶603; Trusts, ¶237.

I. REQUISITES AND VALIDITY.

¶16 (N.Y.Sup.) A release given by an injured railway mail clerk to the railroad whose negligence caused his injuries can be said to have been given under "mutual mistake of fact" only when the clerk did not anticipate his injuries would later cause the development of spinal meningitis and his death, while the railroad, through its claim agent, also did not anticipate such facts.—*Miles v. New York Cent. R. Co.*, 178 N. Y. S. 637.

If plaintiff can say that by a mutual mistake of the parties, or its equivalent, a mistake on his part and fraud on the part of his adversary, the cause of action was embraced in a release given by plaintiff, contrary to the intent of the parties, or contrary to plaintiff's interest, if fraud is proven, he is entitled to an instruction that the release does not bar his right to recover.—*Id.*

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

¶57(2) (N.Y.Sup.) In an action against a railroad by the widow of a railway mail clerk for his death, evidence held insufficient to show that the release which the clerk, after his injuries, gave the claim agent of the road, not under the influence of fraud, or active or passive misrepresentation, was void for mutual mistake.—*Miles v. New York Cent. R. Co.*, 178 N. Y. S. 637.

RELIGIOUS SOCIETIES.

¶21 (N.Y.Sup.) Persons constituting the majority of the trustees and congregation of a religious corporation organized as a Congregational church, according to Religious Corporations Law, §§ 160-171, which recognizes a distinction between a "Congregational" and an "Independent" church, have no power under sections 5 and 171 to change the church allegiance of the corporation to the Methodist Episcopal Church.—*Application of Lloyd's Memorial Congregational Church*, 178 N. Y. S. 104.

REMAINDERS.

See Courts, ¶201; Perpetuities, ¶4, 6; Taxation, ¶897; Wills, ¶506, 524, 533, 552, 634, 853.

REPLEVIN.

See Associations, ¶18.

I. RIGHT OF ACTION AND DEFENSES.

¶4 (N.Y.Mun.Ct.) Under Act Cong. Aug. 29, 1916, § 23 (U. S. Comp. St. § 8604b), held,

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goods delivered to a carrier, for which it had issued an order bill of lading, could not be replevied from it, without such bill of lading first being surrendered to it, or negotiation thereof enjoined.—*Salant v. Pennsylvania R. Co.*, 178 N. Y. S. 285.

⚡10 (N.Y.Sup.) Where the evidence clearly established that plaintiff's goods came into the possession of defendant, and were sold and delivered by defendant to a third person, such facts are sufficient to justify a judgment in favor of plaintiff in replevin action.—*Standard Match Co. v. Porter*, 178 N. Y. S. 375.

⚡12 (N.Y.Sup.) Grand jury's failure to indict employé, who, employer claimed, had stolen money, does not relieve employé from liability for such money in employer's action in replevin.—*Hecker-Jones-Jewell Milling Co. v. Murray*, 178 N. Y. S. 385.

IV. PLEADING AND EVIDENCE.

⚡72 (N.Y.Sup.) In action in replevin to recover money in the hands of property clerk of police department, claimed to have been stolen from plaintiff by its employé, and which had been taken from employé by police officer, where employé denied that money had been stolen, and claimed that the money taken from him was his own, plaintiff had burden of proving his case by a fair preponderance of evidence, and was not required to sustain burden beyond a reasonable doubt.—*Hecker-Jones-Jewell Milling Co. v. Murray*, 178 N. Y. S. 385.

In replevin action to recover money in hands of property clerk of police department, claimed to have been stolen from plaintiff by an employé, and taken from employé by police officer, wherein employé denied having stolen money, and claimed the money so taken from him was his own, plaintiff held to have sustained burden of proving ownership of money by fair preponderance of evidence.—*Id.*

REPORTS.

See Corporations, ⚡599.

RESIDENCE.

See Domicile.

RETROSPECTIVE LAWS.

See Statutes, ⚡264.

REVENUE.

See Taxation.

REVIEW.

See Appeal.

REVOCATION.

See Divorce, ⚡167.

RIPARIAN RIGHTS.

See Navigable Waters, ⚡39.

ROADS.

See Highways.

RULES.

See Municipal Corporations, ⚡212.

RUNAWAY.

See Animals, ⚡74.

RUPTURE.

See Evidence, ⚡14.

SAFETY APPLIANCE ACT.

See Master and Servant, ⚡111.

SALAD DRESSING.

See Food, ⚡5, 15.

SALES.

See Appeal, ⚡842, 1062, 1068, 1067; Attachment, ⚡107; Brokers, ⚡35; Corporations, ⚡120; Drains, ⚡88; Evidence, ⚡89, 244, 323, 442; Frauds, Statute of, ⚡89; Judgment, ⚡747; Payment, ⚡21, 30; Pleading, ⚡51, 64; Principal and Agent, ⚡104, 119, 123, 146, 166.

II. CONSTRUCTION OF CONTRACT.

⚡54 (N.Y.CityCt.) Where a sale agreement was prepared in defendant's language and accepted by plaintiff, relying upon assurance that merchandise would be delivered at time fixed, if the meaning is doubtful, it must be construed most favorably to plaintiff, and words must be given the meaning which defendant ought to have reasonably understood plaintiff would put upon them.—*Rosenstein v. Farish Co.*, 178 N. Y. S. 865.

⚡71(3) (N.Y.Sup.) Seller, having agreed to deliver "50,000 to 55,000 yards," was bound to deliver only the minimum amount.—*Salembier, Levin & Co. v. North Adams Mfg. Co.*, 178 N. Y. S. 607.

⚡85(1) (N.Y.Sup.) Contract whereby defendant agreed to manufacture and sell to plaintiff 1,000 barrels of a new product used in coloring material and make shipments in approximately equal monthly quantities over the year, the first shipment to be made on completion and operation of the plant, was an absolute contract to deliver the 1,000 barrels within the year, and defendant was liable for failure to do so, regardless of whether due diligence had been exercised in completing the plant.—*Burns Mfg. Co. v. Clinchfield Products Corporation*, 178 N. Y. S. 483.

⚡85 (2) (N.Y.CityCt.) A sale contract provision that, if the production of a certain mill should be curtailed during the time for delivery by "strikes, lockouts to counteract strikes, shortage of labor," etc., "deliveries shall be made proportionate to the production," construed as meaning that the "shortage of labor" excusing performance must result from strikes under the rule of ejusdem generis, that, where an enumeration of specific things is followed by some more general word or phrase, the latter will be held to refer to things of the same kind.—*Rosenstein v. Farish Co.*, 178 N. Y. S. 865.

☞88 (N.Y.Sup.) Interpretation of the language of a contract to purchase samples to be delivered "as soon as possible" is for the court.—*William Anderson Textile Mfg. Co. v. Rosenman*, 178 N. Y. S. 380.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

☞89 (N.Y.Sup.) In an action for goods sold and delivered under written contract specifying date of delivery as September 1st, testimony of plaintiffs' salesman alone, which was denied by defendants, held insufficient to sustain their burden to prove an entire departure from the terms of the written contract by the fixing of an extended date, September 20th, for delivery.—*Gutman v. Weisbarth*, 178 N. Y. S. 377.

☞89 (N.Y.Sup.) Where defendant purchased from plaintiff's principal goods to be shipped from Spain, the written contract of sale providing that cost, insurance, and freight were included in the price, held that, where plaintiff stated that his principal had been put to delay and expense by reason of war conditions, and compelled to pay out a considerable sum of money, and that plaintiff would not deliver the goods or documents of title unless defendant agreed to bear half of the expense, there was no consideration for defendant's promise to bear half of such expense, and plaintiff could not recover, where defendant, who gave a check for the amount, stopped payment after obtaining the documents of title.—*Caruana v. Prudential Spice Co.*, 178 N. Y. S. 401.

IV. PERFORMANCE OF CONTRACT.

(B) Bills of Sale.

☞149 (N.Y.Sup.) Where a railroad, selling scrap material on the site of its freight house removed from leased land, believed through its officer that it was selling only slate, scrap iron, and coal, with lumber, which also the purchaser believed, such material being fairly worth the \$100 consideration, the bill of sale to the purchaser did not cover several hundred dollars worth of copper sulphate gradually deposited under the old freight house from the waste of a telegraph company's batteries.—*Salisbury v. Segal*, 178 N. Y. S. 599.

(C) Delivery and Acceptance of Goods.

☞150(1) (N.Y.Sup.) One who repudiates a contract to deliver goods is liable in damages.—*Stabilimento Metallurgico Ligure v. Joseph*, 178 N. Y. S. 241.

☞162 (N.Y.Sup.) Where defendant ordered from plaintiff 300 cases of evaporated milk, Holly brand, to be shipped from warehouse, and defendant's truckman refused to accept the milk first tendered because it was not Holly brand, whereupon plaintiff's representative gave him two orders on another warehouse, one for 150 cases of milk, and the other for 150 cases of Holly milk, held that, where those in charge of the warehouse told the truckman when he presented the orders he was too late, there was no constructive delivery; Personal Property Law, § 124, subd. 3, providing that, where

goods at time of sale are in possession of a third person, the seller has not fulfilled his obligation to deliver unless such third person acknowledges to buyer that he holds the goods on the buyer's behalf.—*J. A. Kirsch & Co. v. Roulston, Beckett & Co.*, 178 N. Y. S. 246.

Orders on a warehouse to deliver cases of milk where warehouse receipts are retained by seller are not "documents of title," within Personal Property Law, § 124, subd. 3, relating to delivery of goods in possession of a third person other than the seller.—*Id.*

☞164 (N.Y.Sup.) Where a buyer ordered 300 cases of Holly brand evaporated milk, and the seller could not deliver that number of cases of Holly brand, the buyer was not obligated to accept a partial delivery.—*J. A. Kirsch & Co. v. Roulston, Beckett & Co.*, 178 N. Y. S. 246.

☞172 (N.Y.Sup.) Seller, having contracted to make deliveries of woolen goods, was not relieved from liability for failure to so do by fact that United States government had preempted practically the entire woolen goods supply on account of war.—*Salembier, Levin & Co. v. North Adams Mfg. Co.*, 178 N. Y. S. 607.

☞177 (N.Y.Sup.) The time and place of shipment of goods are regarded as a warranty—that is, a condition precedent—upon the failure or nonperformance of which the other party may repudiate the whole contract: "shipment" meaning delivery of goods to carrier and his bill of lading therefor issued.—*Goldenberg v. Cutler*, 178 N. Y. S. 522.

Where contract specifies a November shipment, the buyer need not accept one made in October.—*Id.*

☞179(1) (N.Y.Sup.) Buyer, who retains goods, is liable for purchase price thereof.—*Schwartz v. Bedell, Inc.*, 178 N. Y. S. 397.

☞180(2) (N.Y.Sup.) Under Personal Property Law (Sales of Goods Act) § 125, subds. 2, 3, a buyer's acceptance of a portion of thread delivered which conformed to the requirements of the contract does not prevent rejection of thread which did not conform to the contract requirements; the rule that acceptance of a part of a delivery of goods which were required to be delivered as a whole not applying, and the case being one where the buyer makes delivery of goods of different description not included in the contract.—*Bloom v. Abram Bloom Co.*, 178 N. Y. S. 264.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

☞218 (N.Y.Sup.) Where the corporate buyer of imitation pearls from a German house rejected part of the shipment as defective, which rejection was ratified by the seller, and, after a remittance was made for the shipment, less a deduction for defective pearls held subject to the seller's order, the buyer company endeavored to return the defective pearls, but could not on account of war conditions, and on its liquidation and dissolution the defective pearls were stored in the name of the buyer company until the controversy about them could be determined, such pearls did not belong to the buyer company; title having revested in the seller.—*Lewenthal v. Lewenthal*, 178 N. Y. S. 252.

VI. WARRANTIES.

⚡272 (N.Y.Sup.) Straw hat bodies, purchased by hat manufacturer from dealers in straw goods, were impliedly warranted to be merchantable, under Personal Property Law, § 96.—*Levine v. Isler*, 178 N. Y. S. 7.

⚡273(3) (N.Y.Sup.) Where seller and buyer were on equal footing as to ability to judge fitness of goods for intended purpose, buyer's disclosure of purpose for which goods were intended was insufficient, under Personal Property Law, § 96, subd. 1, to raise implied warranty of fitness for such purpose, in absence of evidence that buyer in placing order relied on seller's skill and judgment.—*Eichler v. Kahnweiler*, 178 N. Y. S. 257.

⚡285(2) (N.Y.Sup.) Where it was customary in the millinery trade for manufacturers to buy merchandise from six months to a year ahead for the summer trade, and meanwhile store it, hat manufacturer, who, having bought straw hat bodies in November, notified seller of breach of warranty upon discovery of breach during following April by dyers, to whose warehouse sellers had sent goods, gave notice within a reasonable time after he knew or ought to have known thereof, within Personal Property Law, § 130.—*Levine v. Isler*, 178 N. Y. S. 7.

VII. REMEDIES OF SELLER.**(D) Resale.**

⚡333 (N.Y.Sup.) If a seller, whose goods have been refused, mails to buyer a letter containing the notice required by Personal Property Law, § 144, subd. 3, to entitle seller to sue for purchase price, but during buyer's absence delivery is refused by one of buyer's employes and the letter is returned to plaintiff unopened, there is no sufficient notice under such section.—*Bijou Button Co. v. Empress Novelty Co.*, 178 N. Y. S. 434.

(E) Actions for Price or Value.

⚡355(2) (N.Y.Sup.) In seller's action for balance of purchase price, defense of fraud, in that seller had delivered a defective second-hand piano, instead of the new piano buyer had bought, should have been specially pleaded, and was not available under a general denial.—*Weser Bros. v. Ofrio*, 178 N. Y. S. 385.

(F) Actions for Damages.

⚡372 (N.Y.Sup.) Seller, having accepted goods returned by buyer, and having issued its credit memorandum therefor without complaint, cannot recover damages for buyer's refusal to accept the goods.—*Schwartz v. Bedell, Inc.*, 178 N. Y. S. 397.

VIII. REMEDIES OF BUYER.**(A) Recovery of Price.**

⚡392 (N.Y.Co.Ct.) In an action for damages for alleged breach of warranty in the sale of three automobiles, where the uncontradicted evidence disclosed that one of them went into plaintiff's possession, the evidence was conflicting as to whether plaintiff or defendant held possession of the others, and there was no evidence of any offer to return them, plain-

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tiff has not brought himself within Personal Property Law, § 150, subd. (d), relating to seller's breach of warranty, rescission, and permitting recovery of price paid, and cannot recover the full purchase price, in the absence of testimony, that they were valueless.—*Schneider v. Hodgkins Field Hardware Co.*, 178 N. Y. S. 281.

(C) Actions for Breach of Contract.

⚡411 (N.Y.Sup.) A counterclaim, based on plaintiffs' failure to deliver goods bought by defendants, is insufficient to set out a cause of action, where it was not alleged that at appointed time of delivery defendants were able and willing to make the payment required.—*Bigio v. Steinbrugge*, 178 N. Y. S. 110.

⚡418(2) (N.Y.Sup.) Where delivery and payment are to be concurrent acts and seller refuses to deliver, buyer is entitled to recover as damages the differences between the contract price and market value of the goods at the time and place appointed for delivery.—*Varagnola v. Partola Mfg. Co.*, 178 N. Y. S. 428.

Where goods were to be shipped from New York to Italy, payment to be made upon shipment against shipping documents by certain New York banks, with whom buyer agreed to open and maintain a credit for that purpose, the damage for refusal to deliver was the difference between contract and market price in New York at time of shipment, and not Italy; New York being place of delivery.—*Id.*

IX. CONDITIONAL SALES.

⚡479(6) (N.Y.Sup.) Where a piano was sold on the installment plan, under an agreement that title should remain in the seller until it was paid for, held that, where the purchaser was in default and was about to remove the piano from the state, it is no defense to an action by the seller to foreclose the lien, where the piano was taken into the custody of the marshal before payment was made, that he stated to defendant's wife that the piano might be moved in case security was given and the arrears paid, etc.—*Cooper v. Nissinoff*, 178 N. Y. S. 411.

SCHEDULE

See Carriers, ⚡151.

SCHOOLS AND SCHOOL DISTRICTS.

See Criminal Law, ⚡1169; Livery Stable and Garage Keepers, ⚡4½; Mandamus, ⚡8.

II. PUBLIC SCHOOLS.**(C) Government, Officers, and District Meetings.**

⚡47 (N.Y.) Education Law, § 890, conferring upon the commissioner of education quasi judicial power to determine controversies, and section 96, giving him power to institute proceedings, do not confer initial jurisdiction to entertain and determine finally whether the city of New York under its charter (section 1102) could credit "the general fund for reduction of taxes" with school money appropriated to the city by the state as a reimbursement in part for money raised by taxation for

school purposes, or whether such section was impliedly repealed by Laws 1917, c. 786, so that such money should be placed to the credit of the board of education.—People ex rel. Hyman v. Finegan, 125 N. E. 97, 227 N. Y. 219.

(D) District Property, Contracts, and Liabilities.

§71 (N.Y.Sup.) In view of Education Law, §§ 304, 890, questions as to the validity of an election concerning the construction of a new school building and issuance of bonds are peculiarly for the determination of the commissioner of education, and involve matters which the law commits to him for determination in the first instance at least, and the courts cannot interfere and assume to pass upon the questions on the merits.—Lewis v. Smith, 178 N. Y. S. 838.

(E) District Debt, Securities, and Taxation.

§102 (N.Y.Sup.) Education Law, providing in sections 410-412 for school district tax on personal property "liable for tax," but nowhere defining property that is liable, is not an entirely separate and independent statute, but one to be interpreted and construed in connection with the Tax Law.—People ex rel. Franklin Mills Co. v. Collins, 178 N. Y. S. 65.

Manufacturing corporations, within Emerson Act (adding article 9a to Tax Law) § 208, subd. 3, by payment of income tax under sections 215, 219h, are exempt under section 219j from school district tax provided for by Education Law, §§ 410-412, though Emerson Act does not specifically refer to or repeal any of the provisions of Education Law, since Education Law is to be construed in connection with Tax Law, and property exempted under Tax Law from all taxes in lieu of a percentage of income to be paid is no longer taxable even for school purposes.—Id.

§106 (N.Y.Co.Ct.) Where defendant was appointed school collector for a district by the trustee thereof, and his appointment was duly filed according to law, but he failed to execute the bond required by Education Law, § 252, he had no authority to collect a tax, and hence was liable in conversion for seizing and selling under the tax roll, with the trustee's warranty attached, certain personal property of one who refused to pay his school tax.—Gray v. Hardenbergh, 178 N. Y. S. 346.

Where a duly appointed school district tax collector failed to qualify by giving bond required by Education Law, § 252, and was without authority to collect a tax, and liable in conversion for seizing and selling personal property of one who refused to pay his school tax, the fact that owner, after the sale under the tax warrant pursuant to notice duly posted, delivered some of property to purchaser would not preclude his action against the collector for a conversion.—Id.

(G) Teachers.

§130 (N.Y.) One given an "assistant teacher's license to act as a critic teacher" in February, 1899, is simply a critic teacher and not an assistant or regular teacher.—Sullivan v. Board of Education of City of New York, 125 N. E. 99, 227 N. Y. 240.

§144(4) (N.Y.) A teacher issued an "assistant teacher's license to act as a critic teacher" in 1899 is entitled only to the compensation of a model teacher, in view of Laws 1900, c. 751, § 4, and Laws 1911, c. 902, § 1.—Sullivan v. Board of Education of City of New York, 125 N. E. 99, 227 N. Y. 240.

Under Laws 1911, c. 902, § 1, adopting schedules for teachers' salaries, critic teacher, though licensed as assistant teacher, was entitled only to pay as critic teacher, not as regular or assistant teacher.—Id.

(H) Pupils, and Conduct and Discipline of Schools.

§160 (N.Y.Co.Ct.) In a prosecution under Education Law, § 624, relating to compulsory education of children between 8 and 16 years, the only defense is that they are not in proper physical and mental condition to attend school.—People v. Himmanen, 178 N. Y. S. 282.

Where father of two children, physically and mentally able to attend school, resided 3½ miles from schoolhouse by one road and a little less than 2 miles by a shorter road, which had water standing in it in places during rainy weather, failed to send them to school, it was no defense, in prosecution for violation of Education Law, § 624, relating to compulsory education, that distance and condition of road made it unreasonable to require him to send them, in view of section 623.—Id.

The excuse raised by father of several children, in his prosecution under Education Law, § 624, relating to compulsory education, that the distance from his house to schoolhouse is so great and that roads for part of the time are so bad that it would be unreasonable to require him to send his children, should be presented by proper petition to the state board of education, or by an appeal from the decisions of school district in February, 1919, discontinuing the transportation of school children.—Id.

In prosecution of a father under Education Law, § 624, relating to compulsory education, for failure to send children to school, the fact that one child was under school age and that another had a crippled leg, did not relieve defendant as to other children, who were of school age, and with reference to whom no physical or mental defect was shown, though the charge was made in one information and one warrant for failure to send the four children to school.—Id.

SEALS.

See Contracts, §10.

SEAMEN.

§11 (N.Y.Sup.) In a seaman's action against his employing steamship company for negligent treatment of a broken arm received in the course of his duties, evidence held insufficient to take to the jury the question whether the company was liable for negligence because those in charge of the ship did not send him to a hospital at Barbadoes, or at one of the vessel's South American ports of call.—Leone v. Booth S. S. Co., 178 N. Y. S. 620.

Where the ship's doctor was competent, and

the appliances and facilities in the ship's hospital were sufficient for treatment of the injury to a seaman, the steamship company was not liable for failure to send him ashore at Barbadoes or South American ports of call to receive hospital treatment there, because the captain did not overrule the instructions within his own department of the ship's doctor.—Id.

SEARCHES AND SEIZURES.

See Intoxicating Liquors, ¶225, 245, 249.

SECRET FORMULÆ.

See Food, ¶5, 15.

SEDITION.

See Criminal Law, ¶250.

SELECTIVE SERVICE ACT.

See Landlord and Tenant, ¶331.

SENTENCE.

See Criminal Law, ¶1206, 1216.

SEPARATE PROPERTY.

See Husband and Wife, ¶138.

SEPARATION.

See Husband and Wife, ¶278-281.

SEQUESTRATION.

See Divorce, ¶277.

SET-OFF AND COUNTERCLAIM.

See Account Stated, ¶19; Appeal, ¶848; Arbitration and Award, ¶57; Courts, ¶189; Judgment, ¶883; Pleading, ¶383; Sales, ¶411; Trial, ¶25, 370; Trusts, ¶218.

I. NATURE AND GROUNDS OF REMEDY.

¶8(1) (N.Y.Sup.) The general rule is as regards set-offs that equity follows the law.—Edelman v. Schwartz, 178 N. Y. S. 587.

Something more than the mere existence of reciprocal and independent demands is required to authorize a set-off in equity, when not allowed under the statute.—Id.

II. SUBJECT-MATTER.

¶44(1) (N.Y.Sup.) At law a joint debt cannot be set off against a separate debt, nor a separate debt against a joint one.—Edelman v. Schwartz, 178 N. Y. S. 587.

SEWERS.

See Drains.

SHERIFFS AND CONSTABLES.

See Infants, ¶16; Mandamus, ¶172.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(A) Sheriffs.

¶2 (N.Y.) A sheriff, at the general election of 1920, can be elected in a county where the incumbent of the office died in 1916, and a successor was elected at a special election for a three-year term running from January 23, 1917, to January 23, 1920, and the former will take office on the 1st day of January, 1921, for a term of three years, thereby restoring the time for election of sheriff in the county to the general election day.—People ex rel. Bast v. Voorhis, 125 N. E. 86, 227 N. Y. 167.

Where, by the Constitution and statutes, the term of office of a sheriff elected at a special election to fill a vacancy by death, will not expire until after the 1st of January following the general election in 1919, and there is no provision for the election of a sheriff to succeed the present incumbent until the general election in the year in which his term expires, the election of a sheriff will occur within the third year after the year in which the term of the incumbent began, and at the earliest possible date for which provision is made after the incumbent's term, which is in the only way possible a compliance with the Constitution requiring that the office of sheriff be filled by election every three years.—Id.

¶2 (N.Y.Sup.) Public Officers Law, § 4, and County Law, § 180, substantially providing that the term of a sheriff elected at a general term shall commence on January 1st next after the election, prevent the election of a sheriff for Queens county at the general election of November 4, 1919, where term of a sheriff specially elected on January 23, 1917, to fill a vacancy did not expire until January 23, 1920, and a special election will be necessary at that time, and every three years thereafter.—People ex rel. Bast v. Voorhis, 178 N. Y. S. 645.

¶5 (N.Y.) Where the sheriff of Queens county died October 23, 1916, his vacancy could not be filled at the general election in that year, and a special election to fill the office was properly held on January 23, 1917, the date for which the Governor called it, and the term of office of the person elected commenced January 23d, and ran for three years, not expiring until January 23, 1920.—People ex rel. Bast v. Voorhis, 125 N. E. 86, 227 N. Y. 167.

Though Election Law, § 292, does not give the Governor authority to call a special election at the end of the three-year term, on January 23, 1920, of a sheriff elected to fill a vacancy by death, it contains ample authority for him to appoint a sheriff to continue in office until the beginning of the political year next following the general election of 1920.—Id.

The Governor has power to appoint a sheriff to take office until January 1, 1921, when a regularly elected sheriff will take office, following the expiration, on January 23, 1920, of the term of an incumbent elected January 23, 1917, at special election to fill a vacancy by

death, though Public Officers Law, § 30, enacted pursuant to Const. art. 10, § 8, does not include among the enumerated vacancies in office which the Governor may fill by appointment one arising from expiration of a fixed term.—Id.

Ⓔ5 (N.Y.Sup.) Under Const. art. 10, § 1, providing for election of sheriffs every three years, a sheriff elected at a special election to fill a vacancy holds for the term of three years.—People ex rel. Lempp v. Board of Elections, 178 N. Y. S. 516.

Ⓔ5 (N.Y.Sup.) The term of one elected sheriff of Queens county at a special election held on January 23, 1917, to fill a vacancy in the office caused by the death of a former incumbent, did not expire until January 23, 1920, so that there was no vacancy in such office which could be filled at the general election to be held on November 4, 1919.—People ex rel. Bast v. Voorhis, 178 N. Y. S. 645.

SHIPPING.

VII. CARRIAGE OF GOODS.

Ⓔ139(1) (N.Y.Sup.) Clause in bill of lading, limiting liability to \$100, is consistent with clause providing "that, in the event of claims for short delivery when the steamer reaches her destination, the price shall be the market price," and shipper in case of loss in transit can recover only \$100, despite provision of Harter Act, §§ 1, 2 (U. S. Comp. St. §§ 8029, 8030).—Kroll v. Oriental Nav. Corporation, 178 N. Y. S. 250.

SIGHT.

See Master and Servant, Ⓔ385.

SIGNATURES.

See Elections, Ⓔ144, 155.

SLANDER.

See Libel and Slander.

SNOW.

See Municipal Corporations, Ⓔ773, 821.

SOLDIERS.

See Elections, Ⓔ144.

SPECIFIC PERFORMANCE.

See Pleading, Ⓔ34.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

Ⓔ6 (N.Y.Sup.) A vendee in a contract of sale of land, entitled to a conveyance upon payment of a certain sum of money and execution of a mortgage and bond, was entitled to specific performance; the vendor having the right, in the event of his legal remedies becoming inadequate, to compel specific performance.—Schuyler v. Kirk Brown Realty Co., 178 N. Y. S. 568.

The true doctrine in regard to mutuality in specific performance is that a defendant should not be compelled to specifically perform his

promise, unless equity is able to give him, at the time of the decree or later, such performance on plaintiff's part as defendant bargained for.—Id.

Ⓔ17 (N.Y.Sup.) An assignee of a vendee in a contract of sale of land may compel specific performance thereof.—Schuyler v. Kirk Brown Realty Co., 178 N. Y. S. 568.

II. CONTRACTS ENFORCEABLE.

Ⓔ25 (N.Y.Sup.) Contract by trustees of village to purchase land outside the village for a dumping ground will not be specifically enforced; village having no power to make such contract, under Village Law, § 89, subd. 23.—Gibson v. Village of Massena, 178 N. Y. S. 850.

IV. PROCEEDINGS AND RELIEF.

Ⓔ130 (N.Y.Sup.) In an action by an assignee of a vendee under a contract of sale of land, whereby vendee was entitled to conveyance upon payment of certain money and execution of a bond and mortgage, the court, where the plaintiff offers in his pleading to join with his assignor in a mortgage and bond, may enforce such offer as a basis and condition for any relief given him, although such offer is more than that required by the contract.—Schuyler v. Kirk Brown Realty Co., 178 N. Y. S. 568.

STAIRWAYS.

See Landlord and Tenant, Ⓔ169.

STATES.

See Eminent Domain, Ⓔ169.

V. CLAIMS AGAINST STATE.

Ⓔ184 (N.Y.Ct.Cl.) Where claims were dismissed upon claimant's failure to be present at time for which they had been set for trial, because of misunderstanding or breach of understanding between claimant's counsel and member of Attorney General's staff, court will restore claims to calendar, if it has jurisdiction to hear claims on their merits.—Cooper-Snell Co. v. State, 178 N. Y. S. 272.

Where highway contractor filed claims against state in 1914, but has never filed notice of intention to file claim, as required by Code Civ. Proc. § 264, Court of Claims has no jurisdiction, notwithstanding Laws 1918, c. 603, conferring jurisdiction over claims of such contractor, if claim "shall be filed * * * within six months from the time this act takes effect," though such notice of intention shall not have been filed; such act applying to claims existing, but not filed, and not to claims already filed.—Id.

Facts and circumstances showing that date of accrual of claim was within six months of date of filing, so as to give Court of Claims jurisdiction under Laws 1919, c. 175, must be alleged, the mere allegation that claims were filed within six months from date of accrual being statement of a conclusion.—Id.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

VI. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

⚡181(1) (N.Y.Sup.) Where it was contended that a provision in a remedial statute had retroactive effect, the court must ascertain the legislative intent from the language used and the circumstances surrounding the enactment of the statute; but in so doing the court must not interpolate anything into the statute.—*People ex rel. Gabriel v. Warden of New York County Penitentiary, Wards Island*, 178 N. Y. S. 595.

⚡181(2) (N.Y.Sup.) A statute will not be construed, so as to render it meaningless and ineffective for any purpose.—*Niagara Gorge R. Co. v. Gaiser*, 178 N. Y. S. 156.

⚡188 (N.Y.) In construing statutes, the legislative intent is found in the legislative language which unqualifiedly commands.—*City of New York v. Whitridge*, 124 N. E. 788, 227 N. Y. 180.

⚡188 (N.Y.Sup.) Statutes must be construed according to language employed, and where no ambiguity exists and the language is apt and the construction plain, courts cannot correct supposed defects, or depart from the language used in deference to supposed intent.—*People ex rel. Franklin Mills Co. v. Collins*, 178 N. Y. S. 65.

⚡219 (N.Y.Sup.) The fact that "Durkee's Salad Dressing and Meat Sauce" has been in use for a great many years without complaint being made that it was misbranded, and that opinions of the Attorney Generals of the state uniformly have treated such product and similar products as falling within the proviso in Agricultural Law, § 201, as articles sold under their own distinctive names, is of great importance to the court in its interpretation of such statute, in an action wherein it is claimed that such salad dressing is misbranded.—*People v. Durkee*, 178 N. Y. S. 614.

(B) Particular Classes of Statutes.

⚡239 (N.Y.Sup.) A statute in derogation of the common law must be strictly construed.—*Nelson v. Nelson*, 178 N. Y. S. 80.

(D) Retroactive Operation.

⚡264 (N.Y.Sup.) While ordinarily a statute will not be construed so as to give it a retroactive operation, unless its language either expressly or by implication requires it to be so construed, the rule does not apply to remedial statutes, or those extending benefits, where vested or constitutional rights are not affected.—*People ex rel. Gabriel v. Warden of New York County Penitentiary, Wards Island*, 178 N. Y. S. 595.

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- 2193. Amended by Laws 1919, ch. 410—178 N. Y. S. 595.

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- § 12—178 N. Y. S. 682.
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- § 214—178 N. Y. S. 154.
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- § 4—178 N. Y. S. 645.
- § 30—125 N. E. 86, 227 N. Y. 167.

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- Ch. 48—178 N. Y. S. 491.
- § 28—178 N. Y. S. 670.
- § 53—178 N. Y. S. 156.
- § 66—178 N. Y. S. 93.
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- Ch. 49—178 N. Y. S. 491.
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- Ch. 60—178 N. Y. S. 65, 368, 525.
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- § 25—178 N. Y. S. 156.
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- § 89, subsec. 23—178 N. Y. S. 860.
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- Ch. 67—178 N. Y. S. 416, 418, 439, 449, 460, 494, 519, 589.
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- Greater New York, § 1017. Laws 1901, ch. 466—178 N. Y. S. 90.
- Greater New York, § 1102. Laws 1901, ch. 466—125 N. E. 97, 227 N. Y. 219.
- Greater New York, § 1472. Laws 1897, ch. 378—178 N. Y. S. 179.
- Greater New York, § 1473. Laws 1897, ch. 378. Amended by Laws 1914, ch. 475—178 N. Y. S. 179.
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- 1859, ch. 62, §§ 23, 24—178 N. Y. S. 451.
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- 1869, ch. 888 (§ 20 added by Laws 1871, ch. 303)—178 N. Y. S. 68.

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 1919, ch. 175—178 N. Y. S. 272.
 1919, ch. 307—178 N. Y. S. 156.
 1919, ch. 410—178 N. Y. S. 595.
 1919, ch. 626—178 N. Y. S. 679.

STEPCHILDREN.

See Wills, § 552.

STORES.

See Landlord and Tenant, § 167, 169.

STREET RAILROADS.

See Appeal, § 1048; Witnesses, § 275.

I. ESTABLISHMENT. CONSTRUCTION, AND MAINTENANCE.

§ 38 (N.Y.) A city after having removed a street pavement in order to make a sewer improvement may, under the provisions of Railroad Law, § 178, require a street railroad to restore the pavement between its tracks and for a space of two feet outside thereof.—City of New York v. Whitridge, 124 N. E. 788, 227 N. Y. 180.

II. REGULATION AND OPERATION.

§ 99(16) (N.Y.Sup.) A water wagon driver, who upon approaching an intersecting street turned to the left and crossed over to water the south side of street, on which he had been traveling, without passing beyond point of intersection, and was struck by a street car as he was turning, held not contributorily negligent, where he crossed over before he came to the traffic upon intersecting street; neither the general rule nor the ordinance requiring vehicles turning to left into another street to go to right of and beyond intersection being applicable.—Veeldorano v. Union Ry. Co. of New York City, 178 N. Y. S. 576.

§ 118(11) (N.Y.Sup.) In an action for injuries to a pedestrian, knocked down and rolled along by a street car, in which complainant made no charge of any willful or wanton act, but alleged negligence and gross negligence, it was error to charge that in any phase of the case plaintiff was entitled to recover, without showing freedom from contributory negligence.—Bryant v. New York Rys. Co., 178 N. Y. S. 819.

STRIKES.

See Injunction, § 101, 223; Master and Servant, § 338, 339; Sales, § 85.

SUBROGATION.

See Insurance, § 603.

SUPPLEMENTARY PROCEEDINGS.

See Execution, § 387—419.

SURETYSHIP.

See Principal and Surety.

SURROGATES' COURTS.

See Depositions, § 29; Discovery, § 30.

TAXATION.

See Adverse Possession, § 79; Drains, § 88; Judgment, § 747, 750; Quietting Title, § 12; Schools and School Districts, § 102, 106; Waters and Water Courses, § 203.

III. LIABILITY OF PERSONS AND PROPERTY.

(A) Private Persons and Property in General.

§ 58 (N.Y.Sur.) Taxing acts are construed strictly against the state, and if a tax law does

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not expressly include property, it cannot be taxed by implication.—In re Green's Estate, 178 N. Y. S. 353.

⚡103 (N.Y.) Readjustment of debt agreement of stockholders and voting trustees held not to contemplate double transfer of stock, so as to require a double transfer tax, although the legal title to the stock was passed from one set of voting trustees to another set by direction of adjustment managers, who had the right to have the legal title passed to them or to direct a transfer.—Hudson & M. R. Co. v. State, 125 N. E. 202, 227 N. Y. 233.

(B) Corporations and Corporate Stock and Property.

⚡124½ (N.Y.Sup.) Where railroad was being operated by receiver of owner, instead of receiver of lessee, receiver of owner, even prior to enactment of Laws 1917, c. 710, was required to pay as part of franchise tax under Tax Law, § 185, 1 per cent. on gross earnings reported under section 192, notwithstanding lease, since operation of railroad by such receiver was by virtue of franchise conferred upon owner by state.—People ex rel. Kalbach v. State Tax Commission, 178 N. Y. S. 486.

⚡160 (N.Y.Sup.) A corporation engaged in furnishing steel structures erected in place on realty in accordance with plans and specifications of engineers or architects is neither a "manufacturing" nor a "mercantile" corporation, within Tax Law, § 208, as amended by Laws 1917, c. 726, and its application to vacate an assessment of its capital under Tax Law, § 12, on ground that it is required to pay a tax of 3 per cent. on net income, and is exempt from any tax on its personality or capital, will be dismissed.—People ex rel. Post & McCord v. Cantor, 178 N. Y. S. 579.

⚡161 (N.Y.Sup.) A corporation engaged in furnishing steel structures erected in place on realty in accordance with plans and specifications of engineers or architects is neither a "manufacturing" nor a "mercantile" corporation, within Tax Law, § 208, as amended by Laws 1917, c. 726, and its application to vacate an assessment of its capital under Tax Law, § 12, on ground that it is required to pay a tax of 3 per cent. on net income, and is exempt from any tax on its personality or capital, will be dismissed.—People ex rel. Post & McCord v. Cantor, 178 N. Y. S. 579.

V. LEVY AND ASSESSMENT.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

⚡382 (N.Y.Sup.) In determining the "surplus profits or reserve funds" under Tax Law, § 12, relating to taxation of corporate stock, the assets of the corporation which are not taxable in the state shall not be included.—People ex rel. Federal Terra Cotta Co. v. Purdy, 178 N. Y. S. 316.

The intention of the Legislature by Tax Law, § 12, was to provide that the net assets not exempt of every company, including surplus exceeding 10 per cent. of the par value of the capital, should be assessed at its actual value, and that in determining whether there is a surplus all property exempt from taxation must first be eliminated, and then make the deductions men-

tioned in such section, thus leaving the net amount taxable, and in doing so it is to be remembered that there is a distinction between "exemptions" and "deductions"; property being "exempt" because the state cannot and does not tax it, and "deductions" being allowed to avoid double taxation, etc.—Id.

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

⚡734(5) (N.Y.Sup.) Though an exemption from taxation in favor of the property of a hospital is personal to the owner, yet title based on a tax deed for taxes levied while the property was in the possession of the hospital cannot be upheld, on the theory that after conveyance by the hospital the exemption was lost, and the grantee could not assert the invalidity of the previous tax levy.—Pines v. Traktman, 178 N. Y. S. 90.

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

⚡865 (N.Y.Sur.) Tax Law, § 221b, imposing a tax on the investments, defined in article 15, of 5 per cent. in addition to that imposed by section 221a, is expressly limited to the investments defined in such article.—In re Preston's Estate, 178 N. Y. S. 447.

⚡867(1) (N.Y.Sur.) The investment and reinvestment of a person's own money did not constitute "doing business," within Tax Law, § 220, subd. 2, imposing a tax on transfers of capital invested in business in the state by a nonresident doing business in the state.—In re Green's Estate, 178 N. Y. S. 353.

The "business" intended by Tax Law, § 220, subd. 2, is some common-law business carried on by a recognized trader, mechanic, shopkeeper, etc., or by some person other than an owner of an estate for its benefit.—Id.

The maintenance of an elaborate office organization for the investment and reinvestment of one's own money, and the collection of rents and dividends, does not constitute "doing business," within Tax Law, § 220, subd. 2.—Id.

A corporation organized to take over decedent's active investments was not her agent, and its transactions did not constitute the doing of business by her, within Tax Law, § 220, subd. 2, where the value of securities transferred to it was credited to her on its books, and the company debited with a corresponding amount, and interest or dividends thereon were distributed by it as dividends.—Id.

⚡867(1) (N.Y.Sur.) Property of nonresident decedent situated within New York is not taxable under Laws 1885, c. 483, imposing a collateral inheritance tax.—In re Tucker's Estate, 178 N. Y. S. 446.

⚡867(1) (N.Y.Sur.) A trust deed executed by a son of deceased was subject to a transfer tax, although son was a nonresident and was given possession of the securities prior to execution thereof, where deceased was to receive the income of the trust property for life, and had power of revocation; the son being only an intermediary.—In re Miller's Estate, 178 N. Y. S. 554.

§867(1) (N.Y.Sur.) Under Tax Law, § 220, subd. 2, as it existed prior to its amendment by Laws 1919, c. 626, imposing tax upon transfers of nonresident decedent's "tangible property within the state or of any intangible property, if evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in" certain classes of corporations, transfers of real estate within the state of nonresident decedent held subject to transfer tax; real estate being tangible property under section 243, and qualification, "if evidenced by," etc., applying solely to intangible property.—In re Matthiessen's Estate, 178 N. Y. S. 679.

§876(1) (N.Y.Sur.) A transfer of property to a city for the establishment of a hospital was not exempted from taxation by Tax Law, § 221, relating to charities, etc.; exemption under such statute being determined by the identity of the beneficiary, and not by the purpose of the transfer.—In re Miller's Estate, 178 N. Y. S. 554.

§879(1) (N.Y.Sur.) Where grantor in trust deed reserves right to revoke the deed and terminate the trust, the transfer is subject to the operation of the statute, which provides for taxation of transfers made in contemplation of death, or intended to take effect in possession or enjoyment at death.—In re Miller's Estate, 178 N. Y. S. 554.

§886½ (N.Y.Sur.) The provision of Tax Law, § 230, that when property is transferred and the rights and interest of the transferees are dependent upon contingencies or conditions defeating or abridging them, a tax shall be imposed upon the transfer at the highest rate possible on the happening of any of the contingencies or conditions, has reference to present contingencies or conditions, and not to remotely possible contingencies.—In re Upjohn's Estate, 178 N. Y. S. 686.

Where testator directed that the income of one-half of his residuary estate should be paid to his wife for life, and at her death to various named beneficiaries during the life of a certain grandnephew, and upon the death of the wife and grandnephew half of the residue to be given to certain institutions, which, under Tax Law, § 221, were exempt from the payment of a transfer tax, and in case of dissolution before the bequests became effective, or if any of the institutions should become legally incompetent to take, their bequests to go to others, the possibility that all of the charitable corporations would be unable to take at the time the bequest should become effective held too remote to become present contingencies or conditions, within section 230.—Id.

§895(6) (N.Y.Sur.) The transfer tax appraiser, in reporting the value of decedent's estate, should have deducted from value of assets as found a sum sufficient to liquidate claims for \$900,000 and for \$50,000, on both of which suit had been brought, and on the smaller of which judgment for the full amount had been recovered; if the recovery on the larger claim is less than the amount set apart by the executor to pay it, the state comptroller may move to fix the tax on the sum thus saved the estate, with interest.—In re Sielcken's Estate, 178 N. Y. S. 364.

§895(7) (N.Y.Sur.) Inheritance taxes paid to foreign states should be deducted from the legacies that are taxed in such state, and not from the gross estate as an expense of administration; and where the order fixing the tax does not specifically state the amount on each legacy, the tax should be deducted from the respective legacies in proportion to the amount transferred to each taxable legatee.—In re Guiteras' Estate, 178 N. Y. S. 559.

§897 (N.Y.Sur.) Under the Tax Law, § 221a, providing that remainders shall be taxed at the highest rate possible under any contingency, where decedent gave his widow a life estate in his residuary estate, and provided for division of the remainder among children, but authorized the trustees in their discretion to pay the widow any part of the principal, the trustees may pay over to the widow the entire residuary estate, and the remainder should be added to the value of her life estate to determine the rate of transfer tax.—In re Howland's Estate, 178 N. Y. S. 368.

§900(1) (N.Y.Sur.) On review of the order of the transfer tax appraiser in proceedings to fix transfer tax on the estate of a decedent, the surrogate is without power to construe her will and determine whether legacies are charged on the realty.—In re Rhodes' Estate, 178 N. Y. S. 782.

§900(2) (N. Y. Sur.) Where an erroneous transfer tax order has been imposed on the estate of a deceased person, the executor of the estate is not limited to his remedy by appeal to obtain relief, but may have the order modified on motion.—In re Preston's Estate, 178 N. Y. S. 447.

§900(3) (N.Y.Sur.) The Surrogate's Court, on motion by beneficiaries under a will to vacate for want of jurisdiction the court's prior void order, fixing the collateral inheritance tax on the property passing to them under the will, is not concerned with the fact that the beneficiaries cannot recover the money paid to the state pursuant to the void order.—In re Tucker's Estate, 178 N. Y. S. 446.

TELEGRAPHS AND TELEPHONES.

See Landlord and Tenant, §161.

TENANCY IN COMMON.

See Descent and Distribution, §12; Perpetuities, §8.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF CO-TENANTS.

§19(5) (N.Y.Sur.) One tenant in common cannot purchase an outstanding claim or title to the exclusion of his cotenant, and such purchase is presumed to be for the benefit of all; hence, where a tenant in common, for the purpose of cutting off the interest of an infant cotenant, allowed the premises to be sold on mortgage foreclosure, and bought the same in through a third person, such tenant in common will be compelled to hold the outstanding title for the benefit of the infant cotenant, who did not acquiesce, upon the infant's contribution of her share of all lawful expenditures.—Rider v. Phillips, 178 N. Y. S. 142.

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↪38(8) (N.Y.Sup.) In a suit by an infant tenant in common against her cotenant and one who purchased the common property on foreclosure of a mortgage, evidence held to show that the cotenant was the real owner of the property, and that he consented to foreclosure of the mortgage for the purpose of cutting off the infant tenant's interest, buying it in through a third person.—*Rider v. Phillips*, 178 N. Y. S. 142.

THEATERS AND SHOWS.

See Injunction, ↪77, 96, 101; Master and Servant, ↪339.

↪3 (N.Y.Sup.) Under Greater New York Charter, § 1472, and section 1473, as amended by Laws 1914, c. 475, the giving of an operatic performance in the city of New York is a privilege which can be exercised only by those who have procured license to do so from the commissioner of licenses; the power to revoke such licenses being placed by section 1476 in the courts of record of the city.—*Star Opera Co. v. Hyman*, 178 N. Y. S. 179.

TIME.

See Associations, ↪18; Bills and Notes, ↪489; Discovery, ↪58; Eminent Domain, ↪153; Jury, ↪25; Mandamus, ↪143; Sales, ↪285; Venue, ↪63.

TORTS.

See Corporations, ↪310; False Imprisonment, ↪13; Injunction, ↪96; Libel and Slander, ↪10-120; Municipal Corporations, ↪734-821; Negligence, ↪32-89; Trever and Conversion.

TRADE-MARKS AND TRADE-NAMES.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(A) What Constitutes Infringement.

↪57 (N.Y.Sup.) Though there are differences in names, etc., the similarity between plaintiff's earlier trade-mark and defendants' trade-mark is no less objectionable because its separate features, when examined in detail, are not found to be copies of corresponding features of plaintiff's trade-mark.—*Freyer Machinery Co. v. Hollander Machinery Co.*, 178 N. Y. S. 151.

It is not necessary, to constitute infringement, that every element of a trade-mark be appropriated, or that trade-mark be completely copied; the test being whether, taking into account the resemblances and differences, the former are so marked that the ordinary purchaser is likely to be deceived thereby.—*Id.*

It is no defense to a motion to enjoin use of any imitation of plaintiff's trade-mark and label, etc., that there is no proof that any one had been deceived by the similarity in the two trade-marks: liability to deception being sufficient ground for injunction.—*Id.*

↪58 (N.Y.Sup.) Where design of plaintiff's trade-mark on new and secondhand machinery was identical with defendants' trade-mark on secondhand machinery adopted over ten years later, and court is satisfied that the devices used are identical and that the character of

type, words used and arrangements of words are almost identical in both trade-marks, plaintiff is entitled to restrain defendants, its competitors, from using any imitation of its trade-mark and label.—*Freyer Machinery Co. v. Hollander Machinery Co.*, 178 N. Y. S. 151.

TRADE SECRETS.

See Injunction, ↪56, 136.

TRADE UNIONS.

See Injunction, ↪101, 228; Master and Servant, ↪389.

TRADING WITH THE ENEMY ACT.

See War, ↪12, 29.

TRAINING SCHOOLS.

See Infants, ↪16; Mandamus, ↪172.

TRANSFER TAX.

See Taxation, ↪867-900.

TREASON.

See Criminal Law, ↪250.

TRESPASS.

See Arrest, ↪63, 64; Carriers, ↪286; False Imprisonment, ↪13; Navigable Waters, ↪22, 26; Schools and School Districts, ↪106.

TRIAL

See Costs; Criminal Law, ↪741-829; Evidence, ↪590; Jury; New Trial; Venue.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

↪25(13) (N.Y.Sup.) Defendants' answer, admitting every allegation of the complaint, except the conclusion that a certain balance was due, raised no issue, and, having pleaded counterclaims, the denial of defendants' motion to be allowed the affirmative with the jury was error.—*Dukas v. Hennessy Realty Co.*, 178 N. Y. S. 420.

↪26 (N.Y.Sup.) In action for breach of warranty in failing to dye skins in accordance with contract, where plaintiffs abandoned an incorrect measure of damages, and undertook to prove the difference in the respective market values of the skins as they were and as they should have been, though the allowance of plaintiffs' amendment to conform with the proofs may have been proper, defendants should have been granted an adjournment to get an expert witness to meet the new theory of damages.—*Miller v. Windholtz*, 178 N. Y. S. 4.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

↪109 (N.Y.Sup.) The practice of disposing of cases on the mere opening of counsel is a very unsafe method of deciding controversies, where

there is anything to decide, and cannot be resorted to unless counsel stating the case to the jury deliberately and intentionally states or admits some fact that in any view of the case is fatal to the action.—*Graybill v. Smadbeck*, 178 N. Y. S. 413.

In an action for damages for false representations made in sale of land, where the complaint was oral, but the summons bore an indorsement, "Fraud in obtaining moneys upon false and fraudulent representations," and bill of particulars detailed defendant's false representations, *held*, that it was erroneous to nonsuit plaintiff on the opening of her counsel.—*Id.*

VI. TAKING CASE OR QUESTION FROM JURY.

(C) Dismissal or Nonsuit.

⚡159 (N.Y.Supp.) Plaintiff's failure to prove a contract alleged as the basis of his cause of action should have entailed dismissal of his complaint on defendant's motion at the close of his case.—*Ansin v. Kaufmann*, 178 N. Y. S. 702.

VII. INSTRUCTIONS TO JURY.

(D) Applicability to Pleadings and Evidence.

⚡251(2) (N.Y.Supp.) In action for damages for libel, court erred in submitting to the jury the question of privilege, where it had not been pleaded or raised on the trial in a proper way.—*Clark v. Variety*, 178 N. Y. S. 698.

⚡253(3) (N.Y.Supp.) In action for false imprisonment and malicious prosecution against defendant, owner of public bathing establishment on seashore, who had caused plaintiff's arrest for trespassing upon and erecting tent on land in front of defendant's bathhouse, instruction that plaintiff had a right to erect and maintain tent against defendant's protest, which instruction lost sight of defendant's paramount right, as riparian owner, of access to and from sea *held* erroneous.—*Johnson v. May*, 178 N. Y. S. 742.

VIII. CUSTODY, CONDUCT AND DE-LIBERATIONS OF JURY.

⚡305 (N.Y.Supp.) An officer of the Surrogate's Court should not have gone into the jury room to pay their fees to a jury deliberating on the issue of undue influence in a will case; it being important that none should have access to the jury for any purpose, save as directly ordered by the court.—*In re Woods*, 178 N. Y. S. 573.

⚡315 (N.Y.Supp.) In action for conversion, where evidence, as to quantity and value was uncontradicted and, plaintiff was entitled to a verdict for the entire amount of such value or nothing, verdict for a smaller sum indicated a mistake or compromise and cannot be sustained.—*Deitelbaum v. Harrison & Meyer*, 178 N. Y. S. 388.

IX. VERDICT.

(A) General Verdict.

⚡337 (N.Y.Supp.) In action against sewer contractor for death of boy, who fell off cofferdam, where court instructed jury that contrac-

tor was not liable if the boy had a right to be on cofferdam, since in such case contractor could not have kept him off, and further charged that contractor was not liable if boy had no right on cofferdam, since in such case he would have been a trespasser, verdict for plaintiffs was contrary to law of case as charged by court; such instructions being tantamount to direction to find for contractor.—*Shalata v. Rodgers*, 178 N. Y. S. 494.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

⚡370(3) (N.Y.Supp.) The court, in granting defendant's motion to frame issues raised by counterclaim and reply, went too far in providing for the trial of issues that were not raised by the reply to the counterclaim, but by the denials of the defendant of the allegations of the complaint.—*Lord Electric Co. v. Oak Realty Co.*, 178 N. Y. S. 709.

TROVER AND CONVERSION.

See Arrest, ⚡13, 35; Brokers, ⚡35, 38; Discovery, ⚡47; Trial, ⚡315.

II. ACTIONS.

(A) Right of Action and Defenses.

⚡15 (N.Y.Supp.) Plaintiff's right to recover for a conversion of property depends on title being in him, and is not aided by casting doubt on its ownership by others.—*Salisbury v. Segal*, 178 N. Y. S. 599.

(C) Evidence.

⚡40(1) (N.Y.Supp.) In action against cement contractor for conversion of tarpaper, evidence *held* insufficient to sustain verdict for plaintiff.—*Deitelbaum v. Harrison & Meyer*, 178 N. Y. S. 388.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Assignments for Benefit of Creditors, ⚡197; Courts, ⚡201, 480; Parent and Child, ⚡3; Perpetuities, ⚡4, 6; Taxation, ⚡867, 879; Wills, ⚡506, 524, 533, 552, 557, 634, 680, 684, 732, 853, 866.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

⚡21(2) (N.Y.Sur.) Unaided by Personal Property Law, § 12, as to charitable trusts, a trust to divide \$500 income among testator's poor relations selected by the executors and trustees, is void, because the beneficiaries are too indefinite and uncertain.—*In re Moller's Estate*, 178 N. Y. S. 682.

II. CONSTRUCTION AND OPERATION.

(A) In General.

⚡112 (N.Y.Supp.) Trust deed will be construed according to intention of donor.—*Street v. Post*, 178 N. Y. S. 531.

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(B) Estate or Interest of Trustee and of Centul Que Trust.

⚡140(1) (N.Y.Sup.) Where trust deed for benefit of wife, provided for termination of trust and delivery of capital of trust fund to husband, or, if deceased, his personal representative or person entitled thereto under will, the trust funds, on wife's death, after husband had died intestate, reverted to husband's estate.—Street v. Post, 178 N. Y. S. 531.

III. APPOINTMENT; QUALIFICATION, AND TENURE OF TRUSTEE.

⚡159 (N.Y.Sur.) In view of Code Civ. Proc. former section 2820 and present section 2641, section 2564, making nonresident aliens incompetent to act as testamentary trustees, is inapplicable to testamentary trustees appointed under the will of a nonresident probated within the county.—In re Yuill's Estate, 178 N. Y. S. 871.

⚡161 (N.Y.Sur.) Code Civ. Proc. §§ 2472-2771, requiring testamentary trustees to give bonds and file oaths of office, etc., is inapplicable to trustees appointed under the wills of nonresidents.—In re Yuill's Estate, 178 N. Y. S. 871.

⚡166(1) (N.Y.Sup.) Where will fixed compensation of testamentary trustee, and forbade further compensation, his receipt of large amount as a commission and as a secret profit on sale of stock of trust estate, and his retention thereof for eight years, and until a motion to remove him as trustee, and his refusal then to pay interest thereon, was a dereliction of duty, and his repayment of amount to estate then did not so palliate original wrong as to justify the court in either approving or overlooking it.—Gould v. Gould, 178 N. Y. S. 37.

⚡166(2) (N.Y.Sup.) Where whole scheme of will showed testator's express insistence that estate should be divided into six separate trusts, and codicil repeated direction that such shares, accounts, and transactions pertaining thereto should be kept entirely separate and never mingled, absolute and continued refusal of one of the testamentary trustees, who practically controlled entire estate, to carry out such direction, is legal ground for his removal.—Gould v. Gould, 178 N. Y. S. 37.

In action by executors and testamentary trustees for an accounting and court's approval of their acts, in which all necessary parties are served with summons and complaint, and had notice of a motion to remove a trustee and appeared thereon, court had jurisdiction to entertain motion, and should grant it, where it satisfactorily appears that such trustee had continuously mingled trust funds with his own, and used them as his own property, contrary to direction of will, and was entirely ignorant of, or defiant of, principles governing administration of trust funds.—Id.

⚡167 (N.Y.Sup.) In action by executors and testamentary trustees for an accounting and court's approval of their acts, in which all necessary parties are served with summons and complaint, and had notice of a motion to remove a trustee and appeared thereon, court had jurisdiction to entertain motion.—Gould v. Gould, 178 N. Y. S. 37.

In action by executors and trustees under a will against all parties interested in estate for an accounting and court's approval of their acts, with motion by certain interested parties for removal of a trustee, where two defendants, remaindermen and daughters of such trustee, though legally served with process, did not appear, one being out of the jurisdiction and the other appearing only specially, it was not necessary to serve them with a notice of a motion in the action to remove their father as trustee.—Id.

Executors and testamentary trustees, whose executorial duties had been completely performed before their action in the Supreme Court for an accounting and court's approval of their acts, making all interested parties defendants, could not complain that papers therein, moving for removal of one of such trustees, showed that he had not ceased to act as executor, and that Supreme Court had no jurisdiction to revoke letters testamentary, as there was no necessity for a decree separating his duties as executor and as trustee, and as Supreme Court has jurisdiction concurrent with that of the Surrogate's Court.—Id.

Real Property Law, § 112, and Code Civ. Proc. § 768, relating to removal of trustees, etc., are permissive, and not exclusive, and nothing therein prohibits the removal of a testamentary trustee on motion in his action for an accounting, etc., as power of court to act comes from Constitution, specifically granting "general jurisdiction in law and equity."—Id.

⚡169(1) (N.Y.Sup.) In trustee's action to pass his accounts and to be permitted to retire from the trusteeship, the appointment of an individual as substituted trustee, instead of the trust company which some of the defendant beneficiaries requested court to appoint in their admissions of service, was not an abuse of discretion, where beneficiaries did not appear, and did not present affidavit stating reasons for propriety of appointment of trust company, since, if important, attitude of all defendants should have been made matter of record.—Powers v. Powers, 178 N. Y. S. 297.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

⚡217(4) (N.Y.Sup.) Where a will creating a trust after authorizing the trustee to sell and invest the proceeds of securities as it shall in the exercise of a sound discretion deem for the best interest of the estate, expressly declared that the trustee should not be limited to the usual investments of trust estates, the trustee was authorized to invest in good railroad stocks a portion of the corpus of the trust which it received in money.—In re United States Trust Co. of New York, 178 N. Y. S. 125.

⚡218(1) (N.Y.Sup.) A testamentary trustee, which invested funds in one of the best railroad stocks, held not liable for depreciation, though it retained the stock for a considerable time in face of a declining market, and then disposed of it at much less than the price paid.—In re United States Trust Co. of New York, 178 N. Y. S. 125.

Where a trustee invested trust money in railroad stock, held that, when the stock depreciated and the investment resulted in loss, the trustee

tee, in event of liability, was entitled to offset against such loss sums which it received for the sale of subscription rights appurtenant to the stock.—*Id.*

⚡218(1) (N.Y.Sup.) Where securities, when they came to a trustee, were of doubtful and uncertain value, he owed only the duty of exercising a reasonable judgment and good faith in administration and collection of the same.—*In re Sherman*, 178 N. Y. S. 164.

Where securities received by trustee were of doubtful value, proof of their value at some time during the administration of the trust must be given, when it is sought to charge the trustee with a loss claimed to have resulted from his bad faith or mismanagement of the estate.—*Id.*

⚡231(1) (N.Y.Sup.) A testamentary trustee must act, not only for the benefit of the trust estate, but also in such a way as not to gain any advantage, directly or indirectly, except such as the law specifically gives him, and owes an undivided duty to the beneficiary, and must never place himself in a position wherein his personal interest will conflict with the interest of the beneficiary.—*Gould v. Gould*, 178 N. Y. S. 37.

⚡237 (N.Y.Sup.) That adult remainder beneficiaries, after death of that beneficiary who was to receive the income from a trust for life, executed to and with the trustee an instrument assigning to it their interest in the trust fund upon a new and further trust specified, etc., held not a release of the trustee's liability for making an improper investment of trust funds; it appearing that the trustee's report at the time of the assignment concealed the loss resulting from the investment.—*In re United States Trust Co. of New York*, 178 N. Y. S. 125.

V. EXECUTION OF TRUST BY TRUSTEE OR BY COURT.

⚡272(3) (N.Y.Sup.) Where trustee, holding corporate stock, received stock dividend, and as holder of stock so received purchased treasury stock under the subscription right given stockholders, life beneficiary, under holding of court that stock dividend was income, was entitled, in addition to the stock received as dividend, to treasury stock purchased by trustee as holder of dividend stock, upon payment to trustee of amount trustee paid therefor.—*In re Baldwin*, 178 N. Y. S. 108.

⚡283(1) (N.Y.Sup.) Where a savings bank deposit was an account in absolute trust for plaintiff for the balance on hand at depositor's death, the defendant, depositor's brother, and executor of depositor's last will, had no claim to or against said account, and an agreement by and between plaintiff and defendant, individually and as executor, to divide equally such balance, defendant having had the savings bank book in his possession for some time, and plaintiff not having been notified of its discovery, was not just, fair, and equitable, and amounted to a fraud, and should be set aside.—*Cherrie v. Reynolds*, 178 N. Y. S. 339.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

⚡305 (N.Y.Sup.) In action by surviving trustees for an accounting and instructions as to who are distributees of funds created by two trust deeds, wherein a defendant, as trustee

under will of one who had a power of appointment conferred by such deeds, served an answer under Code Civ. Proc. § 521, asking affirmative relief against all other defendants, and where all parties interested in trust deeds and will were before court, ultimate rights of those defendants interested among themselves in estate may be determined.—*Maynard v. Maynard*, 178 N. Y. S. 329.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(C) Actions.

⚡362 (N.Y.Sur.) Where cestui que trust, after his removal as executor, has filed objections to account of surviving trustee, which account states that cestui que trust, while acting as executor, misapplied certain funds of the estate of deceased, held, cestui que trust's application to compel surviving trustee to pay him certain income from the trust fund will be denied, with leave to renew, if issues raised by objections are not brought on for hearing.—*In re Brown's Estate*, 178 N. Y. S. 831.

⚡366(2) (N.Y.) Where the will gave to the widow the use of a legacy for life, with a right to use the principal, with remainder over, and the legacy was paid to her by the executors, she became the trustee for the benefit of the remaindermen and executors had no right to sue to recover possession of securities representing part of the legacy, transferred by the widow to a third person, whatever right of action there was accruing to the remaindermen.—*Peck v. Smith*, 125 N. E. 91, 227 N. Y. 223.

TUBERCULOSIS.

See Animals, ⚡35.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names, ⚡57-58.

UNITED STATES RAILROAD ADMINISTRATION.

See Railroads, ⚡5½.

USURY.

See Courts, ⚡201.

VENDOR AND PURCHASER.

See Brokers, ⚡86; Covenants, ⚡100; Drains, ⚡88; Judgment, ⚡747; Municipal Corporations, ⚡221; Pleading, ⚡34; Sales; Specific Performance, ⚡6, 17, 25, 130; Tenancy in Common, ⚡19; Trial, ⚡109.

VENUE.

See Drains, ⚡82.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

⚡57 (N.Y.Sup.) Under Code Civ. Proc. § 987, where action is brought in wrong county, the court has power to change the place

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of trial, although no demand has been made.—*Goldfeder v. Greenberg*, 178 N. Y. S. 581, 582. ⚡63 (N.Y.Sup.) Where personal injury action was brought in Westchester county, by plaintiff residing in Bronx county, against defendant residing in Kings county, and defendant served notice under Code Civ. Proc. § 986, demanding that place of trial be changed to Kings county, but neglected to follow this up by serving notice of motion to change the place of trial, but subsequently did serve such notice of motion, it was error to deny the motion on the ground that it was not made in time; the statute being directory merely, and the action being brought in the wrong county under section 984.—*Goldfeder v. Greenberg*, 178 N. Y. S. 581, 582.

VERDICT.

See Trial, ⚡337.

VERMIN.

See Landlord and Tenant, ⚡125, 171.

VETERINARY.

See Animals, ⚡35.

WAR.

See Criminal Law, ⚡250; Injunction, ⚡77; Sales, ⚡89, 172, 218.

⚡12 (N.Y.Sup.) All alien enemy property in the United States during the war, including choses in action as well as tangible property, is subject to seizure and confiscation when so directed by Congress, as in the Trading with the Enemy Act (U. S. Comp. St. 1918, §§ 3115½a-3115½j).—*Streb v. Chatham & Phoenix Nat. Bank of the City of New York*, 178 N. Y. S. 300.

The Alien Property Custodian, acting under the Trading with the Enemy Act (U. S. Comp. St. 1918, §§ 3115½a-3115½j), in adjudging that a corporation's property belonged to alien enemies and demanding possession, and serving a copy of demand on defendant bank, holding a deposit made by individual plaintiff in name of corporation, which refused compliance therewith, was a part of prosecution, and where plaintiff sued to recover deposit pending a libel in the federal court by Alien Property Custodian to determine ownership of the fund in suit, defendant's motion under Banking Law, § 113, to interplead Alien Property Custodian would be denied, with leave to serve answer after determination of pending libel.—*Id.* ⚡29 (N.Y.Sup.) All alien enemy property in the United States during the war, including choses in action as well as tangible property, is subject to seizure and confiscation when so directed by Congress, as in the Trading with the Enemy Act (U. S. Comp. St. 1918, §§ 3115½a-3115½j).—*Streb v. Chatham & Phoenix Nat. Bank of the City of New York*, 178 N. Y. S. 309.

WARDEN.

See Prisons, ⚡11.

WAREHOUSEMEN.

See Sales, ⚡162.

WATERS AND WATER COURSES.

See Canals; Drains; Evidence, ⚡23; Navigable Waters.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

⚡203(1) (N.Y.Sup.) A rate or charge for supplying water, not based on the amount consumed, but determined with reference to the dimensions, value, exposure, use, etc., of a building, is a tax; but, where the charge depends upon the amount used, the transaction is a voluntary purchase.—*Pines v. Traktman*, 178 N. Y. S. 90. ⚡203(14) (N.Y.Sup.) Where unpaid water charges for which premises were liable amounted to less than \$16, foreclosure should not be decreed; but the city of New York, in which the premises were located, should proceed in the manner indicated by Greater New York Charter, § 1017, under which the lien of the water charges will continue as a valid lien, etc.—*Pines v. Traktman*, 178 N. Y. S. 90.

WATER WAGONS.

See Street Railroads, ⚡99.

WEARING APPAREL.

See Wills, ⚡565.

WILLS.

See Conversion, ⚡3; Descent and Distribution; Executors and Administrators; Husband and Wife, ⚡14; Mortgages, ⚡11; Perpetuities, ⚡4, 6; Taxation, ⚡867, 886½, 895, 897, 900; Trial, ⚡305; Trusts, ⚡21, 166, 167, 217, 231.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

⚡2 (N.Y.Sur.) Where a testator, domiciled in Australia, left personal property in this country, the ultimate disposition of that property is governed by the law of Australia.—*In re Yuill's Estate*, 178 N. Y. S. 871.

IV. REQUISITES AND VALIDITY.

(F) Mistake, Undue Influence, and Fraud.

⚡166(1) (N.Y.Sup.) Evidence held not to justify finding that testatrix's will was executed under undue influence of a sister-in-law, nephews, and a niece, resident in the same city, whom she preferred to the exclusion of other nonresident nephews.—*In re Woods*, 178 N. Y. S. 573.

(G) Revocation and Revival.

⚡175 (N.Y.Sur.) Where testatrix had executed duplicate wills, and it appeared that one of the duplicates had been in decedent's possession, but could not be found, upon the offer of the other for probate it will be presumed that the will had been destroyed by testatrix animo revocandi.—*In re Field's Will*, 178 N. Y. S. 778.

V. PROBATE, ESTABLISHMENT, AND ANNULLMENT.

(A) Probate and Revocation in General.

⚡207 (N.Y.Sur.) Where testatrix has executed duplicate wills, one of such duplicates cannot be probated, unless the other is produced or its absence satisfactorily explained.—In re Field's Will, 178 N. Y. S. 778.

(B) Jurisdiction, Limitations, and Laches.

⚡261 (N.Y.Sur.) An unexplained failure of one who signed a waiver of citation to make application to vacate decree admitting will to probate until one year after date of decree, not only creates a presumption that he was not deceived when he signed the waiver, but shows laches necessitating denial of application.—In re Romano's Estate, 178 N. Y. S. 685.

(G) Petitions, Objections, and Pleadings.

⚡277 (N.Y.Sur.) Objections to probate of a will, which controvert none of the allegations of the petition, and which are insufficient to defeat probate, even if taken to be true, do not comply with Code Civ. Proc. § 2519, and should be stricken out.—In re Diehl's Estate, 178 N. Y. S. 684.

Objections to the probate of a will are to be treated according to the rules governing other pleadings.—Id.

(L) Fees and Costs.

⚡405 (N.Y.Sur.) Where the executor who was a party to the fraudulent execution of a will, presented it for probate, it was an abuse of discretion, under Code Civ. Proc. § 2746, for the surrogate to impose the costs upon the estate, though probate was denied.—In re Marshall's Will, 178 N. Y. S. 711.

VI. CONSTRUCTION.

(A) General Rules.

⚡439 (N.Y.Sur.) It is a primary canon in the construction of wills that, if the provisions are subject to construction, the manifest intent of testator, and not any rule of construction, governs when they come in conflict.—In re Hillis, 178 N. Y. S. 348.

⚡439 (N.Y.Sur.) In construing a will, intention of testator, as expressed in will, governs.—In re Davis' Estate, 178 N. Y. S. 550.

⚡440 (N.Y.Sur.) In construing a will, guesses at testator's intent will not be indulged, but the intention must be clear from the words of the will.—In re Hillis, 178 N. Y. S. 348.

⚡440 (N.Y.Sur.) All rules of construction of wills are subordinate to the primary canon of construction that the intent, to be collected from the whole will, must prevail.—In re Reynolds' Will, 178 N. Y. S. 821.

⚡441 (N.Y.Sur.) The plain and unambiguous words of the will must prevail over a doubtful construction, based on the situation or circumstances of the testator or of the estate.—In re Davis' Estate, 178 N. Y. S. 550.

⚡449 (N.Y.Sur.) There is a presumption of law that testator did not intend to die intestate as to any portion of his property, and that con-

struction which will prevent total or partial intestacy is to be preferred.—In re Hillis, 178 N. Y. S. 348.

⚡449 (N.Y.Sur.) The court, in construing a will, will favor a construction that will avoid intestacy, but in so doing will not go to the extent of refusing to give effect to the testator's plain language, and of adding a substantial clause to the will.—In re Davis' Estate, 178 N. Y. S. 550.

⚡449 (N.Y.Sur.) It is a presumption in the construction of wills that a testator did not intend to die intestate as to any portion of his property, and that construction is to be preferred which will prevent total or partial intestacy.—In re Reynolds' Will, 178 N. Y. S. 821.

⚡450 (N.Y.Sur.) The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.—In re Hillis, 178 N. Y. S. 348.

⚡487(1) (N.Y.Sur.) Extrinsic evidence is not admissible to show testator's intention, where there is no patent ambiguity, where terms used by testator are technical, and where evidence offered cannot explain, and can only contradict, testator's meaning.—In re Phraner, 178 N. Y. S. 768.

(B) Designation of Devisees, and Legatees and Their Respective Shares.

⚡495 (N.Y.Sur.) The words "his heirs and assigns," when used in wills, are merely words of limitation, used to describe the nature of the estate given to the beneficiary, and not to express an intention that a lapse should be avoided by the substitution of the heirs in place of the predeceased devisee or legatee.—In re Reynolds' Will, 178 N. Y. S. 821.

⚡498 (N.Y.Sur.) The rule that the word "issue" will be construed to mean descendants generally yields to an intent manifested in some part of the will to limit the meaning to children only.—In re Durant's Estate, 178 N. Y. S. 111.

⚡506(2) (N.Y.Sur.) Where will created a trust, with remainder over to testator's son's "heirs at law," son's stepbrother was entitled to participate in remainder under Decedent Estate Law, §§ 90, 98, though not of the blood of testator, and though share bequeathed was personality; the stepbrother being both heir at law and next of kin of the son, and the terms "heirs at law" and "next of kin" often being used interchangeably.—In re Phraner, 178 N. Y. S. 768.

⚡524(0) (N.Y.Sur.) On a bequest to trustees, in trust to collect and pay over the income of a fund to a life tenant, and after the death of a life tenant to pay over and distribute the fund, the remainder will not vest in the beneficiaries until the time for payment arrives, and the class of beneficiaries is fixed as of the date of the life tenant's death, and not as of testator's death.—U. S. Trust Co. of New York v. Taylor, 178 N. Y. S. 802.

⚡533 (N.Y.Sur.) In view of other clauses of will, testator's intention in providing that a fifth of the residuary estate should be held in trust for a daughter for life, and on her death leaving "issue" to pay over to such issue the principal for equal division, held to have been to limit the distribution of the remainder to chil-

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dren of the life beneficiary and the issue of any of them dead on distribution, such issue to take parent's share.—In *re Durant's Estate*, 178 N. Y. S. 111.

(C) **Survivorship, Representation, and Substitution.**

⚡552(1) (N.Y.Sur.) Decedent Estate Law, § 29, has no application, so as to prevent the lapse of a devise to a stepson who predeceased the testator; such stepson leaving issue.—In *re Reynolds' Will*, 178 N. Y. S. 821.

⚡552(5) (N.Y.Sur.) Under a will directing the income from a trust fund to be paid to testator's sister during her life, and on her death the capital to be distributed among his "next heirs" by blood according to the statute of distribution, *held*, on the death of life tenant after testator, that the "next heirs" took as members of a class, no vested remainder to testator's next of kin being intended, so that his nephews and nieces did not take by representation from their ancestors, but in their own rights, and his grandnephews, and grandnieces took the share of their immediate ancestor.—*U. S. Trust Co. of New York v. Taylor*, 178 N. Y. S. 802.

⚡554 (N.Y.Sur.) Gifts are said to be substitutional, when provision is made for some one to take the gift in the event of the death of the original beneficiary before the death of the testator.—In *re Reynolds' Will*, 178 N. Y. S. 821.

⚡555(1) (N.Y.Sur.) A will, "I give, devise and bequeath to my stepson, G., an equal," etc., "and to his heirs and assigns forever," *held* not to intend to substitute a child of the stepson, where the stepson predeceased the testator.—In *re Reynolds' Will*, 178 N. Y. S. 821.

(D) **Description of Property.**

⚡565(1) (N.Y.Sur.) Bequest of testatrix's "wearing apparel" *held* to include watch and chain, but not earrings, finger rings, breast pin, or bracelet.—In *re Holden*, 178 N. Y. S. 548.

⚡565(4) (N.Y.Sur.) A bequest of "the unsold publications and copyrights" of testatrix's deceased husband *held* not to include proceeds of sales made by testatrix under contracts providing for payment from time to time, but passing title at once.—In *re Holden*, 178 N. Y. S. 548.

⚡587(4) (N.Y.Sur.) Under a will giving testatrix's furniture and personal chattels to her two sons, H. and F., equally, and \$10,000 to her other son, J., and directing that the residue of her estate be divided into three equal portions, and giving one portion to H., one to F., and one in trust for J., *held*, that one-third of the residue, as of date of testatrix's death, and also one-third of the total income of the residuary estate, should be set apart for the trust created for J., and that all income accrued on the remaining two-thirds of the residuary, together with interest within one year from the granting of letters testamentary upon the \$10,000 legacy, should be further divided into three parts, and one of them paid to the trustee.—In *re Brookfield's Estate*, 178 N. Y. S. 681.

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(E) **Nature of Estates and Interests Created.**

⚡610(1) (N.Y.Sur.) A will reading, "I also give and bequeath to my wife * * * my life insurance policy, and the balance of my whole estate and the use of all of my household goods during her lifetime," *held* to give the widow the life insurance policy and the balance of the estate remaining after payment of preceding legacies, and then to give her the use of the household goods for life, and not merely to give her a life estate in all three items.—In *re Hillis*, 178 N. Y. S. 348.

⚡627(5) (N.Y.Sur.) Joint will of husband and wife, providing that survivor should enjoy realty for life and after death of survivor "it is to be equally divided amongst our surviving children," did not convert an estate by the entirety into an estate in the survivor of them for life, with remainder to surviving children.—*D'Elisa v. Ritondo*, 178 N. Y. S. 838.

(F) **Vested or Contingent Estates and Interests.**

⚡629 (N.Y.Sur.) Construction of will which favors vested future estates will be preferred.—In *re Phraner*, 178 N. Y. S. 768.

⚡634(10) (N.Y.Sur.) Will creating trust for benefit of testator's wife and son, and directing that "from and after the death of both my wife and my said son I give * * * the said share to the heirs at law of my said son," *held* to vest future estate in son's heirs at time of son's death, on son predeceasing wife, and not to postpone vesting until wife's death.—In *re Phraner*, 178 N. Y. S. 768.

⚡634(13) (N.Y.Sur.) Under a will directing the income from a trust fund to be paid to testator's sister during her life, and on her death the capital to be distributed among his "next heirs" by blood according to the statute of distribution, *held*, on the death of life tenant after testator, that the "next heirs" took as members of a class, no vested remainder to testator's next of kin being intended, so that his nephews and nieces did not take by representation from their ancestors, but in their own rights, and his grandnephews and grandnieces took the share of their immediate ancestor.—*U. S. Trust Co. of New York v. Taylor*, 178 N. Y. S. 802.

⚡634(15) (N.Y.Sur.) On a bequest to trustees, in trust to collect and pay over the income of a fund to a life tenant, and after the death of a life tenant to pay over and distribute the fund, the remainder will not vest in the beneficiaries until the time for payment arrives, and the class of beneficiaries is fixed as of the date of the life tenant's death, and not as of testator's death.—*U. S. Trust Co. of New York v. Taylor*, 178 N. Y. S. 802.

(H) **Estates in Trust and Powers.**

⚡680 (N.Y.Sur.) Where a clause provided that it was testator's intention to provide for a trust fund in one of the two distinct ways set forth, but one way could be adopted, and resort in part could not be had to both ways.—In *re Davis' Estate*, 178 N. Y. S. 550.

⚡684(7) (N.Y.Sur.) Where will provided for trust fund, with directions to pay income to wife, with proviso that, if estate was not suf-

ficient to pay all bequests, trustee should pay over income from certain portion of such fund to stepdaughter "during her life," and where estate was not sufficient for payment of all bequests, making inoperative provision for stepdaughter, made conditional upon estate being sufficient, gift to stepdaughter was a present gift, taking effect upon testator's death, and not upon wife's death.—In re Davis' Estate, 178 N. Y. S. 550.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

⇒732(1) (N.Y.Sur.) Where a bequest explicitly provided for its payment from testator's "private estate," or, if insufficient, from principal of any trust funds of which he had power of disposition or appointment by will, the term "private estate" indicated an intention that, so far as it was sufficient, the legacy was to be paid out of property of which testator died seized and possessed in his own right, and that any deficiency was to be paid out of such trust funds.—Maynard v. Maynard, 178 N. Y. S. 329.

Where it is clear that will of one dying without issue, providing for legacies in excess of his individual estate, intended that provisions of will should be made effective, not only by use of such estate, but also by use of trust funds of which he had power of appointment, his intention may be accomplished by marshaling of funds created under the trust deeds and from his individual estate, without injustice to his beneficiaries, though he intended to create a trust fund under the will exclusively from funds set apart under trust deeds, which in terms illegally suspended alienation.—Id.

⇒732(2) (N.Y.Sur.) Legacies to testatrix's niece and others, made by a particular clause of the will, held chargeable on the entire estate; testatrix having possessed personality only to the totally inadequate amount of \$366 when she executed the will, making large bequests therein.—In re Herborn, 178 N. Y. S. 582.

⇒732(2) (N.Y.Sur.) Whether legacies are impliedly charged on testatrix's realty is always a question of intent.—In re Rhodes' Estate, 178 N. Y. S. 782.

⇒733(1) (N.Y.Sur.) No testamentary gift or devise can vest in the beneficiary until the death of the testator.—In re Reynolds' Will, 178 N. Y. S. 821.

⇒733(10) (N.Y.Co.Ct.) Until the payment of debts and other legacies and charges, the residuary estate does not vest in the residuary devisee.—Buck v. Kelly, 178 N. Y. S. 676.

Where defendant accepted a bill of exchange payable to M., and there was evidence that he owned bill at his death, and by will he gave his residuary estate to his wife, who was named as executrix, and there was no evidence of value of estate, of amount of debts, that debts and specific legacies had been paid, or of any administration, she was not owner of bill at time of her alleged assignment thereof to plaintiff, but it was a part of estate, which she could dispose of only as executrix.—Id.

(B) Abatement.

⇒807 (N.Y.Sur.) Where testatrix in the eighth clause of her will gave her husband \$18,000, in the ninth clause gave her grandniece \$1,000, in the tenth clause gave \$300 to her executors for care of her grave, and in the twelfth clause, on death of her husband, directed division of the "remainder" of her estate, \$5,000 to her niece and legacies of from \$1,000 to \$500 each, aggregating \$12,500, to eleven different persons, there can be no abatement common to both classes of legacies; those in the eighth, ninth, and tenth clauses being a charge on the estate, and those in the twelfth clause a charge only on the "remainder" or "residue," meaning what is left after some subtraction or separation.—In re Herborn, 178 N. Y. S. 582.

⇒811 (N.Y.Sur.) The general bequests may be satisfied before payments are made to residuary legatees.—Maynard v. Maynard, 178 N. Y. S. 329.

(F) Legacies Charged on Property, Estate, or Interest.

⇒820(1) (N.Y.Sur.) Whether a legacy is a charge upon real estate of a testator is always a question of his intention.—In re Kreusser, 178 N. Y. S. 62.

⇒820(3) (N.Y.Sur.) Where a will giving executors discretionary power of sale provided that if proceeds of the residuary estate, in which testator's wife was given a life estate, were insufficient to pay certain legacies, which were less than the personality, they should be paid pro rata, and that any excess, after all other legacies had been paid in full, should be divided equally among certain persons, the realty was not charged with payment of legacies, but it was the intention that they should be paid from the primary personal estate, so far as it might go after expenses were paid, and to create a life estate in the wife in the balance of estate, and on her death to pay the legacies.—In re Kreusser, 178 N. Y. S. 62.

⇒820(3) (N.Y.Sur.) Where testator, who owned only realty and had money in bank only to run his business of renting and selling real estate, gave legacies aggregating \$5,100 to children and grandchildren, and the residuary estate to his widow, the general legacies to children and grandchildren were a charge on realty not specifically devised, and the executor, expressly given a power of sale of realty conditioned on a written consent being obtained, had power of sale over the realty not specifically devised.—In re Beacom's Estate, 178 N. Y. S. 869.

(H) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

⇒853 (N.Y.Sur.) Where separate trusts attempted to be created by the residuary clause of a will are void under the statute of perpetuities, such illegality does not destroy a legacy given to infants, as the court may disregard the illegal antecedent trust provisions by accelerating the remainders vested in such infants under the residuary clause.—Maynard v. Maynard, 178 N. Y. S. 329.

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⚡866 (N.Y.Sup.) Where testatrix devised the net rents of real property in trust for the benefit of her grandniece for life, with remainder to her issue, and, if none, to become a part of the residuary estate, and where that operated to suspend the power of alienation of the property for two further lives, making three lives in all, the gift over was void, and the corpus of the property vested in decedent's heirs as of the time of her death.—*Mount v. Mount*, 178 N. Y. S. 168.

WITNESSES.

See Appeal, ⚡1048; Depositions; Evidence; Perjury, ⚡1, 12, 31.

III. EXAMINATION.

(B) Cross-Examination and Re-examination.

⚡270(2) (N.Y.Sup.) In a libel case, trial court erred in permitting plaintiff to be cross-examined at great length on his use of the names of his friends and associates as characters in a "crook" play; the sole purpose of the examination being to endeavor to show that he had but little regard for the feelings of his friends and acquaintances, such matter not being relevant to the issue.—*Clark v. Variety*, 178 N. Y. S. 698.

⚡275(6) (N.Y.Sup.) In action against street railway for injuries to wagon driver in crossing accident, it was improper to cross-examine the driver as to other accidents which he had had, the only question being as to the negligence which caused the particular accident involved in the action, and his negligence at any other time not being pertinent, and such cross-examination was not proper as an answer to testimony of plaintiff, "I have played safety first," in answer to question whether he had crossed the crossing giving notice.—*Veeldorano v. Union Ry. Co. of New York City*, 178 N. Y. S. 576.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION AND CORROBORATION.

(E) Contradiction and Corroboration of Witness.

⚡405(2) (N.Y.Sup.) In wife's action for separation on ground of cruel and inhuman treatment, it was error to allow evidence to contradict husband's denial of his alleged assault on the wife after action had commenced; the denial being of an immaterial and irrelevant fact.—*Averett v. Averett*, 178 N. Y. S. 405.

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